Neutral Citation Number: [2023] EW Misc 6 (CC)

Case No: J11YJ109

IN THE COUNTY COURT AT BRDFORD

Date: 6 July 2023

Before :

HHJ MALEK

- -

Between :

Mr Tahair Mahmood	**Claimant**
- and -	
Liverpool Victoria Insurance Company Ltd	**Defendant**

- -

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Ms Hannah Brookfield (instructed by **Kudos Legal Ltd**) for the **Claimant**
Mr Gareth Price (instructed by **Keoghs LLP**) for the **Defendant**

Hearing dates: 23 May 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Malek :

Introduction

1. In this case the Claimant was involved in a road traffic accident on 22 November 2020. He brings a claim for storage and recovery (in the sum of £3,840), credit hire (£31,992) and general damages (agreed in the sum of £3,000). By the start of the trial liability had been conceded and a number of other matters had been agreed such that the only live issues for me to determine where the sums to be awarded in respect of credit hire and recovery and storage.

Evidence

2. Mr. Mahmood was the only person called to give oral evidence. He was cross-examined and there was an opportunity for me to ask questions of him.

The claim for credit hire

3. On the day of the accident Mr Mahmood was a self-employed private hire driver and was the owner and driver of Mercedes Vito minibus van. Following the accident, and upon the same day, he obtained a replacement Mercedes Vito van from Paloma Car Hire Ltd upon credit hire terms. The credit hire agreement that he entered into shows that he agreed to pay £234 per day for hire plus £24 per day for collision damage waiver – a total of £258 per day. Mr Mahmood continued to hire the replacement vehicle until 26 March 2021, i.e. for some 124 days. The total cost of hire was £31,992.

4. It is Mr. Mahmood's case that he was impecunious at all relevant times and that he did not have the funds to repair his vehicle or enter into the regular car hire market (i.e. hire a car on normal (as opposed to credit) terms). It was, further, his case that he needed his vehicle not only for the purposes of his work as a taxi-driver, but also because he used it for his pleasure and social/domestic purposes.

Need

5. Where classic profit earning chattels are concerned the proper measure of loss is the loss of profit (see *Commissioners for Executing the Office of Lord High Admiral of the United Kingdom v. Owners of the Steamship Valeria [1922] 2 A.C. 242*). It is uncontroversial that a person who suffers loss as a result of the tortious actions of another is not entitled to simply sit back waiting for further damage to accrue, but must act in reasonable mitigation. What is reasonable will depend very much upon the individual circumstances of the case. Neither is it controversial that an individual may choose to incur expenditure in mitigating the primary loss and that this expenditure is prime facie recoverable, but additional loss suffered by a failure to take reasonable steps to mitigate is irrecoverable.

6. Thus, it was confirmed in *Hussain v EUI Ltd [2019] EWHC 2647 (QB)* ("*Hussain*") that (1) a professional driver's vehicle is a profit-earning chattel and that the true loss is the loss of profit, (2) where the cost of hire significantly exceeds loss of profit, the court will ordinarily limit damages to the loss of profit, and (3) even where the cost of hire exceeds the avoided loss of profit, the claimant may still succeed in establishing that s/he acted reasonably. In *Hussain*

Pepperall J gave three examples of where it might be thought the claimant acted reasonably in avoiding a loss of profit by hiring a vehicle even where the cost of hire significantly exceeded the avoided loss of profit.

7. In the first example Peperall J says that, in attempt to mitigate against future (and greater) loss, a business might reasonably provide a service at a loss in order to retain important customers or contracts. Put another way, a business might be acting reasonably in mitigating its loss by incurring what at first sight might appear to be a disproportionate cost in order to avoid a real risk of greater future loss. This must, clearly, be right; but some general observations and points of practical import need to be addressed with regards to this formulation.

8. Firstly, it seems to me to be a matter of common sense that the more disproportionate or greater the cost the less likely it is be seen as reasonable mitigation. Secondly, disproportionate in this sense can mean with regards to both the future loss and the risk of that loss. The greater the loss and/or risk of loss the less likely the cost is to be seen as disproportionate or unreasonable mitigation. Thirdly, when it comes to the loss of contracts its impact on the business (or ability and/or likelihood to cause future loss) can only be assessed by reference to the value of the contract in question and the likelihood of the contract being replaced by other similar contracts or work. The value of the contract is a function of how profitable the contract is which in turn is a function of the length of the contract (including break clauses) and rates payable. Likewise, the value of a customer is a function of how likely that individual is to continue to use the service in the future, how often s/he currently uses the service and what his/her average spend is. The likelihood of being able to

replace the contract with other contracts or work should be capable of being proven by evidence, but a judge is entitled, in my judgment, to take notice of the competitive nature of some markets (for example taxi hire) and the likelihood of replacement work being readily available.

9. In the present case I was taken to a letter from a Mr. Zabeer Hussain dated 20 February 2023 apparently from "Shipley Central" addressed to Kudos Legal Ltd. Mr. Hussain did not produce a witness statement or give oral evidence. As such I was bound to place only limited evidential weight upon its contents. In any event, the letter was clearly deficient and raised more questions than answers. In that letter Mr. Hussain suggests that there was "no guarantee" of Mr. Mahmood keeping his regular work had he not sourced an alternative vehicle. The reason given for this is that Mr. Mahmood had regular contracts, including transporting the children of key workers to and from school and he had a further two contracts transporting vulnerable adults with wheelchair needs. Not only is there no suggestion that Mr. Mahmood would have likely lost this work (it only being said that "no guarantee" could be given that he would be able to keep it), but the idea that he would lose this work clearly flies in the face of Mr. Mahmood's own evidence that a replacement driver and vehicle had been obtained to service these contracts whilst Mr. Mahmood was unable to work -albeit for an admittedly short period of time. Further, no detail (or copies) of the "contracts" have been provided so as to allow a proper evaluation of the impact of the loss of these contracts on Mr. Mahmood's business. Nor was there any evidence of any inability by Mr Mahmood to carry out other jobs so as to replace the profit generated by these contracts or any proper evidence provided by Mr Mahmood to demonstrate the likely impact on his business. In short the

Claimant provided no evidence to suggest that by incurring the disproportionate cost of hiring a taxi-plated van he was somehow avoiding the risk of a larger future loss.

10. However, there is an even more fundamental issue. The Claimant's business accounts for the year ending 5 April 2021 reveal that he made profits of £8,062 or about £155 per week if taken over 52 weeks. This includes a government covid grant of £2,535. The equivalent profit figure for the year ending 5 April 2020 was £10,123 or about £194 per week. This shows a business that is only marginally profitable. In reality the position is even worse. The accounts do not make an allowance or deduction for the Claimant's labour. This is, of course, correct because Mr. Mahmood did not pay himself a salary. Instead, he received an equivalent profit for the time that he put into the business as a driver. The Claimant's evidence is that he worked for five hours a day and, that whilst this might be slightly less during school holidays, it was roughly the same because he had other contracts with the Council which he described as "day centre work". This means that the Claimant was earning circa £6.20 per hour (£155 /5 = £31 per day which should be divided by 5 hours worked per day) at around the time of his accident. Even if adjustments are made for four weeks holiday over the year we only get to a figure of £6.72 (£168 / 25) per hour. This is less than the National Living Wage operable at the time. One way to look at this is that if Mr. Mahmood paid himself the equivalent of the National Living Wage for his work his business would be loss making and, accordingly, no amount of expenditure incurred in mitigating a loss can be justified because there is no loss of profit. Another way of looking at it is that the contract that might be lost is, in reality, unprofitable and therefore not worth saving. Yet another way of

looking at matters is that the business is marginally profitable, but only if Mr Mahmood provides his labour to the business at an unreasonably low level of pay (or return) given the National Living Wage. Whichever way one chooses to look at the issue, it seems clear to me that attempting to save his "contracts" (if that is what Mr. Mahmood was attempting to do) which generated little or no (true) profit (at best around £155 per week) by hiring another van (at a cost of £258 per day) was not a reasonable (or even a true) attempt to mitigate his loss.

11. In his second example in ***Husain*** Pepperall J says:

"*Secondly, many professional drivers use their vehicles for both business and private purposes. Where such a claimant proves that he or she needed a replacement vehicle for private and family use, a claim for reasonable hire charges, even if in excess of the loss of profit that was avoided by hiring the replacement vehicle, will ordinarily be recoverable in the event that a private motorist would have been entitled to recover such costs".*

12. This means, in my judgment, that a professional driver who uses his vehicle for business and private purposes will, usually, have acted reasonably in mitigating his loss by hiring a replacement vehicle even where the cost exceeded his loss of profit *provided always that a private motorist would have been entitled to recover such costs*. A private motorist would not, in my view, be entitled to recover any costs over and above those associated with private motoring. So, a private motorist, would not, for eg, need a taxi plated vehicle for his / her private use and the additional costs associated with business use of the vehicle would be irrecoverable.

13. That this is the correct position seems to me to be clear when one considers that Pepperall J's second example is not, truly, an exception. The underlying question is whether or not the vehicle is a profit earning chattel. If it is a pure profit earning chattel (such as a cargo ship) then the proper measure of damages can only be the loss of profit occasioned. It seems to me that where there is, in addition, minimal private use then the nature of the chattel (being one that is, in essence, profit earning) is not changed; however where there is substantial private use then we are looking at a chattel that has a mixed use. In the latter circumstances, it seems to me that the true measure of loss for the business use of the chattel remains loss of profit. Naturally, if the cost of hiring a replacement chattel which has a mixed use (both business and private) is likely to be less than the loss of profit then that, it seems to me, is reasonable mitigation. Where the cost is likely to substantially exceed the loss of profit it is not, in my view, mitigation of the claimant's business loss at all to hire a replacement chattel. In those circumstances, it would not, in my view, be unreasonable to expect a claimant to mitigate his loss by claiming a loss of profit for the business use of the chattel (on the basis that hiring a replacement chattel for business purposes would be more expensive) and also hiring a replacement chattel for personal use – provided always that this was a reasonable course of action in light of the facts known to the Claimant at the time.

14. In the present case, Mr. Mahmood had a loss of profit of circa £(155 / 5 =)£31 per day. It was, therefore, not reasonable for him to mitigate his business loss by hiring a replacement vehicle costing £258 per day. However, given the Defendant's concession that Mr. Mahmood is likely to have had, in addition to his undoubted business need, a personal need for the vehicle in question, it was

reasonable for him seek to mitigate his personal loss for use of his vehicle by hiring a suitable replacement vehicle in the usual way. However, that vehicle would clearly not need to be licensed to carry passengers, be "taxi-plated" or otherwise adapted for use in the Claimant's business and to seek to use such a vehicle for his personal use (where it represents a greater cost) is not mitigation at all. Whether it was reasonable to hire such a vehicle on credit is yet another question and subject to the usual arguments on impecuniosity and alternatives available in the regular market.

15. In the third example in ***Hussain*** it was suggested that it might be reasonable for a professional driver to hire a replacement vehicle for his business (even if the cost was significantly greater than the loss of profit) because he simply could not afford not to work. In my judgment this cannot apply to a situation where the business engaged in by the claimant is not viable or loss-making. In those circumstances it would be reasonable, in my judgment, following a short period of adjustment to expect a claimant to find alternative employment in order to mitigate his loss.

16. In the present case the Claimant appears to be engaged in work that yields income for him which is less than the equivalent National Living Wage. It seems to me to be unreasonable to require him (as way of mitigating his loss) to continue to engage in his current business wherein he obtains such poor return for anything but the shortest of periods commensurate with him finding suitable alternative employment. If I am wrong about that then I should have no hesitation in concluding that the Claimant was not in a position where he simply could not afford to work. His annual profit from working in the relevant year

was only £8,062. On this sum he was, with the assistance of some benefits, able to run his home. On the evidence the Claimant had a loan facility of circa £5,000 via his bank and further credit facility of circa £5,000 via his credit card available to him. Further, it is clear that his "employer" (Mr. Zabeer Hussain the "owner" of Shipley Central (the taxi base through which Mr. Mahmood acquired his jobs)) was in a position to be able to, and in fact did, assist Mr. Mahmood financially by continuing to pay him to "keep him going" whilst he was not working. That is to say sufficient credit and support was available to Mr. Mahmood to enable him to afford not to work whilst, at the very least, his vehicle was repaired.

17. In summary, where profit earning chattels are concerned the proper measure of damages is the loss of profit. Generally, where the claimant is a professional driver his claim for damages will be limited to the loss of profit and it is only exceptionally that he will be able to argue that he hired, in mitigation of his loss, a replacement vehicle at a greater cost compared to his loss of profit. Whether or not he is able to make out an exception ultimately depends upon whether or not he acted reasonably in mitigating his loss. In the present case the Claimant has failed to demonstrate that his is an exceptional case and accordingly, subject to what I have said about being able to hire a replacement vehicle for personal use, the Claimant's loss is restricted to his lost profit.

Impecuniosity, rate and period

18. As I have indicated elsewhere in this judgment the Claimant had available to him credit of circa £10,000 together with assistance from his employer. He was not, therefore, impecunious at all relevant times.

19. He could and should have, therefore, (a) paid for the repair of his vehicle which ultimately cost £4,445 plus the cost of refitting the airbags and (b) gone into the ordinary hire market to obtain a vehicle for his private use whilst his vehicle was of the road.

20. A reasonable period of time, which takes into account time spent reasonably waiting to see if the Defendant might offer to pay for the repairs and the time taken in carrying out the repairs, would have been some 22 days. Whilst a claimant would be wise to offer a defendant the opportunity to inspect his vehicle he is not, in my judgment, obliged to wait forever. He is only obliged to provide a reasonable window for inspection before he must get on carrying out any repairs so as to mitigate his loss.

21. The comparable rates evidence shows that the total cost of hire for 124 days based upon a 7 day / daily rate survey with Avis would have been £5,461. This gives a daily rate of £44.04 and a total sum of £968 over 22 days. If one adds delivery and collection fees of £155.05 we get a total of £1,123.

22. In addition, the Claimant is entitled to recover loss of profit for 22 days- coming by my calculations to £682.

23. If I am wrong in my above analysis and the Claimant is entitled to recover the cost of hiring a taxi-plated vehicle then, of course, there is no comparable rates evidence and the Claimant must, but only in those circumstances, be entitled to recover such hire costs for the period of 22 days. That would mean that he would not be entitled to recover basic hire costs or the loss of profit.

Storage and recovery

24. The Defendant takes no issue with the amount of recovery or the daily cost of storage. I agree with the Defendant's submission that a reasonable period to store the vehicle (prior to removing it for repair) in the event that the Defendant wished to inspect the vehicle would be a period of 14 days.

Conclusion

25. Counsel are both invited to agree a consequential order and let me have it (via my clerk) for my approval. In the event that such an order is agreed and sent to me for my approval in advance of the handing down of this judgment then the parties and their representatives are excused from attendance at the handing down of this judgment.