Neutral Citation No. [2014] NIQB 99

Ref: **STE9334**

Judgment: approved by the Court for handing down

Delivered: **06/08/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

NICOLA BURROWS

Plaintiff:

and

ALAN ROSS

Defendant:

STEPHENS J

Introduction

[1] This is a defendant's appeal and a plaintiff's cross-appeal in relation to an assessment of damages in a credit hire case. Liability is admitted.

[2] Credit hire litigation continues unabated and at disproportionate expense despite numerous judgments articulating the applicable legal principles. On 17 June 2011 McCloskey J commenced his judgment in *McAteer v Kirkpatrick* [2011] NIQB 131 by stating :

> "The battle between insurance companies and credit hire organisations rages on."

That remains the position. To date there has been no commercial or legal resolution. One underlying problem is that the credit hire rates can be of complete indifference to the person who hires the vehicle because the cost of hire is borne not by him or her but rather by the insurer of the "at fault" driver. If there is complete indifference then there will have been no consideration of the interests of the person who has to pay and no consideration of the duty to mitigate the loss. Under the present system the competitive control on the cost of credit hire is through disproportionately expensive fact specific proceedings in which the insurer of the "at fault" driver seeks to discharge the burden of establishing a hypothetical case as to what would have occurred if the individual had taken reasonable steps to mitigate the loss. In order to

discharge that burden the insurer of the "at fault" driver has to establish a basic hire rate for an equivalent vehicle in the plaintiff's locality at the relevant time lower than the credit hire charges which are the subject of the claim and that it would have been reasonable for the plaintiff to have hired a vehicle at that basic hire rate. Companies now exist whose sole commercial function is to capture and collate internet details of car hire rates for all the different types of vehicles for each month of each year in every part of the United Kingdom, so that, from this vast archive, insurance companies can subsequently seek to establish that alternative cars were available for hire at the relevant time in the relevant locality at a lower basic hire rate than the credit hire charges the subject of the claim. The response from the credit hire company in this case, as I assume in others, is to point out all the differences between the captured internet screen shots of basic hire rates and the terms that the credit hire company provides, seeking to establish that the alternatives are not comparable or did not convenience the personal circumstances of a particular plaintiff so that it was not unreasonable for the plaintiff to have hired from the credit hire company at the higher rate. A problem for the courts and for both the insurers and the credit hire companies is that the outcome in each case is dependent on the particular facts of the individual case and is also heavily influenced by the personal circumstances of the individual plaintiff. Examples of personal circumstances influencing the outcome are an "A" level student in the middle of exams in *Gilheaney v McGovern* [2009] NIQB 38 and a wife and mother in *Salt v Hedley* [2009] NIQB 69. The plaintiff in this case has a PHD in chemistry and was an employee of a pharmaceutical company in Newry. She lived with her parents on the Ards peninsula. Those personal circumstances will be unknown to the insurer of the "at fault" driver and largely unknown to the credit hire company at the time that the car is hired. The personal circumstances are not taken into account by the credit hire company when deciding whether to hire a vehicle to the plaintiff. The only factor that they take into account is whether the other driver was at fault. The personal circumstances only become fully known to the insurer of the "at fault" driver during the course of the litigation and most probably at the hearing. Accordingly, both the prediction of outcome and the resolution of disputes are impeded. Both the credit hire company and the insurer concerned in this particular case consider that the present system is unsatisfactory and that the costs are disproportionate though the credit hire company blames the insurance company for the disproportionate nature of the costs. My assessment is that the costs are clearly disproportionate not only in this case but also in the vast majority of credit hire cases.

[3] Since *Burdis v Livsey* [2003] RTR 3 a reasonable discount being applied to the credit hire rate has been rejected as a method of dealing with these cases on the basis that such a discount would be arbitrary. So also has the approach of stripping out the cost of the additional elements in the credit hire rate. The reason for rejecting that second approach was that it was thought that the cost of the detailed disclosure and analysis would be cumbersome in small cases and would be disproportionate to the sums claimed in most of these types of cases. I would observe that the present system is cumbersome and that the present costs are disproportionate. I would also add that in this jurisdiction there is not a proliferation of credit hire companies and it

could be that, after hearing and determining a case in relation to each credit hire company, a percentage attributable to the additional elements could be used in other cases involving the same company provided that the credit hire charges were not just increased to offset the percentage discount.

[4] The time may have come to look again at whether the approach of stripping out the additional elements in the credit hire rate is legally and factually appropriate. However that is not this case. The issues raised on this appeal did not extend to an argument that the costs of the additional elements should be stripped out. Rather the issue was confined to the rate of hire claimed by the plaintiff in comparison to what the defendant contends were basic hire rates in the plaintiff's locality at the time of the accident and at which it was contended that it would have been reasonable for the plaintiff to have hired a vehicle. The defendant conceded that the period of hire of 39 days from 25 June 2013 to 2 August 2013 was appropriate. The plaintiff conceded that she was able to pay car hire charges, without making sacrifices which she could not reasonably be expect to make and accordingly that she did have a choice not to use the services of a credit hire company. In relation to the rate of hire the defendant concedes that the plaintiff is entitled to recover the rate that was charged by Crash Services Limited unless the defendant can discharge the burden of establishing that the plaintiff failed in her duty to take reasonable steps to mitigate her loss.

[5] In the County Court the plaintiff claimed daily rates of £45.85 plus VAT for the hire of the vehicle and £7.50 for a nil excess, making a total daily rate of £52.35 plus VAT or £62.82 inclusive of VAT. The total charge for the hire period of 39 days was £2,496.78 inclusive of VAT. The defendant contended that the daily rate should be £22.10 inclusive of VAT. They arrived at this figure in a somewhat unusual manner. They took the monthly rate of £496.94 charged by Avis for a car hired from Belfast City Airport and applied that rate over the entire 39 days. They then added on the extra charge by Avis for nil excess together with a £30 delivery and collection charge. This amounted to a total charge of £862.17 which was then divided by 39 to arrive at an equivalent daily rate of £22.10 inclusive of VAT. The Learned District Judge allowed a daily rate of £30.00 plus VAT plus the daily charge of £7.50 plus VAT for a nil excess giving a total award of £1,755. At the end of this appeal the defendant was contending for a weekly rate of £136.88 plus a weekly rate for excess waiver of £98.00 plus £30 delivery and collection charge, a total of £1,338.62. The plaintiff maintained her total claim for £2,496.78. So it can be seen that the defendant wishes to reduce the award in the County Court by the amount of £416.38 and that the plaintiff wishes to increase the award by the amount of £741.78. The difference between what the defendant contends is the basic hire rate of £1,338.62 and the credit hire rate charged to the plaintiff of £2,496.78 is £1,158.16. That difference is the amount at issue in this litigation.

[6] Mr Cleland appeared on behalf of the plaintiff and Mr Montague QC and Mr Bernard Fitzpatrick appeared on behalf of the defendant.

Legal principles

[7] I set out the legal principles in *Gilheaney v McGovern* [2009] NIQB 38, *Gilheaney v McGovern No. 2* [2009] NIQB 46, *Salt v Hedley* [2009] NIQB 69 and *Kelly v Mackle* [2009] NIQB 39. I am indebted to McCloskey J for his erudite review of the legal principles in a series of cases including *Matchett v Hamilton* [2011] NIQB 131, *Mahood v McDonnell and Another* [2011] NIQB 57, *Mateer v Kirkpatrick* [2011] NIQB 52, *Stokes v McAuley* [2010] NIQB 131 and *Smyth v Diamond and conjoined cases* [2010] NIQB 74. I adopt and incorporate his analysis of the appropriate legal principles. So far as this appeal is concerned there are only a few points that I would add.

[8] In the earlier authorities the terminology used was the "spot rate." However in *Pattni v First Leicester Buses Limited and Bent v Highways and Utilities Construction Limited* [2011] EWCA Civ 1384 Aikens LJ stated:

> "34. This basic hire rate has often been referred to as the "spot rate", but that is, with respect, a misnomer. The term "spot rate" is more appropriately applied to rates of freight or charter hire, or the price of a commodity in open, often international markets, where the service or commodity is bought for delivery today, as opposed to some time in the future. I think it would be better if, in the context of credit hire cases, the term "spot rate" were not used in future and the term "basic hire rate" or "BHR" were used instead. That term more accurately describes what is the basic measure of damages recoverable in cases where the claimant could afford to have hired a car by paying in advance, ie. not hiring the car on credit."

Accordingly, the terminology that I will use in this judgment is the "basic hire rate" rather than the "spot rate".

[9] In *Bent v Highways and Utilities Construction Limited* [2010] EWCA Civ 292 Jacob LJ stated:

> "9. … Very often when one is assessing valuation evidence in all sorts of fields, one has evidence of prices of the same or similar things at different dates and has to make appropriate adjustments. Working with comparables and making adjustments is the daily diet of judges concerned with valuation in all sorts of fields. Clearly evidence of the spot rate a year or so later than the relevant date is likely to throw

> considerable light on what the spot rate would have been at the time.
>
> 10. I would add further that one must not be hypnotised by any supposed need to find an exact spot rate for an almost exactly comparable car. Normally, the replacement need be no more than in the same broad range of quality and nature as the damaged car. There may be a bracket of spot rates for cars rather 'better' and rather 'worse'. A Judge who considered that bracket and aimed for some sort of reasonable average would not be going wrong."

I consider that the search for a basic hire rate is not an exact science. I also consider as a *general principle* that it is not reasonable for a plaintiff to demand exact equivalence between the damaged car and the hired car. So for instance if the damaged car had satellite navigation and the hired car did not then, unless there was some particular demand for this facility, it would not be a sufficient reason justifying extra credit hire charges.

[10] The defendant called as a witness Steven Robert Pollard of Surveyorship Limited. That is a company which carries on the business in England of capturing internet details of car hire rates throughout the United Kingdom. Mr Pollard prepared three schedules from his company's captured internet details seeking to ascertain the rate charged in June 2013 for the hire of a Nissan Micra 1.2 or equivalent in the Cloughey area. The first schedule was of daily rates for equivalent vehicles charged at the time by four car hire companies namely Avis, Enterprise, Europcar and Hertz. The second and third schedules were respectively for the seven day/weekly rate and the 28 day/monthly rate charged at the time by the same car hire companies. Those schedules were backed up with the captured screenshots from which they had been prepared. Mr Pollard also gave general evidence as to the availability of these alternative vehicles for hire on 25 June 2013. It was not possible for Mr Pollard to obtain definite information as to specific availability because that information cannot be captured and the car hire companies subsequently were not able or not willing to provide the information. The evidence of availability was restricted to the utilisation rates of the four car hire companies which varied from 75.3% to 86.0%. Mr Pollard also gave evidence as to the purchase of car hire excess insurance cover. Some car hire companies do not offer a nil excess but the additional insurance required to obtain a nil excess can be purchased independently over the internet from companies, such as, Questor Insurance Services Limited ("Questor"). Alternatively, some car hire companies make an additional charge in order for the client to obtain a nil excess but the rates charged by the car hire company can be undercut on the internet by companies who specialise in excess insurance, such as Questor. Mr Pollard's evidence included evidence as to the captured rates charged by Questor for excess insurance cover. Finally, Mr Pollard gave evidence as to oral enquiries that he had made by telephone of car hire companies.

[11] If the company from which the car is hired has a basic hire rate as opposed to a credit hire rate then it might be appropriate to take that company's basic hire rate as the appropriate recoverable hire rate. Crash Services Limited does not have a basic hire rate and in such circumstances an appropriate method of calculating the basic hire rate is to look at "actual locally available figures," see paragraph 40 of *Bent v Highways & Utilities Construction, Allianz Insurance* [2011] EWCA Civ 1384. Mr Pollard's evidence is clearly relevant to that issue. If the evidence is reliable and accepted then it is perfectly appropriate to find the basic hire rate from such evidence. The whole exercise is hypothetical in that the court is envisaging what the individual would have done if he or she had gone into the ordinary car hire market and carried out a reasonable search. The search on that hypothetical basis is for the figure which the plaintiff was willing to pay if she had in fact gone into the ordinary car hire market to find a temporary replacement for her vehicle. It is also hypothetical in the sense that, if the plaintiff had been paying the charges herself, she might have been prepared to endure a quite unreasonable degree of inconvenience. The hypothetical search is not on that basis. It is for what the plaintiff would reasonably have done and what is reasonable is not to be weighted in the jeweller's balance. Such a hypothetical search has to take into account the personal circumstances of the plaintiff. The cheapest is not necessarily the best and for all sorts of reasons anyone may reasonably choose to hire from a company that is not the cheapest available.

[12] Evidence of the nature given by Mr Pollard cannot be excluded on the ground that it is hearsay of whatever degree, see Article 3 of the Civil Evidence (Northern Ireland) Order 1997. The consideration of the weight (if any) to be given to hearsay evidence is governed by the provisions of Article 5 of the 1997 Order. The defendant could have sought to introduce this evidence by way of a witness statement from Mr Pollard and such evidence being hearsay would have been admissible. However, under Article 4 of the 1997 Order where the defendant, being a party to civil proceedings, adduces hearsay evidence of a statement made by a person and does not call that person as a witness, then the plaintiff, being any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence-in-chief.

Factual background and conclusions

[13] The plaintiff, Nicola Burrows, the owner and driver of a Nissan Micra 1.2 was involved in a road traffic accident on 24 June 2013 at Camlough Road, Newry. The plaintiff was then employed by Norbrook Laboratories at its premises in Newry and she was driving home after a day's work via Newtownards to Cloughey on the Ards Peninsula, a distance of approximately 61 miles. This journey usually takes approximately 1 hour and 40 minutes depending on the traffic. The defendant's vehicle collided with the rear of the plaintiff's vehicle causing damage to the tailgate, rear panel, rear bumper and boot floor. After the collision the plaintiff's vehicle was capable of being driven though the boot would not lock and accordingly the car

could not be left securely. The plaintiff drove home. The plaintiff has a computer and broadband at home and ordinarily could research the internet. She is the only person in her household with that capacity. Neither of her parents, with whom she lived, use the internet. It could be suggested that the road traffic accident was not a major one and that one would ordinarily expect an individual after such an accident to be able to carry out a simple internet search later in the day for hire cars in his or her area and for car repair companies who would collect and repair his or her motor vehicle. However, the plaintiff explained, and having seen her give evidence, I accept, that on her return home somewhat later than usual and after a day's work and the trauma of the accident, she was upset. That emotionally that evening she was unable to make any plans for the repair of her own vehicle or to make any arrangements for alternative transport whilst her car was being repaired. I accept that the plaintiff was unable to undertake an internet search that evening. I make it clear that is a finding of fact specific to this case, having seen and assessed the plaintiff.

[14] There is no public transport available from Cloughey to Newry. The next day her father drove her to Newtownards. She obtained a lift with another employee from Newtownards to her place of work in Newry. The plaintiff's mother agreed that whilst the plaintiff was at work she would make enquiries in relation to the repair of the plaintiff's vehicle and the hire of a replacement vehicle whilst it was being repaired. I find that the plaintiff had sufficient confidence in her mother's ability to make appropriate enquiries and that given the plaintiff's personal circumstances it was reasonable for the plaintiff to delegate this task to her mother despite the fact that her mother, being unable to access the internet, would be unable to carry out the search as competently as the plaintiff. I find that in the event her mother made only two telephone calls and that her enquiries came to an end immediately after she had contacted Crash Services Limited. I consider that it was unreasonable for the plaintiff's mother not to have enquired from Crash Services Limited about the charges that were to be made. I consider that undertaking a reasonable search of the car repair and car hire markets would have involved the plaintiff's mother contacting by telephone other car repair and car hire companies in the locality of which there were many.

[15] The plaintiff explained, and I accept, that at work she was not allowed to carry out any internet searches nor was she allowed to have a phone about her person. Accordingly, she was unable to make private telephone calls during working hours. She could only do so during her 15 minute morning break and her 30 minute lunch break. The plaintiff had a mobile telephone but it was not a "smart phone" with internet access. I accept that the plaintiff had no method of obtaining internet access until she returned home later on that day. At her lunch break she was informed by telephone by her mother that she had contacted two companies. The plaintiff could not remember the name of one of them. The other was Crash Services Limited. Her mother explained that Crash Services Limited would collect the plaintiff's vehicle which was at her home in Cloughey in order to have it assessed and, if appropriate, repaired. That Crash Services Limited would deliver a

replacement hire vehicle to her home. That collection and delivery would occur that day. That the plaintiff did not have to be present when the replacement vehicle was delivered and that she did not need to present her driving licence to anyone on behalf of Crash Services Limited. That as the accident was not the fault of the plaintiff there would be no charge to the plaintiff herself. She would not have to pay anything. There was no discussion as to the actual cost of the repairs or of the cost of the hire of the replacement vehicle. At that time the plaintiff did not know who was going to repair her vehicle nor did she know how long it would take for her car to be repaired. She did not ask for any estimate as to how long it was likely that she would need a replacement vehicle. The only information that Crash Services Limited required were the details of the plaintiff's motor insurance policy so that the plaintiff's insurance policy could be transferred to the replacement vehicle. The plaintiff's mother gave the plaintiff a telephone number for Crash Services Limited and the plaintiff then spoke to either Sinead or Nicole in that company, providing details of her insurance cover. Either the plaintiff or Crash Services Limited arranged for the plaintiff's insurance cover to be transferred. The plaintiff was both delighted and relieved. This was a problem which had arisen without notice and the appropriate arrangements could not be pre-planned. In the event, her problems had been sorted out quickly and without any inconvenience or worry to her. The plaintiff agreed during the course of the telephone call that she would avail of the services provided by Crash Services Ltd. The plaintiff was completely indifferent as to cost. The search by the plaintiff and on her behalf by her mother for a hire car was unreasonable. The question remains what a reasonable search would have revealed.

[16] Upon her return from work that evening the plaintiff found that her car had been taken to Autobody Accident Repair Centre ("Autobody") in Newtownards. She also found the replacement vehicle, a Kia Reo 1.4, was waiting for her at her home.

[17] The next day the plaintiff rang Autobody and was informed that an engineer was going to assess her vehicle and that the assessment and repairs would take "about a week or so." She was not told that it would take a month. After that week had passed the plaintiff kept phoning Autobody enquiring as to whether her vehicle had been fixed. However, she was told that Autobody were having difficulty in sourcing a particular part which the plaintiff understood to be the tail gate. The parts that were being sourced were second hand or generic parts which were cheaper. Generic parts are parts not provided by the manufacturer of the car. It appears that this is done to enable the car to be repaired rather than written off. The plaintiff was requested to ring back in a couple of days on each occasion and thereafter she contacted them regularly. It was all a bit vague. In fact the repairs took some 39 days and the plaintiff then arranged to return her hired car and to collect her own vehicle at Autobody. In order to do this she took time off work.

[18] The plaintiff signed an agreement with Crash Services Limited on 28 June 2013. That agreement asserts in clause 15.8 that :

> "This is not a credit agreement and no interest is being charged"

In this judgment I have referred to the charges made by Crash Services Limited as "credit hire charges." It is more accurate to refer to them as "accident management hire charges." The charges have never been claimed by Crash Services Limited from the plaintiff and the plaintiff has all the usual benefits associated with credit hire charges.

[19] The agreement also contained the following terms:-

(a) … We (that is Crash Services Limited) will not require you to pay any insurance excess or pay for damage that is not covered by the terms of your policy of insurance …

(b) When your own vehicle has been damaged in an accident which is not your fault, we can provide repair services and/or hire you a replacement vehicle of a similar standard to your own. You are responsible for the costs, but hire charges can be financed for a period of up to 48 weeks while the third party's insurer is pursued for the amounts due.

(c) To obtain finance, you must enter a credit agreement with Granite Financial Limited at the same time you enter into this contract. Absent your entry into a credit agreement, we may terminate this contract under Clause 13.2 and hire charges will be payable immediately.

(d) At your request and expense, we will deliver and collect the hire vehicle at the beginning and end of the rental period, at a place to be agreed.

(e) You can cancel the service within 7 working days of signing this contract, without giving a reason, and without incurring any charges, unless the service has been carried out before the end of this period with your agreement.

It can be seen that the agreement envisaged a further finance agreement with Granite Financial Services Limited. No such further agreement was entered into. The contract with Crash Services Limited could have been terminated by the plaintiff within 7 working days. The collision damage waiver clause relieved the plaintiff of the obligation to pay any insurance excess or for "damage" that is not covered by the terms of the plaintiff's insurance policy.

[20] On 5 August 2013 "Crash Services" issued an invoice for £2,496.78 inclusive of VAT in respect of 39 days hire and 39 days in relation to charges for a nil excess. The invoice stated that Crash Services is a trading style of Granite Financial Limited

which is a different company from the company with which the plaintiff entered into the written agreement dated 28 June 2013. No issue was taken in relation to this by the defendant.

[21] I accept the evidence of Mr Foster, engineer, that there are plenty of car repair companies in the Cloughey area who would have been prepared to collect and repair the plaintiff's motor vehicle. I find that it would have been a simple matter for the plaintiff's mother to have contacted these companies by telephone. I also consider that all of those companies would have been quickly in a position to provide the plaintiff with an estimate as to how long the repairs would take to carry out.

[22] In her evidence the plaintiff accepted that if she herself had been paying for the hire of a replacement vehicle then she would have made enquiries about the cost and that she would have taken the cheapest car hire rate available. The cost of hiring a car decreases depending on the duration of hire. The longer the hire period to which the client is committed then the cheaper the rate. If an individual could reasonably anticipate that repairs to their vehicle were going to take at least a week then ordinarily they would hire on the cheaper weekly rate rather than on the more expensive daily rate. On the same basis, if they could reasonably anticipate that the repairs would take one month or longer, as in the event they did in this case, they would hire on the yet cheaper monthly rate. The defendant initially contended and the learned District Judge ruled, that the appropriate duration for which the vehicle ought to have been hired was on the monthly rate. However, on appeal it was accepted that it could not have been reasonably anticipated by the plaintiff that the repairs would in the event take that long. The defendant sought to establish that in accordance with her duty to mitigate her loss the plaintiff ought to have hired on the weekly rate or alternatively have changed to a weekly rate at the earliest possible opportunity. The plaintiff has a Doctorate in chemistry and I find that if she had been researching the hire market on the internet or by telephone then before doing so she would have sought and obtained an estimate as to the length of time the repairs would have taken. Such an estimate in this case would have influenced her towards a cheaper 7 day hire rate rather than a more expensive daily rate.

[23] At the conclusion of the case Mr Cleland submitted on behalf of the plaintiff that even if the plaintiff should have hired on the cheaper 7 day hire rate then contractually the plaintiff would have been obliged to hire the vehicle for six weeks as opposed to 39 days, that is five weeks and four days. Alternatively, that contractually she would have been required to pay the daily rate for four days and the weekly rate for five weeks. This issue was not explored in cross- examination or in evidence- in- chief. The result is that I have no detailed evidence to determine whether the alternative car hire companies would have charged four days at the daily rate or charged for six weeks or alternatively just charged on the weekly rate for the additional four days. I consider that in the absence of such evidence that the appropriate inference is that the plaintiff would have been charged for either six weeks or, alternatively, five weeks at the weekly rate and four days at the daily rate.

Furthermore, that if there were a difference between those figures that the most expensive option would be the one that should apply given the burden of proof. The weekly hire rate from Avis is £234.88 including excess waiver and 6 weeks at that rate is £1,409.28 onto which is added a collection charge of £30 giving a total over 6 weeks of £1,439.28.

[24] It was never suggested to the plaintiff that she ought to have been aware of the services of Questor. Accordingly, the defendant conceded that any alternative car hire that did not offer nil excess was not equivalent. I heard no argument in relation to that concession and will proceed, without deciding, that it was correct. However, that was not the only reason why it would have been unreasonable for the plaintiff to have hired from Enterprise or Europcar. There were also issues as to a mileage restriction which would have been exceeded given the distance involved in the plaintiff's daily commute. As I have indicated the car hire search carried out by the plaintiff and her mother was unreasonable. However, given that it was reasonable to delegate to the plaintiff's mother and that she had no internet access, I do not consider that a reasonable search would have led the plaintiff to choose Avis over the other car hire firms. This result would have required someone to carry out an analysis of the terms and conditions of the different car hire companies. That would not have been too much to ask of a person with the time available to do so and with internet access but I consider that it was unreasonable to require the plaintiff to have done so given the circumstances of her work commitments and the fact that she had to delegate to her mother. I do not consider that the plaintiff's mother would have been able to navigate her way through the various options over the telephone. Accordingly, I find that reasonable research of the car hire market, given the personal circumstances of the plaintiff, would not have led to the identification of Avis. I find that if the plaintiff's mother had rung up the car hire companies at Belfast City Airport confusion would have reigned and in those particular circumstances it would have been reasonable for the plaintiff to have hired from Crash Services Limited. If the plaintiff had adopted the route of hiring from Belfast City Airport, she could have ended up with an inappropriate car hire contract.

[25] That determines this appeal in favour of the plaintiff but given that other issues were litigated before me I will set out my findings in relation to them. I will confine my analysis to Avis. These various further issues were raised by or on behalf of the plaintiff in relation to the hire of a vehicle from Avis at Belfast City Airport.

(a) It was asserted that a car hired from Avis could not be delivered to her home and that the defendant had not established that this was an unreasonable requirement given the plaintiff's personal circumstances. It was initially thought that Avis would deliver and collect the replacement at a charge of £30 but it became apparent that the delivery times had to be within pre-determined time frames the latest of which was 3pm to 6pm. The plaintiff would have had to have been at home throughout those 3 hours in order to be

present when the car was delivered. This would have been impossible for the plaintiff given her work commitments in Newry. Accordingly, the issue became whether the defendant had established that it was unreasonable for the plaintiff not to have collected the car from Belfast City Airport. The plaintiff in her evidence suggested that this would have involved her taking a day off work because she would have had to obtain a lift with her father to his place of work in Dundonald and then to take public transport to Belfast City Centre and then public transport from Belfast City Centre to Belfast City Airport. I reject that evidence. Avis is open at Belfast City Airport from 7.30 am to 9.30 pm every day of the week. I consider that if the plaintiff had asked her father he could have taken her the few extra miles from Dundonald to Belfast City Airport or alternatively she could have taken a taxi from Dundonald to Belfast City Airport. There would have been a degree of inconvenience in this but it amounts to an arrangement well within the abilities of this family. If I had found in favour of the defendant, I would have treated the Avis charge of £30 for delivery and collection as appropriate compensation for the costs of going to and from Belfast City Airport to collect and deliver the vehicle.

(b) Another issue raised by the plaintiff in her evidence was the perceived difficulty of co-ordinating car repair and car hire. I consider that there were plenty of car repair companies in the locality and that it would not have been unreasonable to expect the plaintiff or the plaintiff's mother to have made enquiries of car repair companies and then enquiries separately of car hire companies.

(c) The plaintiff did not give any evidence in relation to the next issue or indeed any of the following issues. The next issue involved a £25.00 administration fee. Avis charge a total of £14 per day which is £98 per week for zero excess. That is broken down into zero excess on tyre and vehicle damage which costs £11.50 per day and windscreen cover which costs £2.50 per day. However, vehicle damage claims are subject to a £25 administration fee if the hire car is damaged. It was submitted on behalf of the plaintiff that this administration fee was in effect a £25 excess and accordingly that it was not unreasonable for the plaintiff to have agreed to pay an additional weekly rate of approximately £200 to Crash Services Limited to avoid the administration fee of £25 if in the event she had an accident in the hired car. I reject that submission. The plaintiff was exposed to the potential of an additional administration charge. If she had had to pay that charge it would have been recoverable from the defendant.

(d) The next issue involved fuel contamination and loss of or damage to keys. The plaintiff would not have been at financial risk if she had put the wrong fuel into the car she hired from Crash Services Limited or if she had damaged the keys to that car. She would have been at risk in relation to a car hired from Avis. The question is whether the defendants have established that it

was unreasonable for the plaintiff to pay an additional £200 per week to avoid those risks given her personal circumstances. Some individuals may be prone to putting the wrong fuel into their car or damaging the keys of a car. That was not this plaintiff. I considered that the defendant had discharged the burden of proof in relation to this issue.

(e) Another issue related to the requirement in respect of Avis that an authorisation amount be held on the driver's credit or debit card which would reduce the amount of credit available to the customer and when it might take up to 7 weeks before the credit was restored at the end of a 39 day hire. It was conceded that the plaintiff was not impecunious. By that concession the defendant has established that the plaintiff would have acted unreasonably if she had chosen to pay an additional £200 per week to avoid this requirement.

(f) Availability of an alternative Avis car at Belfast City Airport. The utilisation rate of the Avis fleet is 85.3%. The plaintiff contended that this meant that on 25 June 2013 (or indeed at any given time) it was unlikely on the balance of probabilities that an Avis car would have been available at Belfast City Airport (or indeed anywhere else in the United Kingdom). Avis is a major car hire company and will put considerable effort into the correct commercial balance so that it does not have cars sitting idly in a car park as opposed to being utilised but has sufficient spare capacity, especially in this vehicle category, to have cars available for last minute hire. The Avis fleet consists of 20,200 cars and 14.7% are not utilized. This means that there are 2,969 cars in the Avis fleet which are not utilized. There are difficulties with all these figures as, for instance, definition has not been brought to what is meant by not *utilized* nor as to whether at all times one can say that throughout the UK there are 2,969 cars *available to be used*. However, it can be said that there are a lot of cars available and, given the importance of this calculation to the commercial interests of Avis, I find on the balance of probabilities that an Avis car would have been available at Belfast City Airport on 25 June 2013.

(g) Renewal of car hire. It was contended on behalf of the plaintiff that if she had hired from Avis for an initial one week period then she would have had to renew each and every week with the potential for further trips to Belfast City Airport and with the potential that the car would no longer have been available. That, accordingly, it would not have been unreasonable for the plaintiff to have paid the additional amount to Crash Services Limited who provided the same car throughout whatever period it took for her own car to be repaired. The commercial interests of Avis and of the plaintiff would have coincided with renewal with minimum disruption being the objective of both. There might have been a need for one further trip to Belfast City Airport after 28 days but this could have been done early in the morning or late at night.

Conclusion

[26] I find that the defendant has proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the basic hire rate for the model of car actually hired. The basic hire rate is that charged by Avis at Belfast City Airport for 6 weeks hire. That is a figure of £1,439.28.

[27] I find that the defendant has not discharged the onus of establishing that the plaintiff has failed to mitigate her loss by failing to hire at that basic hire rate given her personal circumstances.

[28] I award the plaintiff £2,496.78. The award in the County Court was £1,755. I therefore dismiss the defendant's appeal and allow the plaintiff's cross appeal.

[29] I am minded to make the same order for costs that I made in *Gilheaney v McGovern No. 2* but invite submissions from counsel.