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Judgment: approved by the Court for handing down | *Delivered:* **01/03/2017**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ON APPEAL FROM THE COUNTY COURT DIVISION FOR ANTRIM

CHIVERS

Plaintiff/Respondent

v

O'LOUGHLIN

Defendant/Appellant

MORGAN LCJ

Introduction

[1] This appeal arises from the plaintiff's claim for loss and damage as a result of a road traffic accident on 20 February 2016 at Robinsons Filling Station on the Cushendall Road, Co Antrim. Liability is admitted and the appeal relates only to the plaintiff's claim for loss from vehicle damage with the defendant raising an objection in relation to the hourly labour rate.

Background

[2] The plaintiff had her motor vehicle, a Hyundai IX 35, repaired by Daly's Garage, Belfast, the garage from whom she had bought the car and to whom she subsequently intended to sell the car in order to trade it in for a new vehicle. The garage placed her in contact with CRASH who then directly negotiated the rates of repair. The charge for labour was £40 per hour for 30 labour hours and the total repair invoice was in the sum of £2,766.81. The defendant at the lower court was arguing for £28 per hour for 25.1 hours but prior to the case being heard it was

agreed between the parties to compromise the number of labour hours at 27.5 hours. The lower court, following evidence and submissions, held that the evidence provided by Mr Alan Foster of AXA was not evidence of open market rates and awarded labour costs in the claimed sum of £40 per hour making a total award of £2,646.81.

[3] In this appeal the plaintiff did not call oral evidence but relied on four pieces of documentary evidence. The first was an invoice from Daly's garage which set out the various components of the repair charge including a breakdown which showed that the total sum for labour was assessed at £1,200 on the basis of 30 hours spent on the work. Secondly, the plaintiff relied upon the Audatex survey which is an analytical tool which assists with the creation of motor vehicle damages estimates. The system benefits from the insertion by those providing estimates of the amounts charged for labour. There are around 2m such items each year, more than any other system in the UK and indeed more than all the other systems combined. The advertising material from Audatex suggests that it gives a highly meaningful in-depth insight into the UK body repair system over the past 10 years.

[4] The plaintiff relies in particular on the fact that the 2015 hourly rate assessed by the analysis of the system was £32.25 and that for 2016 was £33.11. The figures generally indicated that there had been a broad steady increase in the hourly rate over the last 10 years. The material is national in the sense that it applies throughout the United Kingdom and also applies in relation to each and every class of vehicle including commercial vehicles and motorcycles which were the subject of discussion in the course of the evidence. There is no material in relation to regional variations other than the evidence that was adduced of the position in relation to London where costs were estimated, according to Mr Foster, at £40-£45 per hour in relation to the walk-in rate. The third piece of evidence was the document from Mr Bonar, motor assessor. For the reasons that I give later I intend to place no weight on that whatsoever. The fourth was a document from Agnew's which set out the approach that they took which included a rate of £45 plus VAT in relation to all forms of car with higher rates for specialist vehicles. On the basis of that material it was contended that it could not be said that there was anything unreasonable about the rate of £40 per hour which was charged by Daly's.

[5] In answer the defendants called Mr Foster who gave his qualifications and then produced a range of examples as to what he said was evidence tending to indicate what the walk-in rate was. He himself indicated in his evidence that he considered that the true rate was somewhere between £26 and £28 and he then went through 15 examples. The first five examples were in evidence in the court below. The bulk of these examples, some 11 out of the 15, involved quotes or submissions that were made directly to AXA. Three were made to brokers and therefore it would have been obvious that there was at least some insurance company involved and one was through a solicitor. It seems to me that one could probably take the view that that also was a case in which the submitting party would have realised that an insurance company was likely to be involved. Mr Clelland pressed Mr Foster on

whether this is an open market rate or an AXA rate. The figures, in my view, tend to suggest that the AXA rate was £26 which Mr Foster was, I think, broadly prepared to concede. He gave evidence about the position in relation to Agnew's and indicated that they had a degree of training and capacity in terms of their machinery which justified their premium rate in relation to the carrying out of such repairs and I have no reason to doubt that. But it is an example of the power of AXA in this jurisdiction, having regard to the degree of business that they have, that they were able to negotiate a rate of £28 per hour with Agnew's despite the fact that the walk-in rate is some £45 per hour.

[6] I accept therefore that whereas Mr Foster has established that there was an AXA rate of in or about £26 at the time of the completion of these repairs it does not seem to me that it follows that this is cogent evidence of what the walk-in rate was.

[7] The next witness was Mr Bruce who had been maintaining a compilation in relation to walk-in rates for labour since 2014. In his direct evidence he indicated that he believed that the appropriate walk-in rate was £26.80 to £29. He then introduced a document which showed examples from various garages in or about Belfast which suggested a range of somewhere between £25 and £35. I accept his evidence that a figure of £38 had been inserted in error at one point. He noted that the higher rates were reflective of the fact that the rate will vary depending upon the vehicle and he placed this vehicle towards the bottom end. When pressed further on this he said that the walk-in rate he considered to be somewhere between £24 and £29 possibly somewhere between £24 and £30.

Consideration

[8] One of the issues which I had to consider was whether it was proper to draw an adverse inference from the fact that there was no direct evidence from Daly's as to what their walk-in rate was. All that one knows is that they had charged this particular account in this particular way. I invited the views of the parties in relation to the question of adverse inference and I am satisfied on the basis of the authority R (on the application of Stapleton) v Revenue and Customs Commissioners [2008] EWHC 1968 QB and Lynch v Ministry of Defence [1983] NI 216 that it is proper in an appropriate case to draw an adverse inference. I consider that the matter is helpfully set out by Mann J in Fulham Leisure Holdings v Nicholson, Graham and Jones approved by Briggs J in Polarpark Enterprises Ltd v Rupert Allason [2007] EWHC 22 Ch that the following approach should be taken:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue

> by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

In my view that applied in relation to Daly's in terms of their walk-in rate. If the court concludes that there is evidence of lower rates an adverse inference may go to strengthen the evidence adduced on that issue and weaken the evidence introduced by the party who might reasonably be expected to call the witness.

[9] There must have been some evidence however weak adduced in the matter in question before the court is entitled to draw the desired inference, in other words there must be a case to answer on the issue and in my view the evidence of Mr Bruce, along with that of Mr Foster, but principally Mr Bruce raised a case to answer. There does not seem to me to be any satisfactory explanation for the decision not to call Daly's and I draw an inference in favour of the defence in terms of weakening the argument in favour of the proposition that a £40 per hour rate was reasonable.

[10] I discount entirely the evidence of Mr Bonar, the Motor Assessor, because it seems to me that if he had an expert or experienced opinion to offer in this matter he should have come to court and been cross-examined in relation to it.

[11] Taking all of those matters into account I have concluded that the reasonable walk-in rate at the relevant time in 2016 was a figure of £30 per hour. I now want to look at how one should approach the legal principles. They were helpfully set out in this jurisdiction by Gillen J in the case of Watson v McCullough where he identified the case law at paragraph 12 and then set out the guiding principles at paragraph 13 and dealt with the case of Coles at paragraph 14.

> "[12] Counsel referred me to the now well trammelled authorities and cases dealing with credit hire issues. These included Barry Matchett v Heather Hamilton [2011] NIQB 132, Stokes v McAuley [2010] NIQB 131, Bates v Keegan [2012] NIQB 103 ,McAteer v Kirkpatrick

[2011] NIQB 52 and Gilheany v McGovern [2009] NIQB 46. In addition my attention was drawn to a more recent authority in the Court of Appeal in England of Coles and Others v Heatherton and Others [2013] EWCA Civ 1704.

[13] From these cases, I have distilled the following principles:

- The guiding principle is that of *restitutio in integrum*.

- The appropriate measure of damages is the cost of repairing the damaged goods. There is a discernible element of objectively assessed reasonableness in such a test.

- There is limited scope for the operation of the doctrine of judicial notice in this sphere and the courts must carefully adhere to the burden and standard of proof conventionally applied in such cases.

- The requirement of reasonableness operates to prevent the plaintiff from recovering excessive damages.

- There is no single correct solution in such an area. Based upon evidence, the court has to decide whether the amount claimed by the plaintiff exceeds the bounds of what is recoverable in law without applying some arithmetical scale.

- Thus where the differences between competing figures are relatively slight, involving margins of modest dimensions, the court is less likely to conclude the marginally higher amount claimed is unreasonable and to measure damages on the basis of a lower competing rate which is deemed to be reasonable. The common law consistently deals with the realities of life. Market forces and profit making activities give rise to differing costs to the consumer for the same product or service. In any given market or industry there may be a range or band of rates or charges composed of differing money amounts, which, depending on the context, may satisfy the legal requirement of reasonableness.

- Thus the common law will not invariably and inevitably condemn as unreasonable a money rate or amount which is higher than a competing rate or amount.

[14] Coles case reflects the latest development in the litigation over the recovery of the cost of vehicle repairs. In this case the court found that the measure of loss for damage to a vehicle is not necessarily as straightforward as the figure paid at a garage but can be the reasonable cost of repair assessed by a reference to what the individual claimant could obtain on the open market. The court held that it is neither here nor there whether the insurers put in place a repair company which sub-contracts, contracts directly with a garage or repairs the car itself. The only issue is the reasonable cost of repair to the individual claimant, which can be established by any form of admissible evidence in court. Only if the claim appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer."

[12] This case turned on the approach to paragraph 45 of Coles v Hetherton which was another private hire case in which there were, unlike this, a number of different issues which were being advanced on behalf of the various parties. In particular in paragraph 45 the court said:

> "The appellant's attack on the specific charges which have been included in the invoice of MRNM to RSAI alleging that the services were not provided or that they are too high or unreasonable or that they do not represent repairs, all miss the point. The question is not whether each of the items actually charged by MRNM to RSAI is reasonable but whether the overall cost charge by MRNM is reasonable. If the total repair cost paid by RSAI is more than the reasonable repair cost that the claimant would have paid if he had arranged the repairs on the open market, then the sum claimed effectively by RSAI will simply be reduced to the notional reasonable repair cost."

Conclusion

[13] I accept that the approach to the issue of what is the loss suffered in a case of this sort is not necessarily to view the situation item by item. One needs to look at the outcome. Is the outcome reasonable? But the approach to that will vary from

case to case. In this case there is only one item in dispute and the issue is, therefore, whether that charge which can be said to be reasonable. Having concluded that the charge ought to have been £30 I take the view that a charge of £40 was unreasonable and that is evidence that the payment made under the repair account was excessive and prima facie evidence that one should interfere. It can be displaced but it seems to me that if it is to be displaced that there is a need for other evidence to indicate that the overall figure still remains reasonable. That might, for instance, be achieved if there was evidence that a part had been discounted in some way, that all of the hours had not been included or there was some other basis upon which some rough and ready calculations had been made within the bill which could have led to a different outcome. But here where one item is in dispute and there is no such evidence I am faced with having to conclude that this is a case in which the total repair cost was more than the reasonable repair cost that the claimant would have paid if she had arranged the repairs on the open market and that the sum claimed should accordingly be reduced to the notional reasonable repair cost. Having regard to the fact that there were 27½ hours, that there is a sum of £10 per hour which I have found to be excessive that requires a reduction in the award figure of £275.00 plus VAT. I will substitute for the amount awarded below a figure of £2,316.81.