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*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**BETWEEN:**

**COLIN CLARKE**

**Plaintiff;**

**-and-**

**LYNDSAY McCULLOUGH**

**Defendant.**

**McCLOSKEY J**

## (i) INTRODUCTION

[1] This judgment determines the quantum of the Plaintiff's claim for damages against the Defendant. The claim arises out of a collision between the parties' respective vehicles which occurred on 10th April 2010.

[2] I have already determined the issue of liability. In an *ex tempore* judgment given on 10th December 2012, I found in favour of the Plaintiff, with no reduction on account of contributory negligence, for the reasons expressed.

## (ii) THE LITIGATION FRAMEWORK

[3] This case belongs to what is commonly known as the "credit hire" stable of litigation. Thus, arising out of the subject accident, the Plaintiff received a replacement vehicle which operated as a substitute for his own vehicle, damaged in the accident and not reasonably driveable in consequence. The circumstances of the accident itself were quite unremarkable. The parties' respective vehicles were in collision as a result of the Defendant suddenly

opening the driver's door of her parked vehicle, giving rise to an impact with the nearside of the Plaintiff's moving vehicle. Immediately thereafter, the parties conversed courteously, exchanged details and went their separate ways.

[4] In the events which occurred, this quintessentially simple factual matrix became progressively complicated and protracted. This is demonstrated by the following cast of *dramatis personae*:

| | |
|---|---|
| Colin Clarke | Plaintiff |
| Lyndsay McCullough | Defendant |
| Direct Line | Plaintiff's Insurers |
| Zurich | Defendant's Insurers |
| Accident Exchange | Plaintiff's Accident Management Company/ Credit Hire Provider |
| Albany Assistance | Defendant's Accident Management Company/ Credit Hire Provider |
| IGI Insurance Co. Ltd [now AM Trust Europe Limited] | Underwriter of the replacement vehicle insurance policy, insuring the user against the replacement vehicle cost and legal expenses |
| Adam Crump | Accident Exchange Customer Support Advisor |
| Peter Jupe (Donnelly's Honda) | Eventual Repairer Of Plaintiff's Vehicle |
| Scott McClaws | Zurich Claims Handler |
| Jo Garratt | Accident Exchange Customer Support Advisor |
| Liam Powers | Accident Exchange |

[5] In summary, a total of five separate commercial entities providing a mixture of insurance, claims handling and accident management services, each having a different role and purpose, rolled into action in the aftermath of the accident, at different stages. During the ensuing nine months, the Plaintiff struggled valiantly to achieve his single aim, which was to recover his vehicle, duly repaired and begin using it again. His evidence to the Court depicted a striking one man battle against the might of the motor insurance and claims industry. An increasingly bewildered Plaintiff rebounded seemingly endlessly between pillar and post. His story was one of going repeatedly backwards and sometimes sideways but rarely forwards. His frustration must have been profound, particularly given that the accident was patently the full responsibility of the Defendant. The court is bound to observe that the evidence discloses a disturbing lack of realism and efficiency in the motor insurance and claims industry and a questionable use of policyholders' monies in the present depressed economic climate. In particular, the failure of the Defendant's insurers to admit liability for the subject accident is simply baffling. While a modest period of delay to allow for investigations might have been understandable, the fact is that liability was consistently and unrealistically denied and, ultimately the Defendant's insurers undertook the quite hopeless quest of disputing liability before the Court. This course of action was doomed to failure. The Court's ruling on the second day of trial that the Plaintiff succeeds in full, without contributory negligence, was not less than inevitable. I consider that no rational court could have decided otherwise.

[6] Against this background, the Defendant's insurers sought the Court's adjudication on a claim for damages having the following components:

(a) The cost of hiring a replacement vehicle from 12th April 2010 to 5th March 2011 [328 days]: £32,380.97.

(b) The cost of repairing the Plaintiff's vehicle: £2,496.68.

(c) Vehicle storage charges: [244 days]: £2,214.00.

(d) Insurance policy excess: £200.00.

By the end of the trial, items (b) and (d) were no longer disputed.

## (iii) THE EVIDENTIAL FRAMEWORK

[7] I confine myself to rehearsing the salient aspects of the evidence only. Others are addressed in greater detail in Chapters (vii) and (viii) (*infra*).

[8] The Plaintiff's tale was a fairly familiar one in cases of this kind. He testified, without challenge, that his vehicle was not driveable as a result of the subject accident. He made immediate contact with his insurance company (Direct Line). Having read his insurance policy documents, he realised that "Honda Accident Management" (correctly described as "Accident Exchange" – see above list of *dramatis personae*) would deal with everything. He contacted this entity at once. This resulted in the provision of a replacement vehicle to him with effect from 12th April 2010 and the execution of a related series of "credit hire" agreements until 5th March 2011. During this period the Plaintiff, proactively, contacted his insurers and Accident Exchange with some frequency, by telephone and email. At one stage, during the summer of 2010, the Defendant's insurers (Zurich) appeared to have authorized the repair of the Plaintiff's vehicle in the amount of the estimate. However, this did not materialise. Liability for the accident was at no time admitted by the Defendant's representatives. Indeed, correspondence was sent by one of the Defendant's interested agencies (Albany Assistance) threatening proceedings against the Plaintiff. Ultimately, exceedingly frustrated, the Plaintiff turned to his own insurers (Direct Line) and had his vehicle repaired through them. He described his family, employment and financial circumstances and commitments. He emphasised that he had been repeatedly advised by Accident Exchange that he was **entitled to** a replacement vehicle.

[9] In cross examination, the Plaintiff recounted that, from the outset, the Accident Exchange official assured him that he was entitled to a "like for like" replacement vehicle and that the Defendant insurers would pay for repairing his own damaged vehicle. He was aware from approximately September 2010 that liability was disputed. He accepted that from the beginning, 12th April 2010, he had the benefit of a "protection" insurance policy (see the reference to IGI Insurance in paragraph [4] above). Eventually, acting on the advice of Accident Exchange, he invoked this policy on 30th December 2010. At the beginning, his expectation had been that his vehicle would be repaired within a couple of weeks. The replacement vehicle was driven exclusively by him. He was concerned about the growing replacement vehicle bill with the passage of time. However, he considered the Defendant's insurance company responsible for this because the accident was not his fault. In his words, "*I relied totally on Accident Exchange – I entrusted everything to them*".

[10] The evidence elicited concerning the Plaintiff's financial circumstances was that he is a married man with a very young child. Both he and his wife were in employment. There was no evidence about their income or outgoings. He described finances as "tight" and testified that their home was subject to a mortgage. They had, he asserted, no savings or credit bank balance. He had the use of a credit card with a facility of up to £4,500. Initially, he accepted that he might have utilised this for the purpose of paying his insurance excess of £200. Later in his evidence, he was more disposed to accept that his credit card might have been used to pay for a replacement vehicle. I interpose the

observation that this rather bare response (in cross examination) lacked substance and context, as it did not address issues of dates or periods nor, crucially, did it deal with how/when/by whom payment for repairing the Plaintiff's vehicle would be made.

[11] Certain documents also featured in the evidence. These included in particular the following:

(a) In a letter dated 12th April 2010, Accident Exchange informed the Plaintiff that repairs to his vehicle would be authorised by the Defendant's insurers only "*if their insured accepts liability for the accident*".

(b) In a separate letter bearing the same date, written in the wake of a conversation with the Plaintiff, Accident Exchange further informed him:

> "*In simple terms, we hire a replacement vehicle to you while we organise and manage the repairs to your vehicle on your behalf. When the hire vehicle is returned to us, we pass the bill for our hire charges to the insurance company of the at fault driver. We will also provide you with a policy of insurance at no cost to you which will cover you in the event that we are unable to recover our charges.*"

(c) Various emails generated from mid/late April 2010 confirm unambiguously that liability was in dispute. This became a recurring theme of email communications during the ensuing months.

(d) In an email dated 29th June 2010, the Plaintiff explicitly acknowledged his awareness that liability was disputed.

(e) One discrete email communication, dated 30th June 2010 from Accident Exchange to Zurich, recorded that the latter had "… *failed to obtain a claim form from your insured*"; lamented that the Plaintiff's vehicle was still not repaired; enclosed an engineer's report, a repair estimate and photographs "*that clearly show your insured's door has swung open and hit our client's correctly proceeding vehicle*"; requested the authorisation of repairs; and mooted the possibility of issuing proceedings.

(f) At this stage, yet another player, Albany Assistance (representing the Defendant) entered the fray, threatening the issue of proceedings against the Plaintiff. This, I observe, appears remarkable, in circumstances where the Defendant's insurers were engaged in active correspondence **and** the Defendant had yet to complete a claim form!

(g) Another email belonging to this discrete phase documents a discussion between representatives of Accident Exchange and Zurich suggesting that the latter would indeed authorise repair of the Plaintiff's vehicle.

(h) By 5th August 2010, Accident Exchange had instructed solicitors to issue proceedings against the Defendant. Subsequently, the Plaintiff continued to express his frustration and dismay.

(i) At this juncture, on 15th October 2010, the Writ was issued, followed by a Statement of Claim served on 7th January 2011 claiming unparticularised ongoing credit hire charges exceeding £15,000.

(j) On 21st December 2010, Accident Exchange advised the Plaintiff to initiate a claim under the "accident protection policy" and he duly did so, on 31st December 2010.

[12] The next material development was the repair of the Plaintiff's vehicle by his own insurers, having invoked his personal insurance policy and the associated expiry of the last of the segmental "credit hire" period, on 5th March 2011. Next, on 8th March 2011, Accident Exchange transmitted a letter to Zurich, documenting "*evidence in support of the charges incurred by Mr Colin Clarke with Accident Exchange Limited arising from an accident involving your insured on 10/04/2010.*" This intimated a total claim of £19,876.56 (including the insurance excess of £200). The components of this figure were "*hire charges*" of £13,966.50, an "*administration fee*" of £30, a "*non-standard driver charge*" of £2,351.76, an engineer's inspection fee of £58.75 and VAT of £3,269.65. These components and the total thereof were detailed in the first of four schedules. The remaining three schedules claimed progressively increasing amounts for delayed settlement of the claim on a month by month basis, rising by (in round figures) £1,200, £2,500 and £13,000. In an accompanying schedule, the daily cost of the replacement vehicle to the Plaintiff was stated to be £44.26 (including "extras") for the first two days; £57.45 (including "extras") for the next five months approximately; and £97 (including "extras") for the balance of the replacement vehicle period, from 23rd September 2010 to 5th March 2011. The total amount specified in this schedule was **£32,322.22**. This contrasts with the amount claimed in the first of the four columns contained in the accompanying letter, **£19,876.66**. A second calculations document, in addition to the "Statement of Charges", appears to have accompanied the Accident Exchange letter of claim to Zurich dated 8th March 2011. Each of these three documents contains a series of figures and calculations. It suffices to say that no evidence of explanation or reconciliation of these conflicting figures and computations was adduced on behalf of the Defendant. While Mr McKay QC manfully attempted to fill this gap in his closing submissions, suggesting (*inter alia*) that a discounted rate was (mistakenly?) applied, this could not, as I observed then, be any substitute for evidence.

[13] One of the consequences of the series of conflicting and inconsistent figures and calculations was that when the amended Statement of Claim was served on **1st August 2012**, the amount claimed for "credit hire" was the largest of the four total figures contained in the aforementioned letter of claim – to be contrasted with the amount which Accident Exchange **actually** levied against the Plaintiff and duly received from the underwriter under the "protection" policy. To summarise:

(a) Accident Exchange levied a total charge of £19,676.66 against the Plaintiff for the use of the replacement vehicle.

(b) This became the subject of the Plaintiff's claim under the "protection" policy **and** the payment of precisely this amount by the underwriter to Accident Exchange on 16th March 2011.

(c) Accident Exchange (the real Plaintiff) proceeded to claim £32,380.97 against the Defendant in these proceedings.

[14] By reason of the "protection" insurance policy claim and ensuing payment recorded above, the Plaintiff's claim against the Defendant was, with effect from 16th March 2011, (some 5 months post-Writ) a subrogated claim, in which, as noted above, the real claimant was Accident Exchange. At the conclusion of the trial, it was highlighted on behalf of the Defendant that the Plaintiff's discovery failed to disclose either this particular insurance policy or the payment made thereunder. This prompted a late exchange of letters between the parties' respective solicitors in which, *inter alia*, the Defendant's solicitors contended that belated discovery confirmed that the "credit hire" aspect of the claim must be confined to the smaller of the two figures highlighted in paragraph [12] above. This was disputed by the Plaintiff's solicitors, who rejoined:

> "*We have been advised by Accident Exchange Limited that as per the vehicle rental agreements …. signed by the Plaintiff the extent of the Plaintiff's liability is indeed the full £32,580.97 as claimed in these proceedings. However, due to an internal error on their part, only the discounted rate was discharged under the insurance policy underwritten by IGI Insurance Company Limited (now AM Trust Europe Limited).*"

## (iv) THE ISSUES

[15] On behalf of the Defendant, Mr O'Donoghue QC (appearing with Mr Ham, of counsel) initially formulated three main submissions:

(a) The principal component of the Plaintiff's claim viz the replacement vehicle cost of £32,380.97 is irrecoverable by reason of the Cancellation

of Contracts made in a Consumer's Home or Place of Work Regulations 2008 ("*The 2008 Regulations*").

(b) In the alternative, the totality of the replacement vehicle period is excessive and unreasonable and the Plaintiff's claim must be reduced accordingly. Also in the alternative to (a), the amount claimed in respect of the replacement vehicle is excessive and unreasonable, with the result that the Plaintiff's claim must be reduced.

(c) The Plaintiff had failed to mitigate his loss by failing to pursue the repair of his vehicle through his own insurance company at an early stage.

From this deceptively simple beginning the trial proved to be decidedly organic in nature.

[16] By the conclusion of the two day trial, the Defendant's case had undergone a veritable metamorphosis. This resulted in an adjournment to enable an amended Defence to be prepared. The resulting amended Defence contained some six new pages of fairly dense typescript, incorporating the following principal contentions:

(i) The "credit hire" aspect of the Plaintiff's claim is a subrogated claim brought by him on behalf of IGI Insurance/AM Trust Company which, by making a payment of £19,676 to Accident Exchange on 16th March 2011, discharged the Plaintiff's apparent liability to Accident Exchange under the successive agreements.

(ii) If the above contention fails, the only of the successive "credit hire" agreements which were conceivably [*my addition*] compliant with Regulation 7(4) of the 2008 Regulations were those dated 12th April 2010 [of two days duration] and 22nd December 2010 [of 73 days duration], as the requisite cancellation notice was not incorporated in any of the others, thereby rendering them unenforceable. This reduces the Plaintiff's recoverable damage for this discrete loss to £5,840, being 73 days at the rate of £80 per day dating from 22nd December 2010.

(iii) In any event, the theoretical zenith of this aspect of the Plaintiff's claim must be confined to £19,876, representing the actual amount of the total replacement vehicle cost levied against the Plaintiff in respect of the entire period – and not the amount claimed, £32,380, which is a substantially higher figure containing, **on their face**, a series of late payment penalties which were at no time levied against the Plaintiff but surfaced for the first time in the pre-action letter of claim, dated 8th March 2012, written by Accident Exchange and directed to Zurich.

(iv) The discrete component of £2,351 in respect of a "Non-standard driver charge" is irrecoverable on any showing, being devoid of any factual or legal foundation.

(v) The Plaintiff failed to mitigate his loss by arranging to have his vehicle repaired within a reasonable time. This failure must be viewed in the light of his twofold knowledge that Accident Management could arrange such repairs only in the event of liability being admitted and that liability was denied.

(vi) This knowledge was shared by the Plaintiff and Accident Exchange. Notwithstanding, the latter continued to seek to profit from hiring a replacement vehicle to the Plaintiff throughout the first 8 months (approximately) of the 11 month period under scrutiny.

(vii) Given the state of knowledge of the Plaintiff and his agents (Accident Exchange), the Plaintiff should have mitigated his loss by arranging to have his vehicle repaired by, at latest, the end of June 2010, thereby reducing his recoverable "credit hire" claim to a period of some 12 weeks, which translates to £3,888 in money terms. The claim for storage charges should be adjusted accordingly, reducing this to £592.

(viii) Finally, the Defendant advances two discrete contentions, which are to the effect that the amounts claimed in respect of the fourth and fifth "credit hire" agreement periods [embracing the period 24 September 2010 to 5th March 2011] are excessive on the freestanding ground that the Plaintiff was supplied with replacement vehicles of a standard superior to his own damaged vehicle, giving rise to a reasonable recoverable rate not exceeding £57 *per diem*.

The above summary [the court's handiwork] was duly accepted by Mr O'Donoghue QC. The original Defence was no longer recognisable. Permission to amend was duly granted.

[17] In reply, the main submissions developed by Mr McKay QC (appearing with Mr Bernard Fitzpatrick, of counsel) on behalf of the Plaintiff were the following:

(a) Relying on the decision in ***W – v – Veolia Environmental Services (UK) Plc*** [2011] EWHC 2020, the enforceability of the successive replacement vehicle hire agreements under the 2008 Regulations is immaterial, as the relevant charges have already been paid.

(b) In the alternative, the Plaintiff acted reasonably at all times.

(c) The Defendant has failed to discharge its burden of establishing that the Plaintiff failed to mitigate his losses and, in this context, the Plaintiff was under no obligation to pursue repair of his vehicle via his own insurance policy.

I record that the heavily amended Defence, of late advent, was the subject of an amended Reply served on behalf of the Plaintiff, which joined issue with the Defendant's amended pleading.

## (v) GOVERNING LEGAL PRINCIPLES

[18] In Turley - v - Black [2010] NIQB 1, I outlined the normal framework of cases belonging to the stable of credit hire litigation. In summary:

(a) The Plaintiff claims damages against the Defendant tortfeasor arising out of a road traffic accident, in which the Plaintiff's vehicle is damaged.

(b) An element of the Plaintiff's claim relates to the hire of a substitute vehicle following the accident in question.

(c) There is a commercial supplier of vehicles, who provides the vehicle in question to the Plaintiff during the relevant period.

(d) The supply arrangement has a financing dimension, involving a credit hire company, with whom the Plaintiff contracts.

(e) There is usually a commercial relationship between the vehicle supplier and the credit hire company.

(f) The Plaintiff normally obtains, pursuant to his contract with the credit hire company, benefits over and above the basic use and enjoyment of the substitute vehicle –to be contrasted with a simple hire arrangement.

(g) In most cases, the Plaintiff's claim in respect of the substitute vehicle is not one for out of pocket losses actually sustained as a result of making payments for the service. This is the normal scenario. In such cases, if the court determines to make any award to the Plaintiff in respect of the vehicle hire, the ultimate beneficiary of such award will be the credit hire company, by virtue of the agreement which it has struck with the Plaintiff. Sometimes the credit hire company itself can pursue the claim, by virtue of subrogation rights acquired under the financing contract.

(h) In virtually every contested case, the amount claimed by the Plaintiff in respect of vehicle hire is strongly contested by the Defendant, on the ground that the rate and/or period is/are excessive and unreasonable.

[19] In Stokes – v – Macaulay [2010] NIQB 131, I had occasion to rehearse certain basic principles: see paragraph [9]. It is trite that the overarching principle is that of *restitutio in integrum*. Giving effect to this principle, the Court must endeavour to place the Plaintiff in the position which he would have occupied but for the Defendant's tort, insofar as monetary compensation can achieve this (see McGregor on Damages, 19th Edition, para 1-0123). In the same judgment, I gave consideration to certain specific principles which have developed in the field of credit hire litigation. See paragraph [18]:

> "**[18]** In those cases where the victim of the Defendant's tort arranges to obtain a replacement vehicle, as the House of Lords' decisions make clear, this is to be viewed through a particular legal prism: it constitutes a course of action which mitigates the damage which the Plaintiff would otherwise sustain through loss of use of his damaged vehicle. Thus, in so-called "credit hire" cases, this gives rise to the general principle that the amount specified in the credit hire company's invoice is prima facie the measure of the Plaintiff's loss. This is subject to "stripping out" any additional benefits **and** any issue of mitigation of damage **and** any issue of impecuniosity. However I would formulate two propositions. The first is that where "stripping out" is not agreed between the parties (a rare occurrence), the court can only undertake this exercise on the basis of evidence. The second is that where mitigation of damage is canvassed, the burden is on the Defendant to establish that the Plaintiff failed to take reasonable steps to mitigate his loss - bearing in mind that the loss, properly analysed, is the loss of use of his vehicle - or acted unreasonably in purported mitigation thereof. "

[20] In McAteer – v – Kirkpatrick [2011] NIQB 52, I formulated the series of governing principles in the following way:

(i) The principle **of restitutio in integrum**: this being a claim in tort and not in contract, damages are designed "… to place the injured party in the same position as he was before the accident as nearly as possible". (Per Lord Hope in **Lagden –v- O'Connor** [2004] 1 AC 1067,

paragraph [30]. See also McGregor on Damages (18th Edition), paragraph 1-023 and following).

(ii) **The principle of reasonable necessity**. As Lord Mustill stated, the need for a replacement vehicle "is not self-proving". (**Giles –v- Thompson** [1994] 1 AC 142, at p. 167). For example, the Plaintiff may have been in hospital or on a foreign holiday during some or all of the period of hire. While need is not difficult to establish or infer, Lord Mustill observes that "… there remains ample scope for the Defendant in an individual case to displace the inference which might otherwise arise". Lord Nicholls' formulation is that the hire of a substitute vehicle must be "reasonably necessary". (**Dimond –v- Lovell** [2002] 1 AC 384, at p. 391). I incline to the view that the onus rests on the Plaintiff, in this respect.

(iii) **The Plaintiff's duty to take all reasonable steps to mitigate his loss.**
If the Plaintiff's vehicle requires to be repaired in consequence of the Defendant's negligence, this causes a loss of use of the vehicle. Where the Plaintiff, in such circumstances, hires a substitute vehicle, the correct analysis in law is that he is mitigating the loss which would otherwise occur. As Lord Hoffmann observed in ***Dimond –v- Lovell***, Mrs. Dimond, in procuring a replacement vehicle by availing of the services of the credit hire company, was taking reasonable steps to mitigate her damage. (Supra, at p. 401). This principle is most fully expounded by Lord Hope in ***Lagden –v- O'Connor.*** (*Supra* at paragraph [27]). Thus, the motorist who hires a replacement vehicle is avoiding the inconvenience and disturbance which he would otherwise have suffered and is mitigating that loss. The claim for hire costs is in lieu of the claim for general damages for loss of use which would otherwise eventuate.

(iv) **The principle that expenditure incurred in mitigation of loss must be reasonable**. This principle is the corollary of principle (iii). Per Lord Hope:

> *"But the principle is that he must take reasonable steps to mitigate his loss. The injured party cannot claim reimbursement for expenditure by way of litigation that is unreasonable…*

*If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle."*

(v) Next, there is the interlinked principle that, in incurring such expenditure, the Plaintiff can recover *"…even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss". McGregor, (paragraph 7-005).* Credit hire claims may permissibly be viewed as the paradigm of this freestanding principle.

(vi) **Prima facie, the credit hire invoice amount is the normal measure of damages**.

*"If the loss has been avoided by incurring a substituted expense, it is that substituted expense which becomes the measure of that head of loss. Under the doctrine of mitigation, it may be the duty of the injured party to take reasonable steps to avoid his loss by incurring that expense". (Per Lord Hobhouse in* ***Dimond –v- Lovell,*** *AT P. 406).*

And per Aldous LJ*:*

*"A person who needs to hire a car because of the negligence of another must, subject to mitigating his loss, be entitled to recover the actual cost of hire …*

*The claim will be based on evidence as to the rate charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates. Thereafter the evidential burden passes to the insurers to show that it would not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate.* ***(Clark –v- Ardington Electrical Services (and other cases)*** *[2003] QB 36, paragraphs [146] and [148]).*"

It seems to me that this qualifies as a prima facie rule, or general principle, since the amount specified in the credit hire company's invoice is the result of the

Plaintiff's steps to mitigate the loss which would otherwise accrue (a claim for general damages for inconvenience and disturbance arising out of loss of use of his vehicle) **and** it engages the onus of proof principle viz. the burden rests on the Defendant to establish that the Plaintiff failed to take reasonable steps to mitigate his loss and/or acted unreasonably in the steps taken. Furthermore, this prima facie rule, or general principle, points up the importance of the court acting on **evidence** at all times. Whatever else might be said about some apparently inflated credit hire invoices, they constitute evidence: and if the court's determination is to be an award of a lesser amount, this too must be based on **evidence**. The correct application of the governing principles seems to yield the proposition that such an outcome is permissible only via agreed facts and/or cross-examination of the Plaintiff and/or the adduction of appropriate evidence by the Defendant, whether via the mechanism of the Civil Evidence (Order) 1989 or otherwise.

(vii) **The principle/rule of onus of proof.**

*"The onus of proof on the issue of mitigation is on the Defendant. If he fails to show that the claimant ought reasonably to have taken certain mitigating steps, then the normal measure will apply." (McGregor, 18th ed. paragraph 7-019).*

This is a rule of long settled pedigree and vintage. Lord Hope frames the principle in these terms:

> *"**If the Defendant can show** that the cost that was incurred was more than was reasonable – if, for example, a larger or more powerful car was hired although vehicles equivalent to the damaged car were reasonably available at less cost – the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent".*
>
> (My emphasis).

It will be readily apparent that this well established rule of evidence is inextricably linked with the immediately preceding principles.

(viii) **The "additional benefits" principle.** The thrust of this discrete principle is that the Plaintiff may not recover the full amount specified in the credit hire company's invoice: but it seems to me of undeniable importance to consider this principle in conjunction with virtually all of the immediately preceding principles. The rationale of this particular principle is that the Plaintiff generally acquires additional benefits pursuant to the credit hire agreement which are not compensatible in law. The Plaintiff is relieved of the requirement to personally fund the hire and is also relieved of the trouble and anxiety of pursuing a claim, of the risk of having to bear the irrecoverable costs of a successful claim and the risk of having to bear the costs of unsuccessful litigation. (Per Lord Hoffmann in ***Dimond –v- Lovell***, p. 401.) In ***Dimond –v- Lovell***, the House of Lords corrected the approach of the Court of Appeal in the following terms:

> *"I think that what has gone wrong is that the Court of Appeal did not consider the rule that requires additional benefits obtained as a result of taking reasonable steps to mitigate the loss to be brought into account in the calculation of damages". (Per Lord Hoffmann, pp. 401-402).*

Lord Hoffmann's reference to the Plaintiff's duty to mitigate his loss is noteworthy. It may be that, correctly analysed, there is no freestanding "additional benefits" principle. Rather, the issue of additional benefits is encompassed by some or all of the immediately preceding.

(ix) **The "spot rate" measure of damages principle**.

> *"How does one estimate the value of these additional benefits that Mrs. Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay First Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car. As the judge said, First Automotive charged more because they offered more. The difference represents the value of the additional services which they provided. I quite accept that a determination of the value of the benefits which must be brought into account will depend upon the facts of each case.* ***But***

> ***the principle to be applied ... seems to me to lead to the conclusion that in the case of a hiring from an accident hire company, the equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided****". (Per Lord Hoffmann, my emphasis).*

Once again, this principle must be considered in conjunction with all of the immediately preceding principles.

(x) **The "additional benefits" principle adjusted for the impecunious Plaintiff.**

> *"But it is reasonably foreseeable that there will be some car owners who will be unable to produce an acceptable credit or debit card and will not have the money in hand to pay for the hire in cash before collection. In their case the cost of paying for the provision of additional services by a credit hire company must be attributed in law not to the choice of the motorist but to the act or omission of the wrongdoer. That is Mr. Lagden's case. In law the money which he spent to obtain the services of the credit hire company is recoverable." (Per Lord Hope in* ***Lagden –v- O'Connor****, paragraph [37]).*

Thus, at the conclusion of this chapter of his opinion, Lord Hope supplied negative answers to his earlier rhetorical questions:

> *"But what if the injured party has no choice? What if the only way that is open to him to minimise his loss is by expending money which results in an incidental and benefit which he did not seek but the value of which can nevertheless be identified? Does the law require gain to be balanced against loss in these circumstances?"*

As a matter of reasoning, the principle of restitutio in integrum features in the conclusion reached since, if the opposite conclusion were to be adopted:

> *"So he will be at risk of being worse off than he was before the accident. That would be contrary to the*

*elementary rule that the purpose of an award of damages is to place the injured party in the same position as he was before the accident as nearly as possible". (**Lagden –v- O'Connor,** paragraph [30]).*

(xi) **The principle of res inter alios acta**. The essence of this principle is expressed by Nicholson LJ as "*the well known legal principle that a tortfeasor cannot require the injured party to invoke his contract with his insurers in order to mitigate his loss". **McMullan –v- Gibney** [1999] NIJB 17, at p. 18.* See also ***Giles –v- Thompson*** *[1993] 3 All ER 321,* per Sir Thomas Bingham MR at p. 349 and the pithy statement of Longmore LJ *in **Bee –v- Jenson** [2007] EWCA. Civ 923 – "The fact that [the Plaintiff] is insured should be irrelevant to his claim …": paragraph [23*]. Notably, the reach of this principle did not serve to redeem the unenforceable agreement in ***Dimond –v- Lovell.*** The simple rationale of this conclusion was that to hold otherwise would defeat the policy of the legislation, which was to declare unenforceable the type of agreement under consideration. However, absent a vitiating factor such as unenforceability, this remains a doctrine of some potency in this sphere of litigation.

The first 5, 9th, 10th and 11th of these principles are engaged in the present action.

## (vi) THE CANCELLATION OF CONTRACTS MADE IN A CONSUMERS HOME OR PLACE OF WORK REGULATIONS 2008

[21] I shall describe this instrument as "*the 2008 Regulations*". They came into operation on 1st October 2008. Per Regulation 5:

"*These Regulations apply to a contract, including a consumer credit agreement, between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made –*

*(a) during a visit by the trader to the consumer's home or place of work, or to the home of another individual;*

*(b) during an excursion organised by the trader away from his business premises; or*

*(c) after an offer made by the consumer during such a visit or excursion."*

Regulation 7 makes provision for a right to cancel a contract to which the Regulations apply. This right is exercisable during the "*cancellation period*". Per Regulation 7(2):

> "*The trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made …*"

Regulation 7(3) continues:

> "*The notice must –*
>
> *(a) be dated;*
>
> *(b) indicate the right of the consumer to cancel the contract within the cancellation period;*
>
> *(c) be easily legible …*
>
> [and must contain prescribed information]."

Regulation 7 continues:

> "*(4)* ***Where the contract is wholly or partly in writing, the notice must be incorporated in the same document.***
>
> *(5) If incorporated in the contract or another document the notice of the right to cancel must -*
>
> *(a) be set out in a separate box with the heading Notice of the Right to Cancel; and*
>
> *(b) have as much prominence as any other information in the contract or document apart from the heading and the names of the parties to the contract and any information inserted in hand writing.*
>
> *(6) A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right*

*to cancel and the information required in accordance with this Regulation.*"

As reflected in the added emphasis, regulation 7(4) is the most important provision of the 2008 Regulations in the present proceedings.

## (vii) THE FIVE "CREDIT HIRE" AGREEMENTS – MY FINDINGS

[22] It is convenient to rehearse separately my discrete findings in respect of these agreements. I preface this with a generic description of the agreements since, in substance, there is so little difference amongst them. Pursuant to each of these agreements Accident Exchange hired a vehicle to the Plaintiff. The overall replacement vehicle period was 12th April 2010 to 5th March 2011, during which five separate agreements were executed. Every such agreement was dated and signed by the Plaintiff. Each of them specified the following:

(d) The "*vehicle group*" of the rented vehicle.

(e) The "*waivable excess*" amount.

(f) The "*daily rental charge*".

(g) The "*basic excess waiver"* amount.

(h) The "*residual excess waiver*" amount.

(i) The "*WTU (*ie windscreen, tyres and under body) *waiver*" amount.

(j) The daily "*non standard driver*" charge: this was £7.17 in all of the agreements.

(k) The "*delivery and collection*" charge: this was £100 in all of the agreements.

(l) The daily "*additional driver charge*": this was £7.50 in all of the agreements.

The Plaintiff also agreed to pay Accident Exchange an administration charge of £25 "*for each charge that the Lessor transfers to me or pays on my behalf*". Accompanying each of the Plaintiff's signatures in all of the agreements was the following statement:

"*I hereby agree to hire the vehicle on the terms and conditions set out above*".

[23] Each of the agreements incorporated a detailed set of "Terms and Conditions". These appear to have been uniform throughout. Clause 1.12 defined "*rental period*" as:

> "*The shorter of the period for which you have a reasonable need for a vehicle by reason of the accident and a period of 85 days from the date of this Agreement.*"

By Clause 1.13, the cost of repairing the Plaintiff's vehicle had to be approved by Accident Exchange. Clause 2.1 provided:

> "*Where you cannot use your motor vehicle as a result of an accident which in our opinion was the fault of a third party, we may hire you the vehicle for the rental period and allow you credit on the [*hire charges and any repair charges] *in accordance with this agreement.*"

The central contractual obligation undertaken by the Plaintiff was expressed in Clause 3.2:

> "*You shall pay the hire charges together with interest to us in full and by a single payment immediately upon the expiry of the credit period. It is your duty to ascertain in advance the amount which is due.*"

"*Credit period*" is defined as a measurement of time expiring on the earlier of the last day of 51 weeks measured from the date of the agreement **or** the date of financial settlement of the Plaintiff's claim against the third party, duly approved by Accident Exchange **or** the date of a Court decision or approved discontinuance of legal proceedings **or** the date when Accident Exchange terminates the agreement **or** the date of the Plaintiff's death or insolvency. Accident Exchange's entitlement to terminate the agreement is detailed in clause 6 and arises in the event of, *inter alia*, their formation of opinion that the Plaintiff would be unable to recover the higher and repair charges from the third party. Upon termination any such unpaid charges become due and payable, together with interest, to Accident Exchange by the Plaintiff: per Clause 6.2. The elaborate framework of Clause 4 invests Accident Exchange with a **discretion** to have the Plaintiff's vehicle repaired and discharge the cost thereof, but only where satisfied that the vehicle was "*entirely the fault of the third party*".

[24] I make the following specific findings regarding the series of credit hire agreements:

(a) The first agreement was signed by the Plaintiff on 12th April 2010. On the same date, the Plaintiff signed a document entitled "Notice of the Right to Cancel". Both documents bear the generic title "Vehicle Rental Agreement". I find that these two documents formed part of a

package received by the Plaintiff simultaneously and signed separately by him on the same occasion. Each was part and parcel of the other.

(b) On 14th April 2010, the Plaintiff signed the second agreement. There is no evidence of any cancellation notice and no evidence from which its existence can properly be inferred. Accordingly, I find that none existed.

(c) On 14th July 2010, the Plaintiff signed the third agreement. I repeat (b) above.

(d) On 23rd September 2010, the Plaintiff signed the fourth agreement and a fresh "Notice of the Right to Cancel" in terms identical to that dated 12th April 2010. I repeat my further findings in subparagraph (a) above.

(e) On 22nd December 2010, the Plaintiff signed the fifth (and final) credit hire agreement, together with a fresh "Notice of the Right to Cancel" which, in common with each of its two predecessors, bore the generic title "Vehicle Rental Agreement". I repeat my further findings in subparagraph (a) above.

(f) The first, third and fifth of the credit hire agreements and related "Notice of the Right to Cancel" were signed by the Plaintiff at his place of work in circumstances where a representative of Accident Exchange brought the relevant documents to such location and had them executed in his presence. In contrast, the fourth of the five agreements was posted to the Plaintiff and the two relevant documents were signed by him and duly returned by him to Accident Exchange.

(g) The fifth of the five credit hire agreements had one distinguishing feature. On the "front page", which incorporates all the financial and other basic data, there was included a section located between two of the Plaintiff's four signatures bearing the title "Your Right to Cancel" and having the following text:

> "*You have a right to cancel this agreement. Please see the attached notice of your right to cancel, which forms part of this agreement. By signing below you confirm receipt of this notice.*"

[25] The rationale of the 2008 Regulations was considered by Judge Maloney QC in a decision of Cambridge County Court ***Wei – v – Cambridge Power and Light*** [10th September 2010, unreported] in the following passage:

> *"The public policy behind the Regulations was strongly in favour of the consumer, and Regulations were intended to have a deterrent effect to encourage traders to comply with them by imposing drastic civil and criminal sanctions in those individual cases in which their breaches might come to light…….*
>
> *A claimant was entitled to recover damages reasonably incurred by him or on his behalf as a result of a tort, whether or not he was liable at law to a third party in respect of them,* ***Bee v Jenson*** *[2007] EWCA Civ 923,[2007] 4 All E.R. 791 followed."*

The Judge concurred with the decision of the District Judge at first instance that since the credit hire agreement was unenforceable as between the parties to it, given the non-compliance with Regulation 7, any amount purportedly due thereunder was not recoverable in damages in a tort action. I concur with this assessment. Stated succinctly, the Plaintiff could not be compensated for a purely prospective loss which he was not legally liable to incur. The rationale of the decision is uncomplicated: the amount which the Plaintiff was claiming for use of a replacement vehicle was based on agreements which were unenforceable as a matter of law, thereby subjecting him to no <u>future</u> financial liability, with the result that he had no recoverable loss in his action in tort against the Defendant tortfeasor. Significantly, in that case, the "credit hire" cost had not been paid by the Plaintiff to the accident management company.

[26] The legal effect of the above findings is that, viewed through the prism of the 2008 Regulations, the second and third of the series of credit hire agreements executed between the Plaintiff and Accident Exchange <u>were</u> unenforceable against him, by reason of their non-compliance with Regulation 7(4). I shall revisit the legal effect of this presently. I must juxtapose this analysis and conclusion with three undisputed **facts**. The first is that the second and third agreements spanned the period 14th April to 23rd September 2010 – a period of 162 days, almost exactly one half of the total replacement vehicle period. The second is that the overall vehicle replacement period, which was continuous in nature, continued until 5th March 2011, some 11 months post-accident. The third is that 11 days later, on 16th March 2011, the replacement vehicle provider (Accident Exchange) was paid in full for the charge levied by it against the Plaintiff in respect of the facility and period concerned, £19,676. The payor was the replacement vehicle insurer, the Plaintiff having availed of his insurance contractual right to make a claim against this entity. It is well settled – and not in dispute between the parties – that, as a matter of law, this is regarded as a payment made by **the Plaintiff**. Thus, by the advent of the trial, the Plaintiff had incurred an accrued financial loss under this discrete head of damage.

[27] There remains the discrete issue of incorporation, as regards the first, fourth and fifth of the credit hire agreements. Regulation 7(4) of the 2008 Regulations stipulates that the cancellation notice "*must be incorporated in the same document*" and, per regulation 7(2), this notice "*must be given at the time the contract is made*" and, further, satisfy the requirements of regulation 7(3). While there was no dispute between the parties regarding the second and third of these cumulative requirements, the issue of **incorporation** was raised on behalf of the Defendant. At the trial, it proved impossible to reproduce the precise format, assembly and presentation of the successive credit hire agreements and cancellation notices in question. As appears from the above findings, they were clearly received, considered and signed by the Plaintiff at the same time. It is unclear whether they were physically attached to each other by means of a staple or paper clip or otherwise. However, I am of the opinion that the requirements of the Regulations are designed to ensure that the agreement and cancellation notice are packaged together in a manner which ensures that the hirer appreciates their inextricable linkage and has brought to his attention his right to cancel the agreement. "*Incorporation*" in my view, is to be understood in this sense. Furthermore, the Regulations do not prescribe any statutory pro-forma. I find that, as regards the three agreements in question, the two documents formed part of a package received, considered and signed by the Plaintiff simultaneously. Based on the evidence, I further find that these were the only two documents which occupied the Plaintiff's attentions on the three occasions in question. Each was part and parcel of the other. They were, in substance and reality, inseparable. While there is no evidence warranting a finding of some physical bond or attachment, I consider that this is not required by Regulation 7(4). Furthermore, I note the absence of any prescribed pro-forma in the Regulations. I conclude, therefore, that the statutory requirement of incorporation was satisfied in respect of these three agreements.

## (viii) MY OTHER FINDINGS

[28] I make the following further specific findings:

(a) The Plaintiff's perception that he had no legal responsibility for the subject accident was reasonable at all times.

(b) However, the Plaintiff was aware, actually or constructively, from April 2010 that liability was disputed. During the initial period of approximately four months, the Plaintiff reasonably believed that, notwithstanding – whether through an alteration of the liability dispute or by some other mechanism – his vehicle would be repaired without cost to him.

(c) Throughout the replacement vehicle period, the Plaintiff proactively pursued the issue of repairs to his vehicle.

(d) The Plaintiff was advised by Accident Exchange that he was entitled to the use of a replacement vehicle. I find that it was reasonable for him to act on this advice during the first half of the overall replacement vehicle period of 11 months.

(e) Objectively analysed, the Plaintiff's conduct throughout the entirety of the period under scrutiny, including his maintenance of a meticulously composed file of documents and duly reinforced by his demeanour under oath, confirms his awareness and understanding of the essential contents of the various documents signed by him from time to time and reinforces the above findings.

(f) At the commencement of each of the segmental "credit hire" periods, the Plaintiff, in his words, "*just signed up*".

(g) The "*other charges*" ie the charges for benefits other than the cost of the replacement vehicle were not explained to the Plaintiff. However, I find that the Plaintiff was capable of understanding them, whether without assistance and/or by the mechanism of seeking explanation or further information.

(h) Having considered all of the evidence bearing on the Plaintiff's financial and family circumstances, I find that he was not impecunious in the sense and for the limited purpose upon which I elaborate *infra*.

## (ix) **CONCLUSIONS**

[29] The Defendant's contentions, in their final manifestation, focus on the following matters:

(a) The enforceability of the successive "credit hire" agreements.

(b) The actual, to be contrasted with theoretical, cost to the Plaintiff of the use of the replacement vehicles.

(c) The "*non-standard driver charge*" component of all five "credit hire" agreements.

(d) The Plaintiff's failure to repair his vehicle sooner at his own cost.

(e) The unreasonably higher quality – and resulting higher cost – of the replacement vehicle used by the Plaintiff during the fourth and fifth of the credit hire agreement periods.

[30] In determining these issues, all of which bear on the overarching question of whether the Plaintiff's claims are recoverable in law – whether in whole or in part or not at all – I give effect to the governing principles rehearsed in chapter (v) above. I remind myself in particular that, within the ambit of the overarching principle of *restitutio in integrum*, the Plaintiff must take all reasonable steps to mitigate his loss and, borrowing the words of Lord Hope (*supra*) he cannot recover damages "*for expenditure by way of mitigation that is unreasonable*". Furthermore (again per Lord Hope), where it is reasonable for the Plaintiff to hire a replacement vehicle, "*he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle*". One discrete further dimension of every Plaintiff's duty to take all reasonable steps to mitigate his loss is that where the steps and arrangements which he undertakes entail the receipt of so-called "additional benefits", these are vulnerable to be excluded from his recoverable damages on the ground that their effect is to place the Plaintiff in a **better** position than he occupied immediately prior to the commission of the Defendant's tort. Finally, I remind myself of the principle of *res inter alios acta*.

[31] Broadly, the main question for the Court is the reasonableness of the Plaintiff's conduct throughout the whole of the period under scrutiny, which had a duration of some 11 months. In my view, the central issue to be determined is whether the Defendant has discharged the burden of establishing that the Plaintiff failed to take reasonable steps to mitigate his loss or, alternatively, acted unreasonably in the mitigation measures undertaken by him. I consider that, viewing the evidence fairly and in the round, a clear hiatus was reached at the time when the third of the five credit hire agreements was expiring and was to be superseded by the fourth, ie 23rd September 2010. I find that there had been uncertainty and equivocation surrounding the issue of repairing the Plaintiff's vehicle until shortly beforehand. This, coupled with the firm "entitlement" advice which the Plaintiff was receiving from Accident Exchange ["*AE*"] and his natural reluctance to incur an expense of some £2,500 which he considered unjustified, was sufficient to view his conduct until then as reasonable. However, as of September 2010, there was no end in sight to the dispute, the future was impossible to predict and, meanwhile, the meter continued to tick. In addition, at this juncture, the Plaintiff readily accepted a superior replacement vehicle, thereby committing himself to a higher rate of hire which, contractually, was rising from £84.67 [£57.50 basic hire] to £105.17 [£80 basic hire] *per diem*. At this stage, his own vehicle could be repaired for some £2,500. At this point, his accrued contractual liability to AE was circa £12,000 and about to rise some £736 per week.

[32] As the authorities demonstrate, the loss which the Plaintiff was mitigating by acquiring a replacement vehicle was the loss of use of his own vehicle. Come September 2010 I consider that, properly analysed, the Plaintiff had two choices: either to commit himself to a further period – at that stage indefinite and incalculable – of credit hire, at a substantially increased rate **or** to pay for repairing his own vehicle. While there was, of course, a third option viz invoking his own insurance policy this must be disregarded as a matter of law. The issue of reasonableness must be assessed both subjectively and objectively. The Plaintiff's reluctance to incur a credit card bill, with possible interest, is entirely understandable. However, given his financial circumstances, I find that the amount involved was not reasonably beyond his economic reach. In ***Lagden v O'Connor*** [2004] 1 AC 1067, Lord Hope addressed this discrete issue as follows:

> *"[42] The Court of Appeal [2003] QB 36 was alive to this issue. In its judgment, at p 83, para 128, the court said:*
>
> > *'We realise that in some cases it will be necessary to consider the financial ability of a claimant to pay car hire charges. However we do not anticipate that district and county court judges will not be able to arrive at a just result without putting the parties to great expense.'*
> >
> > *That seems to me to be a fair assessment. In practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card. It ought to be possible to identify those cases where the selection has been made on grounds of convenience only without much difficulty.*
>
> *[43] I recognise that, if an exception is to be made in favour of the car owner who is impecunious, there may be some cases where motor insurers will feel that they have no alternative but to take the case to court in order to resolve the question of fact as to whether the claimant had no choice but to use the services of a credit hire company. This may lead to an increase in contested small claims. I do not think that we are in a position to assess the scale of that increase. But motor insurers will be as anxious as anybody to keep these cases out of court with a view to keeping costs to a minimum. This suggests that the better course is to leave it to the insurance market to find its own solution to this problem. We must bear in mind, too, that the object of the law of damages is to put the injured party into the same position as he was before the accident. It would defeat this object if we were to arrive at a decision on policy grounds that would deprive the impecunious motorist of the opportunity of minimising his*

> *loss of use while his car is being repaired by obtaining the hire of an alternative vehicle."*

Per Lord Nicholls:

> *"[9] There remains the difficult point of what is meant by "impecunious" in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make. I am fully conscious of the open-ended nature of this test. But fears that this will lead to increased litigation in small claims courts seem to me exaggerated. It is in the interests of all concerned to avoid litigation with its attendant costs and delay. Motor insurers and credit hire companies should be able to agree on standard enquiries, or some other means, which in practice can most readily give effect to this test of impecuniosity. I would dismiss this appeal."*

I discern no difference in principle between a motorist's ability to pay replacement car hire charges and ability to pay vehicle repair costs. I must also take into account the Plaintiff's clear conviction, duly reinforced by strong and repeated advice, that he was blameless of the accident, with the result that this expenditure would, ultimately, be recoverable by him from the tortfeasor in full. For these reasons, I conclude that the Defendant has discharged the burden of establishing that the Plaintiff's failure to arrange for his vehicle to be repaired at his own expense by 23rd September 2010 was, as a matter of law, a failure to take a reasonable step in mitigation of his loss. It follows that the "credit hire" element of his claim for damages succeeds to the extent of approximately 50% only. I find that the post-23/09/10 claim is irrecoverable in law.

[33] With specific reference to the five issues identified in paragraph [29] above:

(a) I have already found that the second and third of the five credit hire agreements were unenforceable by reason of non-compliance with Regulation 7 of the 2008 Regulations: see paragraph [26 ] above. I have found that the other three agreements were compliant and, hence, enforceable. I conclude, however, that the issue of enforceability is irrelevant, since neither of the contracting parties is seeking or will seek to enforce any of the agreements against the other, given the simple fact that the Plaintiff, through the vehicle of the "protection" insurance policy, has discharged fully his contractual liability to Accident Exchange. It follows that, in simple terms, this aspect of the Plaintiff's claim is for a financial loss already incurred by him and such loss is recoverable as a matter of law as it was a natural and foreseeable

consequence of the Defendant's tortious conduct, is clearly embraced by the overarching principle of *restitution in integrum* and is not defeated by any limiting or exclusionary principle or doctrine, such as remoteness of damage or the rule against double recovery: see, generally, Halsbury (Fourth Edition Reissue) paragraphs 851-862. In thus concluding, I concur with the approach of Judge Mackie QC in ***W*** v ***Veolia ES*** [2011] EWHC 2020 (QB).

(b) The Defendant's contention that the Plaintiff acted unreasonably in mitigating his loss vis-à-vis the increased rate of hire incurred by him contractually from the beginning of the fourth of the credit hire agreement periods viz 23rd September 2010 does not arise for determination, given my conclusion above. If necessary to my decision, I would have been sympathetic to it on the elementary basis that the Plaintiff's change to a superior and more expensive vehicle was, on any showing, manifestly unjustified. However, this assessment would denote but a pyrrhic triumph for the Defendant since – for whatever reason – the charge actually levied against the Plaintiff and duly paid in respect of the fourth and fifth periods was £46.41 [basic], **not** £80 [basic], per day. This daily rate is not challenged as unreasonable. Thus there was no financial consequence of substance. In my view, the correct analysis is that, given these unusual facts, this is not to be characterised a failure to mitigate damage at all.

(c) I conclude that the "non standard driver" charge of £7.17 per day is irrecoverable in respect of the entire period. No evidence was adduced on behalf of the Plaintiff to explain its genesis or rationale. I consider that it can only be viewed as a discrete benefit which the Plaintiff did not reasonably require for any apparent purpose, giving rise to the conclusion that the Defendant has discharged its onus of establishing that the Plaintiff acted unreasonably in purported mitigation of his loss in this freestanding respect. An alternative analysis is that this constitutes an additional benefit viz a benefit over and above what the Plaintiff enjoyed immediately prior to the Defendant's tort, which falls to be "*stripped out*" of the amount claimed: see general principle (viii) above.

(d) See paragraph [32] above.

(e) See (b) above. In short, in the events which occurred, both the provision of an unreasonably superior vehicle to the Plaintiff and the levying of a commensurately higher and unreasonable rate of hire were ultimately irrelevant, having regard to the reduced charge which – inexplicably, on the evidence – Accident Exchange actually levied against the Plaintiff.

[34] The final issue is that of the Plaintiff's claim for storage charges, being £2,214 based on a period of 244 days. To reflect my conclusion in paragraph [31], this too must be reduced, so as to expire on 23 September 2010.

## (x) THE PLAINTIFF'S AWARD

[35] Giving effect to the above findings and conclusions, the Plaintiff's recoverable damages are as follows:

(a) The cost of repairing his vehicle: £ 2,496.68

(b) Insurance policy excess: £ 200.00

(c) Vehicle storage at the rate of £7.50 per day for a total period of 145 days, measured from the first day charged, 01 May 2010, to 23 September 2010 :

£1,305, VAT included.

(d) The cost of hiring a replacement vehicle from 12th April 2010 [the first day of use/charge] to 23rd September 2010 [164 days]:

£8,263.94,VAT included

(e) The "*administration fee*" of £30 and the engineer's inspection fee of £58.75, neither of which was in dispute: £ 88.75

**TOTAL:** **£ 12,408.37**

[36] Accordingly, there will be judgment for the Plaintiff against the Defendant in the amount of £ 12,408.37, together with County Court costs and High Court outlays. The court has not been asked to award interest.