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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **19/09/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

BETWEEN:

COLIN CLARKE

Plaintiff-Respondent

and

LYNDSAY McCULLOUGH

Defendant-Appellant

Before: Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ (delivering the judgment of the Court)

[1] This is an appeal from a judgment given by McCloskey J on 21 December 2012 in relation to the issue of the appropriate quantum of damages payable in a writ action. The case falls into what the judge described as the stable of so-called credit hire cases where a plaintiff hires a car on credit pending repairs to his own vehicle following a road accident. The defendant, who is the appellant in the appeal, appeals from the judge's decision to award damages to the plaintiff (the respondent in the appeal) in respect of a period of 5½ months from the date of the damage to the plaintiff's car. It is the defendant's case that the learned judge erred in his determination of what was a reasonable period of time for the plaintiff to hire a vehicle bearing in mind his duty to mitigate his loss.

[2] Mr O'Donoghue QC and Mr Ham appeared for the defendant- appellant (who we will call the defendant). Mr McKay QC and Mr Fitzpatrick appeared for the plaintiff-respondent (whom we will call the plaintiff). The court is grateful to counsel for their helpful and clear submissions.

[3] In Lagden v O'Connor [2004] 1 AC 384 the House of Lords concluded that if a plaintiff left to himself could not obtain a replacement car to meet the need created by a negligent driver, the damages payable might include the reasonable costs of hiring a car by means of an agreement with a credit hire company. Credit hire companiescould provide a reasonable means whereby an innocent motorist might obtain use of a replacement vehicle when otherwise they would not have been able to do so. Unless the recoverable damages in such a case included the reasonable cost of hire payable to a credit hire company, the negligent driver's insurers would be able to shuffle away from their insured's responsibility to pay the cost of providing a replacement car. That did not mean, however, that an innocent motorist could recover damages beyond losses for which he was properly to be compensated. In this case the issue is as to the measure of the properly compensatable loss suffered by the plaintiff and more particularly as to the proper period for which he is entitled to be compensated as against the defendant, having regard to his duty to mitigate his loss.

Background to the Case

[4] On Saturday 10 April 2010 the plaintiff was driving his Honda Accord car in Newtownabbey. As he was passing the defendant's parked car, the defendant opened her car door causing damage to the plaintiff's car. Both parties appear to have been amicable at the incident although neither admitted liability. It would appear to be common case that the damage to the plaintiff's vehicle was such as to render it incapable of being driven but it was capable of repair and was fully drivable after repairs were carried out. The defendant's case was that the plaintiff was at fault in driving into her opening door. The plaintiff's case was that the defendant opened her car door and hit his car in circumstances which he could not avoid. The trial judge determined the issue of liability at an earlier stage than the issue of quantum. In an *ex tempore* judgment given on 10 December 2012 he concluded that the defendant was entirely responsible for the damage to the plaintiff's car.

[5] Following the accident the plaintiff contacted his insurance company, Direct Line, to determine what to do. Under the terms of his insurance policy he discovered that he was permitted to use the services of Accident Exchange ("AX"), an accident management company, and he contacted them. In its introductory letter to the plaintiff dated 12 April 2010, AX described the services which it provided in the following terms:

> "We help motorists who have been involved in an accident that was not their fault. 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.
>
> After we have made some initial inquiries to assess the feasibility of your claim, if you are eligible, we will contact you to arrange a date for the repair to your vehicle and the supply of a similar replacement hire vehicle. These inquiries usually take 2 or 3 working days to complete.
>
> In order for us to provide you with the best possible service we will also notify the relevant party or their insurer of your claim and of the fact that you have instructed us to act on your behalf. If you are contacted directly by any third party or their insurer, please let me know immediately and pass on any correspondence to me unanswered and I will deal with it on your behalf**. It is important that you DO NOT respond to any communication or enter into any correspondence with them as it may prejudice your claim to do so."**

[6] The chronology of relevant events thereafter may be expressed in the following way:

(a) On 12 April 2010 AX wrote to the plaintiff saying:

> "To enable the at fault driver's insurer to contact their client and form a view on liability in the accident, we will contact the at fault driver's insurer in 10 days to seek authorisation for the repair of the vehicle. Authorisation will only be granted if their insured accepts liability for the accident. If liability is accepted the at fault driver's insurer would inspect your vehicle before making a decision on the repairs. Once authorised we will manage the repair on your behalf, provide you with an estimated completion date for the repairs and keep you updated on the progress of your claim … It is possible that you may be contacted by someone else involved in the accident, such as the other driver, their insurance company or a solicitor. They may do this because they want to reduce their own costs of dealing with your claim often by having your car repaired at a repairer without the necessary skills to guarantee your vehicle is fixed to manufacturer's standards. Please let us know

> immediately if you receive any form of communication from them and we will deal with this on your behalf."

(b) On 14 April 2010 the plaintiff entered into a credit hire agreement with AX for a hire car pending repair of his own vehicle.

(c) On 19 April 2010 the plaintiff emailed AX indicating that he had received a motor accident report form from his insurers and asking whether he should complete it or whether AX would deal with it. AX replied by email saying that the plaintiff could respond to the letter if necessary but to ensure that the insurers did not deal with the claim in relation to the repair to the vehicle as AX were claiming from the at fault insurance company.

(d) The fact that the defendant was disputing liability was communicated to AX (on 20 April 2010, on 26 and 28 April 2010). Thereafter liability remained in dispute.

(e) On 13 July 2010 Albany Assistance Limited, an accident management company acting on behalf of the defendant, sent a letter to the plaintiff stating:

> "To prevent us taking legal action, please confirm the full name and address of your insurer together with your policy number and claims reference if known."

The plaintiff passed the letter to AX.

(f) On 14 July 2010 the plaintiff entered into a new credit hire agreement with AX for a hire car pending repair of his own vehicle.

(g) On 28 July 2010 Albany Assistance sent a further letter to the plaintiff stating that there would be no option but to issue legal proceedings against the plaintiff. This letter was again passed on to AX.

(h) On 23 September 2010 the plaintiff entered into a new credit hire agreement with AX for a hire car pending repair of his own vehicle. On this occasion the rate increased.

(i) On 15 October 2010 the plaintiff issued the writ claiming damages for personal injury, loss and damage by reason of the defendant's negligence in and about the driving, management and control of a motor vehicle.

(j) On 22 December 2010 the plaintiff entered into a new credit hire agreement with AX for a hire car pending repair of his own vehicle.

(k) On 31 December 2010, at the request of AX, the plaintiff made a claim under the Accident Protection Policy taken out at the same time as the credit hire agreement. The policy paid out £19,676.66 to AX discharging the amount due from the plaintiff under the credit hire agreement.

[7] In the proceedings the plaintiff's claim included the cost of repairing his vehicle (£2,496.68 plus £200 excess), vehicle storage charges for 244 days costing £2,214 and hire charges from 12 April 2010 to 5 March 2011 (328 days) costing £32,380.97. Before the judge it was argued that AX had wrongly invoiced only £19,676.66 in respect of hire charges when the true cost of the car hire should have been the sum of £32,380.97. AX has not sought to pursue this additional claim.

[8] Repairs to the plaintiff's vehicle were actually effected on 5 March 2011 after the plaintiff invoked his own motor insurance policy, having run out of patience in relation to the delay in relation to the whole process.

[9] From the correspondence it can be seen that at all times the plaintiff requested matters to be dealt with expeditiously and he made clear that he wanted his own car repaired and returned to him as soon as possible. The plaintiff, accordingly, acted in a perfectly proper manner throughout and his attitude represented the viewpoint and reaction of a reasonable driver faced with the problem of having a car damaged in a motor accident, which required repair to make it drivable again and which had to be replaced on a temporary basis while the repairs were carried out.

The Judge's Conclusions

[10] In a written judgment handed down on 21 December 2012, the judge outlined the legal principles relevant to credit hire cases as formulated in McAteer v Kirkpartrick [2011] NIQB 52. He also noted that, whilst the overall hire period in the present case was 12 April 2010 to 5 March 2011 and continuous in nature, the period was comprised of five separate and distinct credit hire agreements between the plaintiff and AX. The judge made findings of fact which included a finding that the plaintiff's belief that he was not legally liable for the accident was a reasonable one. He also found that the plaintiff was aware, actually or constructively, from April 2010 that liability was being disputed by the defendant. He found that during the initial 4 month period the plaintiff reasonably believed his vehicle would be repaired without cost to himself notwithstanding the disputed liability. The plaintiff was advised by AX that he was entitled to the use a replacement vehicle. The plaintiff proactively pursued the issue of repairs to the vehicle. The judge also made a clear finding of fact that the plaintiff was not impecunious. Applying the legal principles to the facts as found the judge concluded at paragraph [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 23 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 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 to 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. … 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 23 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 September 2010 claim is irrecoverable in law."

[11] The judge therefore awarded damages totalling £12,408 which comprised the cost of repairing the vehicle, insurance policy excess, vehicle storage and the hire of a vehicle from 12 April 2010 to 23 September 2010 (£8,263.94) and in addition allowed an administration fee of £30 and the engineer's inspection fee.

The Parties' Submissions

[12] Mr O'Donoghue QC argued that the plaintiff's duty to mitigate his loss gave rise to an obligation to arrange for the repair of his vehicle as soon as it was made clear to him that liability for the accident was disputed. At the latest this was 28 April 2010, the judge finding as a fact that the plaintiff was aware that liability was disputed by the end of April 2010. Once this occurred there was no reason why the plaintiff could not pay for the car to be repaired himself as the judge found him not to be impecunious. He had the benefit of a credit card limit of £4,500. Whilst the defendant accepts that the plaintiff was entitled to hire a car while the repairs were being carried out, the duty to mitigate obliged the plaintiff to effect repairs to his vehicle within a reasonable period of time. The proper constraints in relation to the vehicle hire are the reasonableness of the period of hire and the rate charged. On the evidence the plaintiff decided in February 2011 to have his car repaired through his own insurance company and the repairs were completed by the first week of March 2011. Counsel argued that the reasonable period of time for the carrying out of the repairs was only 4 weeks. This meant that the plaintiff should have had the car repaired by the beginning of June, 4 weeks after he knew liability was being disputed. The judge erred in finding that there was uncertainty and equivocation surrounding the issue of repairing the plaintiff's vehicle. Even if there was, it was not created by any conduct on the part of the defendant. The judge erred in determining the reasonableness of the period of hire, by taking into consideration the fact that AX had advised the plaintiff that he was entitled to the hire car and that the plaintiff was reluctant to spend £2,500 of his own money on repairs.

[13] Mr McKay QC submitted that the judge conducted an extremely careful and exhaustive analysis of the evidence and therefore his findings of fact should stand. Having regard to the evidence the judge was fully entitled to find that until September 2010 there was uncertainty as to whether the repairs would be dealt with or if the position on liability would be altered. The judge was entitled to find the plaintiff had relied on AX's advice that he was entitled to a hire car. There was no evidence that this advice was wrong or misunderstood by the plaintiff. The judge

was entitled to take into consideration the plaintiff's firm conviction that the accident was the defendant's fault. Defence insurance companies which take an unrealistic attitude to liability in road traffic cases should expect to face a financial penalty when an innocent party is thereby forced to engage the services of a credit hire company subject, of course, to the innocent party's duty to mitigate his loss.

Discussion

[14] When a vehicle is damaged in a road traffic accident the plaintiff will suffer direct loss, which is the diminution in the value of the car resulting from the physical damage. Where the car can be repaired at economic cost, the cost of repairs will be the measure of damages under that heading. That is not in dispute in the present case. In addition to a claim for physical damage to the asset, in the case of a car (which is not normally a profit earning chattel) special consequential damages can be recovered if a substitute car is hired pending completion of the necessary repairs.

[15] In relation to consequential damages there is a duty to mitigate the loss. There is a burden on the defendant to establish that reasonable measures were not taken by the plaintiff to mitigate his loss. When repairs are being made to the damaged car the hiring by the plaintiff of a replacement car is a reasonable step to take to deal with the consequential loss of the vehicle. The plaintiff must act reasonably in the circumstances. To take a simple example, the replacement car should be of a similar quality to the damaged car so a plaintiff could not justify the hiring of a Rolls Royce to replace a Mini. Similarly, he cannot act unreasonably in relation to the length of the period for which he hires the replacement car.

[16] The relevant considerations are neatly brought together by Sheriff Ross in the Scottish case of Whitehead v Johnston [2006] REPLR 25. In that case the pursuer hired a car for nearly a year at a cost of £18,793, the cost of repairs being estimated at £1,750. Those acting on his behalf took no active steps speedily to pursue the claim against the defendant. On the facts of the case the pursuer had a choice when it came to mitigating his loss. He could have paid for the repairs and recovered the use of his car. That would have involved possible additional costs by way of interest charges on borrowing the money or losing interest that could have been earned on the money if it had remained invested. The question in that case was whether, in electing to continue with the hire for a year rather than pay for the repairs earlier, the pursuer acted reasonably. Sheriff Ross pointed out that the issue was always what is reasonable in all the circumstances. He went on to state:

> "There will be cases where for proper reasons liability is disputed. Then there may be no guarantee of early settlement of repair costs although the insurance industry has sensible arrangements between companies (knock for knock agreements) which make that unlikely where both drivers are comprehensively insured. But if a driver is not

> comprehensively insured and if there is no early acceptance of liability, as in the present case, or again as in the present case the pursuer does not take reasonable steps to establish whether the claim is likely to be met, it cannot in my view be reasonable to continue to hire a replacement vehicle at a cost which far outweighs that of repair. There comes a point when any choice open to a potentially wronged party must be addressed … It seems to me that whether or not a choice exists may reasonably be tested by posing the question – if the potentially wronged party was at fault in causing the damage to his vehicle and so necessitating the car hire while it was repaired what would he be likely to do? Or even, if there was doubt about whether he could recover if the potentially wronged party was at fault in causing the damage to his vehicle and so necessitating the car hire while it was repaired what would he be likely to do? Or even if there was doubt about whether he could recover from the other driver what would he be likely to do? The present pursuer had a choice about the length of the hire period. He could have instructed the repairs and instead of continuing to incur hire charges claimed additional costs by way of interest lost or paid of so doing."

[17] In the present case the plaintiff was found by the judge not to be impecunious. If we leave out of account the conduct of and the arrangements made by AX and consider what the respondent would have done if left to his own devices and protecting his own interest, it is clear that, as a reasonable person, he would have repaired the car as quickly as convenient and hired a car in the intervening period. Without a guarantee of being reimbursed he would inevitably have considered it improvident and financially imprudent to hire a car on an open-ended basis pending recovery of the costs of repairs from the third party at some indeterminate point in the future, which could be a long time away.

[18] The evidence establishes that once the decision was made to carry out the repairs they were completed within 4 weeks. As noted, Mr O'Donoghue on behalf of the appellant accepted that a 4 week period would be a reasonable period to hire a substitute car, although in his submissions he was also prepared to accept that the repair work could reasonably have been done by the end of June. Clearly time would be taken to arrange a repair appointment and the appellant accepts that the plaintiff was entitled to some time to come to a decision to proceed with repair and have the repairs carried out.

[19] The trial judge concluded that it would have been reasonable for the plaintiff to have held back on repairing the car and to have continued to hire a replacement

car under the credit hire arrangement until 23 September 2010, the date on which the third of the credit hire agreements was expiring to be superseded by the fourth agreement. He found in paragraph [31] of his judgment that there had been uncertainty and equivocation surrounding the issue of repairing the plaintiff's vehicle. In his view this, coupled with the firm advice that the plaintiff was receiving from AX that he was entitled to use a replacement vehicle and his natural reluctance to incur expenditure of £2,500 which he considered unjustified, rendered his actions reasonable up until 23 September. By that date, however, the plaintiff could see there was no end in sight to the dispute, the future was impossible to predict, and the meter was meantime ticking.

[20] We conclude, however, that a straightforward application of first principles leads to the conclusion that Mr O'Donoghue's argument is correct. The advice which the plaintiff was receiving from AX that he was entitled to use a replacement vehicle until the car was repaired was not sound or dispassionate advice. AX was agent for the plaintiff as found by the judge. As an agent it owed fiduciary duties to the plaintiff. It also owed a duty of care to protect and further the interests of the plaintiff. It had a clear financial interest in the arrangement made with the plaintiff. Inasmuch as under the arrangement it was made clear to the plaintiff that he would not himself be at financial risk, it is clear that there must have been a clear understanding by AX that the insurance company underwriting the cost of the hire of the replacement car would meet the cost of the car in the event of the costs not being recovered from the defendant. AX may itself have funded the cost of arranging the underwriting but if it did so this further accentuates AX's clear conflict of interest in respect of the transaction. As a matter of contract it was a necessary implication that AX undertook a duty to advise the plaintiff with reasonable care and to do so dispassionately without regard to its own financial interests. As matters turned out it is very arguable that AX was in breach of those implied terms and in breach of its fiduciary duty not to allow its own financial interests to take priority over the interests of the respondent who, were it not for the insurance moneys received, in effect, by AX in discharge of the hire charges, would have faced an enormous claim for hire charges in respect of a replacement vehicle hired for a protracted period on the basis of the misplaced advice of AX. Had there been no insurance cover, and had AX sought to recover those charges, the plaintiff in all likelihood would have had a strong argument that the sums were irrecoverable in view of AX's breach of contract and breach of fiduciary duty. AX's incorrect and self-serving advice cannot be determinative of what loss the defendant is bound to meet. The judge's conclusion that there was uncertainty or equivocation until September 2010 does not appear to be consistent with his firm and clear conclusion at paragraph [11](c) in the judgment that emails generated from mid–late April 2010 "confirm unambiguously that liability was in dispute. This became a recurring theme of email communications in

the ensuing period." The judge also concluded that the plaintiff explicitly acknowledged his awareness that liability was in dispute. While the judge concluded that as of September 2010 there was no end in sight to the dispute and the future was uncertain, that was equally true as of 28 April 2010 when liability was disputed. From that period onward no end tothe dispute was in sight. The dispute was clearly likely to lead to, and did lead to, litigation of an unpredictable duration. Nothing in the email exchanges and in the communications between AX and the defendant's insurers subsequent to 28 April could lead to the conclusion that the defendant's insurers were in some way representing to the plaintiff and AX that the denial of liability was merely a notional holding of the line and that there was a meaningful and real possibility that in the near future liability was going to be admitted and that repairs would be carried out and funded in full. We see no evidential basis for the judge's conclusion in paragraph [31] of his judgment that there was a clear hiatus reached by 23 September 2010. The only significance of that as a date was that the plaintiff, as advised by AX, entered into a fresh credit hire agreement which in fact increased the rental rates.

[21] In the result we conclude that the reasonable period for which the plaintiff was entitled to hire a car as a replacement pending completion of repairs was from 10 April until the end of June 2010, the period which Mr O'Donoghue conceded could properly have been considered the maximum period of justifiable replacement hire. We will hear counsel on the quantification of the hire charges for that period.