Neutral Citation No: [2021] NIQB 27	*Ref:* **SCO11446**
	ICOS No: **19/056538**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **05/03/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

KAREN McKIBBIN

Plaintiff;

and

UK INSURANCE LIMITED

Defendant.

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Frank O'Donoghue QC and Conor Cleland BL (instructed by JMK Solicitors) for the Plaintiff/Appellant
Turlough Montague QC and John Dowey BL (instructed by JCW Rea & Son Solicitors) for the Defendant/Respondent

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SCOFFIELD J

Introduction

[1] This appeal, in addition to another along with which it was heard (*Clarke v McEvoy* [2021] NIQB 28), raises the issue of the correct approach to a defendant's challenge to the duration of vehicle hire in a credit hire case for the purpose of assessment of the plaintiff's loss. In addition, there is a dispute about the diminution in value which ought to be allowed as part of the plaintiff's recoverable loss.

[2] Mr O'Donoghue QC appeared with Mr Cleland BL for the plaintiff/appellant. Mr Montague QC appeared with Mr Dowey BL for the defendant/respondent. I am grateful to all counsel for their efficient presentation of the appeal and their helpful written and oral submissions.

The facts and a summary of the evidence

[3] The plaintiff's claim arises out of a road traffic collision which occurred on Thursday 18 October 2018 at the Kilkeel Road, Annalong. On that date, the plaintiff, Mrs McKibbin, a primary school teacher who lives and works in Annalong, was returning from work, driving her Audi A3 car, and was turning right into her driveway. There was a queue of cars behind her. One of those cars, driven by Mr Radzevicius, a policyholder of the defendant insurance company, decided to overtake a number of the cars in front of him. When he did so, his car collided with the plaintiff's car as it was turning right across the oncoming lane which Mr Radzevicius was using to overtake. The impact with the plaintiff's car was to its off-side rear corner and it was damaged in that area. Liability was admitted on the part of the defendant's insured and there was no suggestion that the plaintiff was at fault. The evidence led before me related almost exclusively to the aftermath of the accident and, in particular, the arrangements for the repair of the plaintiff's car and for her hire of an alternative vehicle pending completion of those repairs.

[4] I heard evidence first from the plaintiff. The plaintiff's car was not roadworthy after the accident. It was able to be driven into her home but was not in a condition to be driven any distance. The morning following the incident, on Friday 19 October 2018, the plaintiff contacted Crash Services Limited ('Crash'), an accident management company offering hire vehicles, amongst other services. She did so after having contacted a family member who carried out car repairs. He had said that it would not be advisable for him to seek to repair her car and had suggested the Agnew Audi Repair Centre for the repairs. He had also suggested that she contacted Crash. The plaintiff had not contacted Crash on the Thursday evening because she was not sure if they would be open at the time and, in any event, had wanted to speak to her husband about how to proceed.

[5] When the plaintiff spoke to Crash the day after the accident, it was explained to her by the representative with whom she spoke that they (Crash) would investigate the matter and arrange for the repair of her car as soon as possible. It was an advantage to the plaintiff that Crash would take care of such arrangements as she teaches during the day and does not find it easy to make or take business calls during her work hours. The plaintiff explained that she required a replacement car whilst her own vehicle was being repaired in order for her to travel to and from work and also to visit family who lived in Coleraine. In cross-examination, the plaintiff explained that she wanted Crash to deal with everything on her behalf and to get her car back to her as soon as possible. When she had spoken to Crash by telephone, they had talked her through their general terms and conditions; and had told her that a solicitor would be appointed for her. She was happy with this and wanted someone to take over and manage everything relating to her car repair.

[6] Crash arranged for a replacement hire car to be delivered to the plaintiff's home on the same day that she contacted them, on 19 October. The plaintiff's vehicle was recovered at the same time and taken for repair. The hire car provided

to the plaintiff was a Mercedes A180. She enjoyed the use of this vehicle until the end of the period of hire on Saturday 24 November 2018.

[7] The plaintiff received a written agreement from Crash to sign, which she did sign and then returned on 26 October 2018. In the meantime, she had been spoken to by a solicitor from JMK Solicitors ('JMK') who had discussed terms and conditions with her. She thought this was on the same day on which she had contracted Crash but could not be sure; and also thought that she had had more than one conversation with the solicitors around this time. The plaintiff was not sure who had explained to her the process of a motor assessor being instructed to examine her car but was confident that this had been explained to her. She was assured that her car would be assessed and repaired. She also said that she knew that she would not have to pay anything and that this was made very clear to her. That was another attraction of using Crash's services.

[8] The evidence as to what was happening to the plaintiff's car during the period of vehicle hire was largely provided by Mr Armstrong, the motor assessor called to give evidence on her behalf. He was responsible for inspecting the plaintiff's car after the accident (in part to determine whether it was able to be economically repaired); for authorising the repairs to be undertaken to it on behalf of Crash; and for providing a report on the diminution in its value after repair. Much of the defendant's challenge to the length of hire in this case focused on alleged delays in the instruction of Mr Armstrong and the production and onward transmission of his report.

[9] Mr Armstrong described having been formally instructed by JMK Solicitors on 26 October 2018 (eight days after the accident) but, in advance of that, having been given a 'heads-up' about the need to inspect Mrs McKibbin's car by way of an email from Crash on Tuesday 23 October 2018 (five days after the accident). This enabled him to inspect the plaintiff's car the next day, on Wednesday 24 October 2018, at the Agnew Repair Centre ('Agnews'), to where the car had been taken the previous Friday. He viewed the car on that date along with an estimator from Agnews. He completed an assessment of preliminary costings for the necessary repairs and authorised the repairs to commence. In turn, this allowed the staff at the repairing garage to raise a 'job card' in order to ensure that the plaintiff's car obtained an appropriate slot in the work schedule for repairs. Mr Armstrong then provided his report to JMK on Monday 29 October (although, as described below, there appears to have been two reports addressed to different issues).

[10] Insofar as Mr Armstrong's evidence related to the issue of diminution in value of the plaintiff's own car after it had been repaired, and the defendant's assessor's evidence on that aspect of the claim, it is summarised below in the section of this judgment dealing with the diminution in value claim.

[11] The repairs to the plaintiff's car were completed and it was ready for collection on Thursday 22 November 2018. The plaintiff gave evidence that she had

not contacted Agnews to enquire about progress in the meantime, since she had "*handed it all over to Crash*". The plaintiff was contacted and informed that her car was ready for collection. However, she was not in a position to go to Belfast to collect her car either on that day (22 November) or on the following day. She was working on the Friday. At the time she would have been travelling, she estimated that it would take roughly 1½ hours to travel from Annalong to Belfast to collect her car; and the same time coming back. This was not practical for her on finishing work at around 4.30 pm on either the Thursday or Friday; and she was also concerned that the repair garage may be closed at around 5.00 or 5.30 pm, so that she would not be able to get there on time (although she accepted that she had not made any enquiries about this and that this was an assumption on her part). She therefore arranged to collect her car on the morning of Saturday 24 November and did so. Her evidence, which I accept, was that even if she had been paying for the hire of the replacement vehicle herself, she would not have been able to collect her own car from Agnews any earlier because she could not change the timings of her other commitments.

The claim and the appeal

[12] A civil bill was issued on 11 June 2019 claiming £20,000 for loss and damage sustained by the plaintiff by reason of the negligence of the defendant's insured. By way of replies to a notice for further and better particulars dated 26 July 2019, the plaintiff clarified that her claim was made up as follows:

(a) £6,146.05 for repair costs;
(b) £6,909.34 for vehicle hire costs;
(c) £2,460.00 for diminution in the value of her vehicle; and
(d) £300.00 for vehicle recovery; with the remainder of the claimed sum being comprised of a claim for interest.

[13] Liability was admitted by the defendant. However, in its replies to a notice for further and better particulars dated 2 September 2019, the Defendant asserted that the plaintiff's vehicle hire claim was "*excessive both as regards rate and duration and therefore does not reflect a proper mitigation of loss*". In addition, the defendant asserted that the plaintiff's claim for diminution in value of her vehicle was excessive.

[14] A 'witness statement' was also provided on behalf of the defendant by a Claims Validation Manager in a company called Surveyorship Limited, which provides litigation support to clients dealing with credit hire claims, consisting in this case of analysis and comparison of car hire rates for vehicles comparable to the plaintiff's vehicle at or around the period of hire in order to assist with the quantification of a basic hire rate.

[15] In the event, the sums claimed for vehicle repair and vehicle recovery were agreed by the defendant in the county court (as they are in this court); and the

dispute between the parties focused on the sums claimed for diminution in value and for vehicle hire charges.

[16] His Honour Judge Devlin heard the plaintiff's civil bill sitting in the county court on 22 October 2019. The outcome of that hearing is, strictly speaking, irrelevant to my consideration of the claim, since a hearing by way of appeal from the county court to the High Court is a re-hearing *de novo*. Notwithstanding that, the parties informed me of the outcome below. The judge awarded the plaintiff £9,928.65. He awarded the agreed elements of loss in full but declined to award the full sums claimed by the plaintiff in respect of diminution in value or for credit hire charges. Instead, he awarded the sum of £1,842.60 for credit hire, reflecting 28 days of hire rather than the claimed 37 days; and the sum of £1,640.00 (being 8% of the agreed pre-accident value of the plaintiff's car) for diminution in value. The parties were not sure precisely why the judge below disallowed nine days of hire. It was suggested that this might have represented a disallowance of seven days at the start of the period of hire (for delays in Mr Armstrong being instructed and then providing his report) and two days at the end of the period (between the completion of the repairs and the plaintiff's collection of her vehicle). However, this was not entirely clear.

[17] By notice of appeal dated 7 November 2019, the plaintiff appealed to this court. The notice of appeal expressly appeals only against that part of the decree made by the county court judge whereby it was ordered that the defendant pay the plaintiff's claim for vehicle hire in the sum of £1,842.60. Notwithstanding that, the issue of the judge's award for diminution in value of the plaintiff's vehicle was also pursued on appeal and the defendant took no issue with this, with evidence being called by each party on this issue and full argument being presented on it. The sums in relation to vehicle recovery and repair remain agreed and were not the subject of any dispute.

[18] As to vehicle hire costs, the plaintiff's skeleton argument makes clear that her appeal is *only* against the nine day reduction in the duration of hire allowed by the judge below. I have also been told that the daily rate awarded by the court below, and agreed between the parties for the purposes of this appeal, was £62.17 (including VAT, collision damage waiver and additional drivers' charges). The parties are further agreed that the plaintiff is also entitled to the sum of £102.00 (including VAT) for delivery and collection of the hire vehicle.

Assessment of diminution of value

The plaintiff's motor assessor's report

[19] The claim for diminution in value of the plaintiff's vehicle was grounded on a report from Mr Robert J Armstrong, a motor engineer and insurance claims adjuster, dated 29 October 2018. Mr Armstrong set out the details of the plaintiff's car – a white Audi A3 TFSi S-Line 3 door vehicle, registered in 2017, with mileage of 16,411

and generally in very good condition at the time of the accident – and then addressed the damage to it, the repairs required and the likely diminution in value arising from the accident. He estimated the repair cost at £6,290.52, exclusive of VAT. In the event, the actual repair bill and therefore the claim for repair costs came in under this figure.

[20] As to diminution in value, Mr Armstrong's report was, in material part, in the following terms:

> "*It will have to be disclosed that this vehicle was involved in an accident and subsequently repaired. It is generally accepted throughout the Motor Trade that a deduction of between 5% and 15% of the value will be made purely under the heading of diminution.*
>
> *An obvious argument which is put forward is that if a man who wished to buy a car is presented with two identical vehicles, one of which has been involved in an accident and one, which is unblemished, for the same price, he will choose the unblemished car, or expect a discount.*
>
> *In our opinion the amount of diminution is based upon the type of vehicle, age, recorded mileage, pre-incident condition and the extent of repairs and paintwork necessary.*
>
> *In this instance the vehicle is approximately one year eight months old and as can be seen from our accidental damage report the pre-incident condition was very good.*
>
> *In this instance the repairs necessary consist of realignment on the chassis jig, replacing the rear bumper, rear panel, rear panel crossmember and off side quarter panel and repairing the off side rear chassis leg. The renewed and repaired panels will be repainted and adjacent panels blended in to colour match.*
>
> *We assessed the pre-incident value in the region of £20,500-00 and taking all matters into consideration we feel a figure in the region of 12% would be fair, giving a diminution in the region of £2460-00.*"

[21] In summary, Mr Armstrong considered that several of the car's panels would require to be replaced and that 12% of the pre-accident value – somewhat higher than the mid-point in the usual 5%-15% range off which he was working – was likely to be the diminution in value in the plaintiff's vehicle for the purposes of sale once it had been repaired.

The repair invoice

[22] A further relevant document in relation to the diminution in value claim is the account invoice from Agnew Repair Centre dated 30 November 2018. This records the work done, and replacement parts provided, in order to repair the plaintiff's vehicle. The total repair bill (including VAT) came to £6,146.05, which was the sum claimed by the plaintiff for repairs and agreed as payable by the defendant. The significance of this invoice in the context of the diminution in value claim is that it was one of the documents carefully considered by the defendant's assessor in valuing the diminution in value. In particular, the invoice contained a reference to the following task: "*RENEW REAR BUMPER, REAR PANEL & O/S QTR PANEL*", including the job detail, "*REMOVE QTR PANEL DENT.*" The defendant's assessor thought this ambiguous since the reference to 'renewing' the panels did not make clear if they had been repaired or fully replaced; and the reference to 'removing' the quarter panel dent would not be necessary if the panels were being fully replaced, thereby suggesting that this panel at least had simply been repaired (which was at odds with what appeared in Mr Armstrong's report).

The defendant's motor assessor's report

[23] The defendant met the plaintiff's claim for diminution in value with its own motor assessor's report. The defendant's report was provided by Mr Carlisle C Bruce and is dated 8 October 2019, almost one year after both the date of the accident and the date of Mr Armstrong's report. Mr Bruce is a motor engineer, assessor and claim adjuster. His report notes that he had reviewed Mr Armstrong's report and the final repair account from the repairing garage.

[24] Mr Bruce took no issue with the labour rate of £45.00 *per* hour for repairs since, although the private retail labour rate for this area was (in his evidence) £30.00 *per* hour, he recognised that the work had been carried out by an accredited Audi approved body and warranty repairer, which he considered would be able to justify a higher labour rate. With very minor exceptions (which would yield a saving to the defendant of only £10.00 *plus* VAT), he also recommended that the defendant insurer accept the sums charged for paint and parts. It is unsurprising, therefore, that the repair charges element of the plaintiff's claim was agreed between the parties. Mr Bruce made some additional observations about the duration of the repairs, which are not relevant to the question of diminution in value.

[25] In terms of the plaintiff's car's pre-accident value, having set out the relevant trade and retail values from *Glass's Guide*, Mr Bruce indicated that he agreed with Mr Armstrong's valuation of £20,500. He also agreed that the vehicle remained an economic proposition to repair. The point of difference between Mr Bruce and Mr Armstrong was the percentage by which the plaintiff's car would be diminished in value as a result of having sustained the damage from the accident which had been repaired. Mr Bruce provided two different percentages by which, in his view,

the plaintiff's car may have been diminished in value. Which of those two figures was appropriate would depend on whether a range of the vehicle's panels had been repaired or replaced. In the former case, the diminution in value would be less – because the ability to repair the panels would indicate that the damage was less serious than would be the case if the panels had required to be fully replaced. His conclusions in this regard were expressed as follows:

> "*In this instance there may be an issue as to whether the rear panel and quarter panel were repaired or replaced as these parts do not appear to be listed on the final repair account, although Mr Armstrong's depreciation report states that these were replaced.*
>
> *If these parts were repaired, it is my opinion that diminution in value should not exceed 5% of the retail vehicle value.*
>
> *This equates to a depreciation element of £1025.00.*
>
> *However if both panels were replaced this would elevate depreciation to a 10% loss which equates to £2050.00.*"

[26] Mr Bruce was not in fact correct to say that Mr Armstrong's report stated that the relevant panels *had been* replaced. At his initial inspection on 24 October 2018, Mr Armstrong's assessment was that they *would* be replaced; but the repairs had not been carried out at that point, nor (it seems) at the time of his report of 29 October 2018. Mr Armstrong explained in oral evidence that once the repairs commenced, the repairing garage was able to make a better assessment of the damage and, at that point, they felt it more appropriate to repair the panels, rather than replace them.

Further information and opinion expressed by Mr Armstrong

[27] In fact, on 1 December 2018, after the repairs to the plaintiff's car had been completed, Mr Armstrong provided the solicitors instructing him with additional information on the question of whether the panels had been able to be repaired, as they were, or had been required (as he had initially anticipated) to be replaced. In a letter of that date, he advised as follows:

> "*We confirm that the rear panel, rear panel crossmember and offside quarter panel <u>have been successfully repaired and did not require replacement</u>. This work has reduced the labour and paint material costs to £2,227-50 excluding VAT and £688-90 excluding VAT respectively.*
>
> *The AD Reserve should be set at £5134-99 excluding VAT.*"
> [underlined emphasis added]

[28] As noted above, Mr Bruce's report for the defendant was dated 8 October 2019, some two weeks before the hearing in the county court. It is obvious that he was not provided with Mr Armstrong's letter of 1 December 2018 at the time of completion of his report. Had he been, he would no longer have been in doubt about whether the relevant panels had been repaired or replaced (see paragraph [25] above). At the hearing before me, it was accepted on behalf of the plaintiff that the letter from Mr Armstrong had not been disclosed to the defendant's solicitors at any point in advance of the hearing in the county court. Nor, indeed, was it disclosed in the proceedings before me until after the first day of hearing in response to a request for further disclosure on the part of the defendant.

[29] Mr Bruce's report was served by the defendant's solicitors by email of 6.14pm on 21 October 2019, the day before the hearing in the county court. Mr Gilliland of the plaintiff's solicitors forwarded the report to Mr Armstrong extremely promptly, by email of 6.17 pm on the same date, asking for his comments on it. Mr Armstrong responded at 8.53 am the next morning, the morning of hearing, in the following terms:

> "*As far as repair costs are concerned Mr Bruce only disagrees with £10-00.*
>
> *You will see from my letter dated 1 December 2018 that the rear panel, rear crossmember and off side quarter panel were repaired and not replaced. My depreciation report was sent prior to knowledge of this. Initial figures were based on replacing these panels.*
>
> *This will affect the level of depreciation and would now suggest 10% of PAV giving £2050-00. The diminution in value calculator assess* [sic] *13%.*
>
> *Let me know if you need anything else.*"

[30] Once Mr Armstrong was aware, therefore, that the relevant panels had been repaired rather than replaced, he revised his assessment of diminution in value down from 12% to 10%, the mid-point of the 5%-15% range he had previously mentioned.

[31] It is now common case that neither Mr Armstrong's letter of 1 December 2018, nor his updated view on the appropriate percentage of pre-accident value which represented the diminution in value in this case, was provided to the defendant's solicitors during the course of the proceedings below. Nor indeed were they provided to the county court judge who was faced with assessing this element of the plaintiff's claim. Nor was either document disclosed prior to the hearing of this appeal. This is, on any reading, highly unsatisfactory. I return to this issue below. However, in now assessing the appropriate diminution in value in this case, I

helpfully have the benefit of Mr Armstrong's clarification as to the repair of the panels and his revised view, in light of that information, as to the appropriate percentage reduction in value to the vehicle. Indeed, I was informed in open court that the plaintiff would be content to agree this element of the claim at the level of 10% reduction in pre-accident value. The defendant has taken its chances in rejecting this open offer and continuing to contend for a lower percentage.

The 'calculator'

[32] In the course of his oral evidence, Mr Armstrong made reference to a one page document referred to as a diminution calculation guide (informally referred to as the 'calculator'), which had, apparently, been introduced to him by District Judge Wells some 10 years or so ago. Mr Armstrong said he did not know who the author of the document was, although he believed it had been an (unidentified) professor "*from England*." Mr Bruce was also questioned about this document. He also did not know its original provenance. He said that he had used it many years ago. He thought there had been a suggestion that it had originated from the Association of British Insurers (ABI); but the ABI had apparently denied involvement and it was later "*put to the side*."

[33] The 'calculator' is obviously designed to try to provide some kind of formula the use of which will result in an outcome representing the appropriate figure for diminution in value in the particular case. It is intended to work by the user attributing points across several categories: the type of vehicle concerned; its mileage at the time of the accident; the age of the vehicle; and the nature of the damage which has been repaired. The maximum number of points for each category seems to be 15 (although this is not expressed and, in respect of damage, there was some debate about whether cumulative damage might take the score in that category about 15). Once the points for each category are added together, the total is divided by four to give a notional percentage loss of value. Assuming, therefore, that 15 points were awarded across all categories – say, for a Rolls Royce less than one year old with much lower than average miles which required a chassis replacement – the total would be 60 points, giving an estimated diminution in value of 15%.

[34] The difficulty is that the guidance in the calculator, such as it is, as to how to attribute points under each heading is both vague and outdated (for instance, in relation to the types of vehicle mentioned). It leaves a very significant amount of room for subjectivity in determining where on the scale of points the case falls in respect of several, if not all, of the headings. This is recognised within the document itself in a number of caveats or warnings which it contains. For instance, in respect of the indicative points suggested for certain types of cars or repairs, it notes: "*These are average points to be applied; discretion/judgment should be used in all cases*." Later, it says: "*Care should be taken with this table. You should apply points for your case vehicle as you see it, not something in the table that is near enough to what it fits… The same applies for all categories*." At the top of the document it bears the following admonition: "*DO NOT SUBMIT THIS AS A REPORT*."

[35] Mr Armstrong explained that, when he used the points system provided in the calculator, he arrived at an outcome of 13% depreciation in value in this case. (That is referred to in his email of 22 October 2019: see paragraph [29] above). However, applying his own judgment to the matter, Mr Armstrong said that he "*thought that was a bit excessive*" in light of the fact that the panels in the plaintiff's car had been repaired. He also told me that he had not relied on the calculator in this case.

[36] In Mr Armstrong's evidence in examination-in-chief, before the calculator was mentioned, he had said that there was no guide, nor any guidance or rules, which allowed a more scientific approach to the assessment of diminution in value to be taken. It was purely a matter of opinion. He also gave evidence to the effect that the calculator was not recognised in the industry; that some motor assessors "*disagree with it*", although some assessors will generally look at it; but that no one within the trade considers it binding. He further gave evidence about his experience of judicial reliance on this document, which seems to be limited. It appears that some district judges will ask about it or take it into account, although not considering themselves in any way bound by it; and others either ignore it or are unaware of it. Mr Bruce's evidence supported that summary.

[37] As is the way of these things however, once the calculator had been introduced, it became a further issue of contention between the parties. Mr Armstrong awarded the following points: 8 for the type of vehicle; 12 for the mileage; 12 for the age of the vehicle; and 20 for the damage (because of the number of panels needing repair); giving a total of 52 points, equating to diminution in value of 13%. In a quick calculation conducted at the back of the courtroom and put to Mr Armstrong in cross-examination, Mr Bruce had awarded the following points: 2 for the type of vehicle; 10 for the mileage; 13 for the age of the vehicle; and 6 for the damage; giving a total of 31 points. Having revised this with the benefit of further reflection before he gave his own evidence-in-chief, Mr Bruce later awarded the following points: 2 for the type of vehicle; 10 for the mileage; 13 for the age of the vehicle; and 16 for the damage; giving a total of 41 points, equating to diminution in value of 10.25%. Mr O'Donoghue QC unsurprisingly contended that this supported Mr Armstrong's, rather than Mr Bruce's, assessment of the appropriate percentage reduction.

[38] Having undertaken the calculator exercise, Mr Bruce decried its result, as had Mr Armstrong. The difference in outcomes when it was used by each assessor reflected Mr Bruce's evidence that everyone's interpretation of the document is so different that the points attributed in any case can vary widely. Notwithstanding the outcome when he was responsible for the inputs, Mr Bruce stood by his professional opinion that 5% diminution in value was the correct figure. His evidence was that the calculator was not a "*realistic tool*" and that it was better simply to rely on the opinion of a professional engineer. Mr Armstrong had essentially said the same thing before mentioning the calculator which then led us down (what

Mr O'Donoghue QC candidly referred to during the course of the hearing as) the 'rabbit-hole' of argument over it.

[39] For my part, I found no assistance whatever in the purported outcomes of the calculator exercises. The document is of value in confirming what was common case in any event, namely the type of factors which ought to be taken into account in assessing a claim for diminution in value: the level of prestige and desirability of the vehicle in question, which will take into account its make, model and level of specification; its mileage at the time when it was damaged; and its age. All of these factors play into the vehicle's marketability and value. Obviously, the level of damage which has had to be repaired will also be an important factor in influencing the hypothetical purchaser seeking a discount by reason of other prior damage. These are not the only relevant factors, however, since the market for a particular type of vehicle may be affected by a range of other circumstances and the usual market forces of supply and demand.

[40] The difference in figures provided by using the calculator in this case, and the fact that neither assessor wished to stand over the outcome of their own use of it, led me to the conclusion that it is of questionable reliability, at least without significant updating and much improved guidance to provide clarity on its proper application. Its use runs the risk of over-complicating the appropriate assessment of diminution in value – by providing a range of points allocations over which assessors may haggle – without promoting any significant measure of consistency or accuracy in outcomes overall. Other judges may, of course, choose to view the matter differently but, for my part, I have given the 'result' of the calculator exercises no weight in resolving this element of the claim.

Resolution of the DIV claim

[41] I accept that both of the assessors who gave evidence before me are experienced and expert in this field. Both of them considered the same basic issues in order to assist them with their assessment of diminution in value in this case, namely the type of car involved, its age, its pre-accident condition and, most importantly, the damage to it and level of repairs carried out. They agreed that the plaintiff's vehicle was a prestigious vehicle with a high specification and in very good condition before the accident. The damage and repairs were quite substantial but, as detailed above, the fact that the panels could be repaired rather than having to be replaced would mitigate the reduction in the car's value.

[42] Mr Armstrong's final position on the appropriate figure for diminution in value in this case was 10% – in the middle of his hypothetical range of 5% to 15%. Mr Bruce maintained his position that 5% was the appropriate figure where the panels had been repaired. I accept Mr Armstrong's view that, for a car of this type with substantial damage, a 5% figure for diminution in value is too low.

[43] I do not accept Mr Armstrong's view, however, that the identity of the repairer will not have *any* effect on the level of diminution in value. In my assessment, a purchaser of a repaired vehicle might well be reassured to know that it has been repaired by an approved or warranty repairer on the part of the vehicle's manufacturer, using approved methods and tools and with staff specifically trained to deal with cars of that make. I also consider that Mr Armstrong's change of position from 12% to 10% is too little to reflect the difference between panel replacement and repair, which both assessors appeared to me to accept as being a matter likely to make a significant difference to this element of the claim. As Mr Bruce pointed out, the repaired panels were also not structural panels but were 'bolt-on, bolt-off'.

[44] On the other hand, I also consider that Mr Bruce's ceiling of 10% for the appropriate range in diminution may well be too low. He said that he would "*typically*" use a range of 5% to 10% but that, depending on the vehicle and the damage, that could increase further. He accepted that other assessors would use wider bands and that competent assessors can work off a 5% to 15% range, as Mr Armstrong had. The impression I had was that Mr Bruce felt that a 5% to 10% range was more appropriate in this case because it involved repair of panels, rather than replacement; but that is a matter which Mr Armstrong considered in choosing the appropriate place within the range, rather than as defining the appropriate range. Even assuming that Mr Bruce's 5% to 10% range was correct, I am not persuaded that this is a case which falls at the very bottom of the scale, in light of the level of damage evident in the photographs and the type and condition of the plaintiff's car before the accident.

[45] Taking all of this in the round, Mr Bruce's figure is too low and Mr Armstrong's figure of 10% is too high. I consider that a figure of 7.5% is appropriate.

[46] Before leaving this topic, I would add that I discerned no significant issue of law relating to resolution of the diminution in value claim which, objectively, would have justified the bringing of an appeal in the High Court on this issue in light of the limited value of this part of the claim. Mr O'Donoghue QC sought to persuade me that, since Mr Bruce recognised that a reasonable assessor *could* come to the figure which Mr Armstrong had (that is to say, he was not saying it was totally 'out of the ball park'), Mr Armstrong's figure should be allowed. Provided, he said, that the plaintiff's expert's view was within a reasonable range, there is no reason why the plaintiff should not be compensated to the extent her own instructed expert considered appropriate. Mr O'Donoghue supplemented this submission by contending that, since this area was inherently subjective and the court was seeking to put a figure on what a hypothetical purchaser of the vehicle in future might expect by way of discount because the car had been damaged, erring on the side of the plaintiff's assessment could not be said to represent over-compensation.

[47] In my view, such an approach would be wrong as a matter of law. The task of the court is to seek to put the plaintiff back in the position she would have been in but for the damage caused by the defendant's insured's negligence: no less, but no more. The court must strive to achieve an outcome which approximates as closely as possible to the objectively correct measure of damages. Although authority recognises that there will be many areas where the assessment of proper compensation is inexact, and the court must therefore simply do its best, that is no warrant for abandoning an attempt to evaluate the correct level of damage or to provide one side or the other with an in-built advantage. Where, as in this case, there is a conflict between two experts about the appropriate level of damages, it is entirely open to a judge to prefer the evidence of one over the other or, as I have done, to conclude that the most accurate assessment of the diminution in value is likely to lie somewhere in between.

[48] For completeness, I also reject Mr O'Donoghue's submission that the view of Mr Armstrong was to be preferred because he had had an opportunity to see and inspect the vehicle in person, whereas Mr Bruce did not. Mr Bruce had the opportunity to consider a number of detailed photographs showing the plaintiff's car in its damaged state. I do not rule out that there may be some exceptional case where the facility to see and examine the vehicle in its damaged state may be of significance in assessing the weight to be given to competing opinions on the part of motor assessors. However, such cases are likely to be extremely rare in my view. The nature of the assessment to be undertaken and the factors which are of relevance (discussed above) are such that the facility of physical inspection of the vehicle is unlikely to be a determinative factor in resolving such disputes in all but the most rare cases.

[49] In addition, such an approach would have the consequence of unfairly advantaging plaintiffs, who would be in a position to refuse access to their vehicle to an assessor instructed on behalf of a defendant, in the absence of a successful application to the court for inspection facilities having been made. Indeed, Mr Bruce's evidence was that some repairing garages instructed by credit hire companies would decline to speak to an assessor instructed for a defending insurer. In turn, even if the making of an application for inspection facilities to the court was possible, the additional delay to the repair of the vehicle which that might entail in order for the defendant's assessor to view the car pre-repair, could add considerably to the duration of hire in credit hire cases.

[50] Assessors acting on the part of plaintiffs should, in my view, as Mr Armstrong did in this case, take detailed photographs of the damage. This will assist them in preparing their own report and will assist a reader to understand it; it will also assist an expert instructed on the part of the defendant who, like Mr Bruce, does not have an opportunity in person to see the vehicle in its damaged state; and, importantly, it will assist the court in later considering and quantifying the claim. The provision of such photographs is obviously good practice which both promotes

resolution of cases and assists in providing the court with best evidence where resolution is not possible.

Legal principles applicable to the allowable duration of hire

The duty to mitigate loss

[51] The starting point in a discussion of the issues raised by the defendant in this case in relation to the duration of the vehicle hire period is a proper appreciation of the nature and extent of the duty to mitigate loss. An extremely helpful summary of the relevant principles, and aspects of their application in this area, is to be found in Chapter 6 of *Ellis on Credit Hire* (6th edition, 2019, Law Brief Publishing) (hereafter 'Ellis'). This topic has also been the subject of detailed exposition and helpful summary in previous case-law in this jurisdiction: see, for instance, the judgment of McCloskey J in *McAteer v Kirkpatrick* [2011] NIQB 52, at paragraph [12].

[52] It is a general principle that a plaintiff should take reasonable steps to limit their loss following an accident or, perhaps more accurately, that he or she is not entitled to recover from the defendant tortfeasor any greater sum than that which they reasonably need to expend for the purpose of making good the loss. There is a related principle that expenditure incurred in mitigation of loss must be reasonable. Strictly speaking, a claim for vehicle hire where the plaintiff's vehicle has been damaged and is being repaired is not a claim for loss (the primary loss being the loss of use of the plaintiff's own vehicle) but, rather, a claim for expenditure incurred in mitigation of that loss: see *McAteer v Kirpatrick* (*supra*), at paragraph [12](iii) and the cases of *Dimond v Lovell* and *Lagden v O'Connor* referred to therein. In either case, the plaintiff is constrained to act reasonably.

[53] There is authority to suggest that courts ought not to be over-zealous in allowing defendants to 'chip away' at vehicle hire awards because the primary protection for defendants in this regard is the allowance to the plaintiff of vehicle hire costs only at the 'basic hire rate' or what used to be known as the 'spot rate' (generally, the lowest reasonable market rate of hire for the particular type of car in the relevant area): see *Copley v Lawn* and *Maden v Haller* [2009] EWCA Civ 580 at paragraph [6]. Ellis comments that, for a period, the effect of this ruling by the Court of Appeal of England and Wales meant that mitigation arguments were approached with some scepticism by the courts and with disappointing results for defendants. The case of *Mattocks v Mann* [1993] RTR 13, on which the plaintiff relied heavily in this case, is cited as an example.

[54] However, the author goes on to comment that there has been "*a resurgence of interest in mitigation in recent years*" in this field, citing more recent English Court of Appeal decisions in *Zurich Insurance Plc v Umerji* [2014] EWCA Civ 357 and *Opoku v Tintas Ltd* [2013] EWCA Civ 1299 (each of which was relied upon by the defendant in this case) as having "*re-asserted the important restraint that mitigation of loss can place on excessive claims for hire charges*" such that "*mitigation arguments can no longer be lightly*

dismissed in this area". Indeed, in the *Opoku* case, the Court of Appeal noted (at paragraph [13](2)) that:

> *"In the context of credit hire claims such as this, the courts emphasise the need for careful and proper control of the claims by the application of the doctrine of mitigation: see Giles v Thompson [1994] 1 AC 142 at 167; Lagden v O'Connor [2004] 1 AC 1067 at [28] and [34]; and Singh v Yaqubi [2013] EWCA Civ 23 at [39]. The need for this careful and proper control is the result of three features of such claims:-*
>
> *i) The first is that the charges by the "credit hire" providers are higher than those on the "spot" or "basic" car hire market.*
>
> *ii) Secondly, the schemes are marketed on the basis that the charges will be met by the defendants' insurers.*
>
> *iii) Thirdly, the customer in general also receives the additional benefit of having the company manage and pursue the claim against the other driver or his insurers.*
>
> *As to the last of these features, additional benefits obtained as a result of taking reasonable steps to mitigate loss must be brought into account when calculating damages: see the British Westinghouse case to which I have referred. Logically, and in the light of the second feature of these claims, the case for scrutiny exists not only in respect of the rate charged. It also exists in respect of the period for which a car may be hired under such a scheme; that is the duration of such scheme, although in that case the fact that there is no objective difference means that the general approach to mitigation will often yield the same result."* [underlined emphasis added]

[55] It falls to the court assessing each claim to strike the appropriate balance. The well-worn judicial yardstick for doing so is that of reasonableness.

[56] As noted above, the basic principle is that a plaintiff cannot recover from a defendant by way of damages more than the sum which they reasonably need to expend for the purpose of making good their loss and that they must act reasonably in mitigating their loss (albeit that a plaintiff may recover more for loss incurred in reasonable attempts to avoid loss than would have been the case if the mitigating steps had not been taken). The burden of proof plays an important role in this area because once the plaintiff has discharged the burden of proving that it was reasonable for them to hire a replacement vehicle, the defendant bears the burden of proving that the expenditure on the hire car – including by hiring it for a period than was longer than reasonable – was unreasonable. As Ellis comments (at page 78):

> "*There is an initial burden on the Claimant to show the expenditure on credit hire charges was reasonably incurred. If the Claimant does enough to discharge that burden, then the baton passes to the Defendant to show that the Claimant nevertheless acted unreasonably.*"

[57] Similarly, McCloskey J emphasised in *McAteer v Kirkpatrick* that "*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*" (see paragraphs [12](vi) and (vii)). To like effect, in a context the same as the present case, *viz.* an assertion of an unduly lengthy period of hire, the Court of Appeal in *Clarke v McCullough* [2013] NICA 50, at paragraph [15] of the judgment of Girvan LJ, said:

> "*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.*"

[58] Albeit in an employment law context, but addressing the general principle of the doctrine of mitigation, Sedley LJ in *Wilding v British Telecommunications* [2002] ICR 1079 rejected the contention on behalf of a defending party that "*you act unreasonably if you do not act reasonably*". That was to understate the task of a defendant seeking to rely on a failure to mitigate. Rather, Sedley LJ held as follows:

> "*It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he had proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.*" [underlined emphasis added]

[59] Some cases refer to the plaintiff having to act 'in the ordinary course of business' or in an 'economic' rather than 'uneconomic' way. I do not consider these cases to require the court to apply a different test other than that of reasonableness. Rather, they are applications of this test in different contexts. Such formulations may not assist greatly where the plaintiff, as here, is not acting in the course of

business; but will have more purchase where the plaintiff, or an agent acting on their behalf, *is* acting in the course of business, so that business standards form part of the context of what is or is not reasonable in the particular circumstances.

[60] The standard of what is unreasonable in the circumstances is, of course, an objective rather than a subjective one. It matters not if the plaintiff thought they were acting reasonably if the court concludes that, objectively, they were acting unreasonably in failing to mitigate (or further mitigate) their loss. What was or was not unreasonable in the circumstances of any given case will usually be a question of fact – or, perhaps more accurately, a question of judicial evaluation on the facts as found – so that it is difficult to be prescriptive.

Whether actions of persons other than the plaintiff can breach her duty to act reasonably in mitigation?

[61] A key issue which was the subject of dispute before me is the extent to which, assuming there may have been some unreasonable delay on any of their parts, the plaintiff should be fixed with the consequences of a failure to mitigate the length of vehicle hire arising from delay occasioned by the accident management company (Crash), the solicitors acting for her (JMK) and/or the motor assessor instructed by each of them to assist with the repair process and the formulation of her claim. As discussed further below, there is a certain artificiality in the suggestion (advanced on behalf of the plaintiff) that *she* should not be penalised in terms of the damages recoverable by virtue of any tardiness on the part of any of these parties. That is because, as a result of the commercial arrangements into which she entered with Crash and a related finance company (Granite Financial Limited – 'Granite'), the plaintiff will neither be the direct recipient of the vehicle hire charges recovered from the defendant; nor, more importantly, assuming she has cooperated with Crash and Granite, will she have to bear the financial burden of any balance of those charges which is not recovered from the defendant. Nonetheless, there is an issue of principle to be resolved as to whether or not, if there has been unreasonable delay on the part of parties *other than the plaintiff acting personally herself*, the duty to mitigate loss may have been breached. For the reasons given below, I am satisfied that in this type of case that may be so. In order to understand why that is so, it is necessary to consider in some detail the relationship between the plaintiff and those other parties or entities which play some part, on her behalf, in the taking of the steps necessary to progress her claim and bring the period of necessary vehicle hire to an end.

[62] Before doing so, it is worth saying something generally about the correct legal approach to this issue. Authority clearly suggests that it is not only actions or omissions on the part of *a plaintiff* which may give rise to a breach of the duty to mitigate, so reducing the plaintiff's recoverable damages. There are at least two scenarios where actions or omissions of parties *other than* the plaintiff can limit recovery of costs incurred in mitigation of loss. The first is where the relevant act or omission is that of a person for whom the plaintiff is responsible in law (classically, an agent). The second is where the act of some third party is such as to break the

chain of causation, so that the act of the third party then becomes the cause of the plaintiff's loss (or need to incur expenditure in mitigation) rather than the act of the original tortfeasor. Each of these concepts was recognised in *Mattocks v Mann* (*supra*). That was a vehicle hire case in which, unlike the present case, there had been a failure on the part of the garage which was repairing the plaintiff's car to do so as quickly as might have been expected. In the course of his judgment, Beldam LJ said the following:

> "*For a supervening cause or a failure to mitigate to relieve a Defendant of a period of hire there must, in my judgment, be a finding of some conduct on her [Mrs Maddocks'] part or on the part of someone for whom she is in law responsible, or indeed of a third party, which can be said to be an independent cause of loss of her car for that period.*" [underlined emphasis added]

[63] In that case, on which the plaintiff relies in the present appeal, the plaintiff was able to recover hire charges for a period during which the garage had been guilty of what might well be considered to be undue delay in progressing and completing the repairs. However, the court considered that she had put the car with a reputable repairer and she was not to be criticised because they were overworked. In addition, there was also no evidence to show that the car could have been more speedily repaired elsewhere. This approach was also followed in a later English Court of Appeal case in *Burdis v Livsey* [2002] 3 WLR 762 (see paragraph [121]).

[64] This is not a case, in my view, where something of such significance has happened which amounts to a new and free-standing cause of loss to the plaintiff. An obvious example might be where the repairing garage itself caused some further damage to a plaintiff's car in the course of repairs which significantly prolonged the length of time it took to restore the car to a driveable condition. Another example is that cohort of cases where the defendant offers to provide an alternative hire vehicle and this is unreasonably refused. This case is not in that territory. Rather, the present case is one in which the defendant alleges that the plaintiff, or those acting on her behalf, acted with insufficient expedition to get her back on the road in her own car, thereby unreasonably prolonging the period of hire. There is no doubt that unreasonable actions on the part of the plaintiff herself which resulted in unnecessary extension of the hire period would amount to a breach of her duty to act reasonably in mitigation. An obvious example would be if a plaintiff failed to collect their car after it had been repaired for a period of several weeks, simply because they preferred to drive the hire car. But the key issue of dispute in this case is the extent to which an unreasonable delay on the part of persons *other than* the plaintiff can give rise to a breach of her duty to act reasonably in mitigation.

[65] In principle, it seems clear that persons other than a plaintiff can act in a way which reduces the amount which that plaintiff can recover under the doctrine of mitigation. That seems clear from the reference in *Mattocks v Mann* to conduct on the

part of someone for whom the plaintiff is responsible in law (see paragraph [62] above). It is also clear from first principles of the law of agency. An agent both acts in the stead of their principal and is capable of affecting the principal's relations with third parties: in this context, a defendant. As is noted in *Bowstead & Reynolds on Agency* (21st edition, 2018, Sweet & Maxwell) ('Bowstead & Reynolds') at paragraph 1-005:

> "*The basic notion behind the common law of agency can be explained along the following lines. The mature law recognises that a person need not always do things that change his legal relations himself: he may utilise the services of another to change them, or to do something during the course of which they may be changed. Thus, where one person, principal, requests or authorises another, the agent, to act on his behalf, and the other agrees or does so, the law recognises that the agent has power to affect the principal's legal position by acts which, though performed by the agent, are to be treated in certain respects this as if they were acts of the principal.*"

[66] Whether or not the plaintiff can be in default of her duty to act reasonably in mitigation as a result of any action or omission of the three parties mentioned above requires consideration of each of their positions *vis-à-vis* the plaintiff.

The position of Crash

[67] There is both a practical and legal side to the plaintiff's relationship with Crash. On the practical side, all the plaintiff is likely to be concerned with is the fact that Crash undertake to take all the necessary arrangements out of her hands and attend to them; and to do so at no (or very limited) financial risk to the plaintiff. That is, without doubt, one of the primary benefits of engaging a claims/accident management company and one of Crash's key selling points. In this case, the plaintiff's evidence was to the effect that this was a matter of some significance to her. She wanted Crash to do all that was necessary to effect the repairs to her vehicle and recover the costs and was content to please all of that in Crash's hands.

[68] What someone in the position of the plaintiff can expect from Crash when they engage its services is spelt out in promotional material generated on its behalf. I was provided with a copy of a document of this nature, produced by Crash, entitled '*Why use CRASH*'. (I pause to note that this might well be information which is to be treated as a term of the contract between Crash and one of its customers if it is taken into account by a customer who is a consumer when deciding to enter into a contract with Crash for its services: see section 50 of the Consumer Rights Act 2015). It provides the following summary:

> "*CRASH gets you back on the road as soon as possible, with minimum inconvenience, obtaining the correct compensation with absolutely no financial risk to you.*
>
> *CRASH provides every customer with a special Insurance Policy that ensures you do not have to be at risk of paying personally for repairs or replacement vehicles, medical treatments or any other of our services.*"

[69] In a further section of the document, the advertised advantages of using Crash over the plaintiff using their own insurer or acting on their own behalf are described. That includes the following services:

> "***FULL PROTECTIONS:***
>
> *CRASH provides every customer with a special insurance policy so that you will not face any financial risk in using our services. The full costs of repairs, replacement vehicle hire, medical treatments and solicitor's expenses are covered by this insurance. It covers those costs even in the unlikely event that the other party in your accident blames you and you lose your case in Court…*
>
> ***FULL SUPPORT:***
>
> *Trained investigators are immediately advised of your incident and will, if necessary, meet you at the scene of the accident to make drawings and take photographs. They will contact the guilty party to get the insurance company details. You will not be drawn into any uncomfortable confrontations. A qualified and experienced engineer will estimate the value of your car and will ensure that the car is repaired to the highest standards…*
>
> ***SOLICITOR COSTS:***
>
> *A specialist solicitor will advise on your entitlements to compensation such as personal injury and loss of earnings and vehicle depreciation. The protection of our insurance policy means that you will not be at risk of incurring legal costs.*"

[70] The plaintiff entered into an agreement with Crash dated 26 October 2018 ('the Crash Contract'). (The agreement is dated as having been 'issued' on 19 October 2018 but was signed by Mrs McKibbin and dated by her on 26 October 2018. No issue is taken in this case with the delay in the formalisation of the arrangement). The Crash Contract has most or all of the common hallmarks of a credit hire arrangement described by McCloskey J in *Turley v Black* [2010] NIQB 1 at paragraph [2]:

(i) The agreement is for the hire of an Audi A3 or similar vehicle at a daily rate of £129.94. It also addresses the issue of insurance cover for the hire vehicle and commits the hirer, the plaintiff, to pay CDW of £7.50 *per* day where the insurance cover is comprehensive and of £20.00 *per* day where the insurance cover does not include accidental damage or where third party cover is organised by Crash rather than through the hirer's own insurance company. Pursuant to clause 7.3, the hire vehicle is to be delivered for the hirer's convenience to a location chosen by them, with a delivery and collection charge of £85.00 for this service. There is also provision for storage charges where Crash provides storage facilities for the hirer's damaged vehicle (for instance, if it is rendered a total loss or economic 'write-off' after an accident and is therefore either uninsured or unsafe).

(ii) The core of the arrangement between the plaintiff and Crash is set out in clause 7.1 of the agreement, as follows:

> "*When Your Own Vehicle has been damaged in an Accident which is not Your fault, We can provide Repair Services and/or hire you a replacement vehicle of a similar standard to Your own. YOU ARE RESPONSIBLE FOR THE COST, but the payment of Our Charges can be deferred for a period of up to 48 weeks while the third Party's insurer is pursued for the amounts due.*"

(iii) This provision, as is common in such agreements, permits the hirer to defer the charges due to the accident management company so that the third party's insurer can be pursued for, and ultimately meet, the hire charges incurred as a result of the accident which necessitated the hire. Although clause 16.7 of the agreement notes that, "*This is not a credit agreement and no interest is being charged*", the deferral of the charges plainly provides a significant benefit to the hirer, who is not out of pocket for those charges whilst the claim is being pursued.

(iv) However, the facility of deferring payment of the charges is subject to clause 7.5, which provides as follows:

> "*To defer payment, You must enter an Agreement with Granite Financial Limited (GFL) at the same time You enter into this Contract. Absent your entry into the GFL Agreement, We may terminate this Contract under clause 13.2, and our Charges will be payable immediately.*"

(v) In short, the key benefit of the credit hire agreement, that the hire charges are to be deferred, is only available if the hirer enters into a separate agreement

with Granite. This was underscored in the covering letter to Ms McKibbin, sent by Crash on 19 October 2018, enclosing its contract. That letter said:

> "*In order to avail of our services, we enclose for your attention a Finance Agreement, and Hire Agreement with Granite Financial Limited. Please sign… and return it to our offices…*
>
> ***If you do not return a signed copy of these Agreements to us within 7 days of receipt then any services which have been arranged for you MUST be paid for by you immediately upon demand of same.***" [bold emphasis in original]

(vi) The Crash letter of 19 October 2018 also indicated that, as part of Crash's services, it enclosed "*an indemnity policy which, subject to its terms and conditions, will indemnify you in the event that you are unable to recover the hire/and or* [sic] *repair costs from the other party's insurance company.*" The letter explained that Crash is in many instances able to settle the hirer's claim directly with the third party's insurance company but that, in cases where that is not possible, "*it may be necessary to introduce you to a solicitor who will complete the recovery for you.*" Mrs McKibbin was also warned (in bold type) that, "*… if you choose to appoint a solicitor who is not approved by Granite Financial Limited you must immediately pay for any services which have been arranged for you. Your cover under the indemnity policy will also cease.*"

(vii) I was also provided with a copy of the finance agreement with Granite and the indemnity policy issued by another related company, Granite Insurance Services Limited ('Granite Insurance'), for whom Crash acts as an introducer. The finance agreement provides that Granite will finance the plaintiff's liabilities to Crash and/or a repairer to allow payment of those charges to be deferred. The finance agreement requires someone in the plaintiff's position to make all best endeavours to recover the total charges from the third party at fault in the accident and provides that they must, at Granite's request, instruct a solicitor approved by Granite to assist them, including authorising the solicitor to disclose all relevant information and documents to Granite and to take instructions from Granite concerning the claim (see clause 3.1). The finance agreement is closely related to the plaintiff's relationship with Crash, not merely because of the obvious relationship between Crash and Granite, but because it may be terminated by Granite at 24 hours' notice if the Crash Contract is terminated for any reason; as well as in the event that the plaintiff instructs a solicitor not approved by Granite (see clause 5.1).

(viii) The indemnity policy covers the amount the plaintiff will owe if the charges have not been recovered by the end of the appropriate deferment period and also covers the plaintiff's legal costs. The policy notes in the policy summary

that Granite Insurance will handle the claim or appoint a solicitor to handle the claim on the policyholder's behalf.

[71] In short, the main terms of the legal relationship established between Mrs McKibbin on the one hand and Crash and Granite on the other were that she had to enter into a package of arrangements: not only for hire of the car but also a finance and indemnity arrangement. Having done so, provided she used the solicitors appointed by Crash/Granite and cooperated fully with them in pursuit of her claim, the plaintiff would not have to pay any hire charges at all: the obligation to pay the invoiced charges would be deferred; she would obviously not have to pay that proportion of the charges recoverable from the third party's insurer; and, indeed, she would not have to pay even those charges which turned out *not* to be recoverable from the third party's insurer.

[72] The terms of the Crash Contract relevant to the question of agency include the following. Crash's "*Service*" is broadly defined at clause 8.18 as "*the entirety of the services provided by CRASH to You which may include, but is not limited to, hire and/or Repair Services*". In turn, the "*Repair Services*" which Crash was appointed to carry out are widely defined in clause 8.16 as "*all of the services, activities, work, functions and responsibilities delivered or to be delivered by Us to You in carrying out all work in the nature of repairing, fixing, remedying, making good and cleaning in respect of Your Own Vehicle*". Section 11 of the Crash Contract makes clear the breadth of discretion available to Crash in effecting the repairs to the plaintiff's vehicle on her behalf. Clause 11.1 provides:

> "*At Our absolute discretion, where We are satisfied that (a) the damage to Your Own Vehicle was caused by an Accident which was wholly the fault of a Third Party; and (b) repairing it is economically viable, We will provide Repair Services for Your Own Vehicle and You will pay Our Repair Charges.*" [underlined emphasis added]

[73] Clause 11.2 provides that, where Crash provide an estimate of the repair charges, it is not binding. Rather, Crash "*is entitled to carry out any such work incidental to the Repair Services as is found to be necessary…*" By clause 11.3, Crash also reserves the right at any time to increase the price for the repair services if an increase is imposed on Crash by its supplier for replacement parts. By virtue of clause 11.4, whilst Crash must use its best efforts to provide the repair services within the time (if any) notified to the hirer, time is not of the essence and Crash is not to be liable for any delays.

[74] Mr Montague QC submitted that the plaintiff was in a fiduciary relationship with Crash and that Crash acted as her agent, such that unreasonable delay on its part should be attributed to the plaintiff as a failure to mitigate her loss. This submission was founded on the legal and practical relationship between those

parties, described above, and previous conclusions to that effect by courts in this jurisdiction. In particular:

(a) In *Clarke v McCullough*, the Court of Appeal held that the credit hire company in that case, AX, was acting as agent for the plaintiff, so owing a fiduciary duty to the plaintiff (going so far as to say that its position amounted to a clear conflict of interest): see paragraph [20] of the judgment of Girvan LJ.

(b) This finding was in conformity with the approach of the trial judge in *Clarke v McCullough* (see [2012] NIQB 104, at paragraph [16](vii)), whose finding that the credit hire company was an agent for the plaintiff the Court of Appeal upheld.

(c) Similarly, in *Salt v Helley* [2009] NIQB 69, Stephens J had found that another claims management company, MIS, was the agent of the plaintiff, having been appointed to provide similar services as was Crash in this case: see paragraphs [15], [28] and [31] of the judgment of Stephens J.

[75] I accept, as did the courts dealing with the litigation mentioned above in cases involving accident management companies with similarities to the present, that Crash was the plaintiff's agent. They undertook, in conjunction with Granite, to take over all of the necessary arrangements for repair of the vehicle and progress of the plaintiff's claim for recovery on her behalf. They arranged for possession to be taken of her car, supplied the hire car, appointed the assessor to examine her car and authorise repairs, arranged the repairs, and arranged the appointment of solicitors on her behalf. It seems to me to be clear that this is an agency relationship, since the plaintiff has clearly assented to Crash acting on her behalf and they have acted on her behalf, including so as to affect her relations with third parties and in circumstances which give rise to the owing of a fiduciary relationship on the part of Crash to the plaintiff.

[76] In short, the plaintiff has handed over her affairs in respect of the repair of her car and the recovery of any damages due to her arising out of the accident (by way of repair charges, hire charges, vehicle depreciation, damages for personal injury) entirely to Crash and Granite, acting in concert. The costs protection afforded to the plaintiff by the indemnity policy provided by Granite Insurance no doubt results in this arrangement being attractive to the plaintiff and likely, as the evidence in this case suggested, to make her more relaxed about pushing things along quickly in terms of seeking to bring her period of vehicle hire to an end. She has also placed that in the hands of others in order to, as the Crash promotional material states, get her "*back on the road as soon as possible*." In providing this package of services to the plaintiff and managing all of the arrangements on her behalf, it seems clear to me that Crash has undertaken to act as her agent.

[77] Mr O'Donoghue QC contended that such a conclusion was not open to the court because clause 15 of the plaintiff's agreement with Crash, headed '*Agency*', is in the following terms:

> "*You do not appoint Us nor any other third party as your agent under or in connection with this Contract, and You agree that except as required by applicable law neither We nor any officer or employee of Us nor any associated company owe you any fiduciary duty in connection with the subject matter of this Contract.*"

[78] This clause has the appearance of being designed as a workaround to avoid the consequences of a finding by a court in the present context that an accident management company acts as agent for the plaintiff hirer. I do not consider that the say-so of the accident management company in its standard terms can be determinative of this issue. Mr Montague QC drew my attention to paragraph 6-058 of Bowstead & Reynolds which states:

> "*A contract clause seeking to make clear that a person who might be an agent is not, or might in some circumstances not be acting as such, may also be caught by the Unfair Contract Terms Act 1977, which could require it to be assessed against the "requirement of reasonableness".*"

[79] The passage goes on to note a number of possible conceptual difficulties with the precise application of section 3 of the 1977 Act in this context but, in any event, it appears to me that the relevant provision is now to be found in section 62 of the Consumer Rights Act 2015, since it is clear that the Crash Contract with Mrs McKibbin is a consumer contract: see section 3(3) of the 1977 Act.

[80] However, whatever the merits of the contract between Crash and the plaintiff, and the fairness or otherwise of its terms towards her, in my view reliance on the Consumer Rights Act is beside the point. I accept Mr O'Donoghue QC's submission that the court should be slow to reach any conclusion on the fairness of the standard terms in the Crash Contract in circumstances where Crash itself is not a party to these proceedings and has called no evidence (albeit it would have been open to the plaintiff to call evidence from Crash had she so wished). More significantly however, finding that the purported exclusion of agency was unfair as between the plaintiff and Crash would simply mean that that term was not binding *on the consumer*: see section 2(1) of the 2015 Act. More importantly still, the basic point urged upon me by the defendant is catered for by a more fundamental principle of law, namely that the parties' denial of a relationship of agency is not determinative of the legal position, without the need for recourse to the consumer protection legislation.

[81] This basic principle is found in the House of Lords case of *Garnac Grain Co Inc v Faure & Fairclough Ltd* [1968] AC 1130, at 1137. There Lord Pearson, giving a judgment with which the rest of their Lordships agreed, said this:

> *"The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in Ex parte Delhasse. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency…"* [underlined emphasis added]

[82] This statement of principle was soon approved and applied by Lord Wilberforce in a further decision of the House of Lords in *Branwhite v Worcester Works Finance Limited* [1969] 1 AC 552, at 587, focusing again on whether the parties had agreed to what amounted *in law* to such a relationship. See also Bowstead & Reynolds at paragraph 1-004 which notes that where the criteria for agency are met, "*the normal incidents of agency are, prima facie, likely to apply even if the parties' contract expressly disavows one being the "agent" of the other*"; and Treitel, *The Law of Contract* (15th edition, 2020, Thomson Reuters) at paragraph 16-021: "*It follows that an agency relationship will exist if the parties have agreed to what in law amounts to an agency relationship even if they have professed to disclaim it.*"

[83] I also accept the submission on the part of the defendant that there is a material distinction to be made between the position of a claims or accident management company, such as Crash in this case, and a repairing garage which is independent of the plaintiff, such as was the case in *Mattocks v Mann*. In *Mattocks*, there was nothing to suggest that the garage was in an agency relationship with the plaintiff. It was engaged, in a usual arms-length manner, to effect repairs to the plaintiff's car and no more. In addition, there was nothing to suggest that its own financial interests were to be furthered by the length of time taken for the repairs to be commenced and completed. In light of the above, I consider that the defendant was correct to assert that Crash stood in such a relationship with the plaintiff that any unreasonable delay on its part which prolonged the period of hire can be viewed as a failure on the part of the plaintiff to mitigate her loss or act reasonably in mitigation.

The position of the motor assessor and the plaintiff's solicitors

[84] In this case, since the defendant suggested that delays not only on the part of Crash but, in addition, on the part of both the motor assessor appointed by it (Mr Armstrong) and the solicitors appointed on the plaintiff's behalf by Granite (JMK) could constitute failure to mitigate the vehicle hire claim which redounded on

the plaintiff, I need to separately consider their position. Mr O'Donoghue QC's primary submission was that there was no unreasonable delay on the part of any of these persons or bodies, such that the issue was moot; but also that, if there had been any such delay, the court could not properly consider each of them to have a relationship with the plaintiff such that she would be fixed with the consequences of delay on their part.

[85] The solicitor and assessor are obviously in a different position from Crash in one sense. They do not directly benefit from a prolongation of the vehicle hire period in the same way that Crash, as the hirer of the replacement vehicle, plainly does. Whether any unreasonable delay on their part should likewise be considered a failure to mitigate which may result in a reduced award depends, therefore, on whether one of three possible scenarios arises. The first – accepted in principle by Mr O'Donoghue – is where their act or omission represents a supervening event which breaks the chain of causation of loss. That is not in issue in this case. The second is where the solicitor or assessor is, independently of Crash, in a fiduciary or agency relationship with the plaintiff. The third is where such a relationship with the plaintiff exists through the plaintiff's relationship with Crash, that is to say, where the solicitor or assessor acts as a mere servant or agent of Crash or, potentially, is so closely connected to it to be properly viewed as in the same position as Crash *vis-à-vis* the plaintiff.

[86] In relation to Mr Armstrong, I consider that he is plainly acting as the servant or agent of Crash in its capacity as agent for the plaintiff with responsibility for arranging and effecting the repairs to her car. He is engaged by Crash to assess the viability of repairs and what is required; to advise Crash (on behalf of the plaintiff) as to that; to estimate the cost of repairs and liaise with the repairing garage in relation to those costs and the work to be undertaken; and to actually authorise the commencement of the work. As the Crash promotional material makes clear (see paragraph [69] above), part of the Crash package of services is that an engineer will be appointed to ensure that the customer's car is repaired to high standards. That is plainly part of the repair services offered by Crash.

[87] Whether viewed as a mere servant or agent of Crash, which was at the material time acting as an agent for the plaintiff, or as a sub-agent to whom Crash has delegated authority to act on behalf of the plaintiff, the result is the same. Conceptually, the latter approach may be preferable, namely that Mr Armstrong is a sub-agent appointed with the plaintiff's express or implied authority in light of the fact that the appointment of the motor assessor by Crash was explained to her at the time of Crash's appointment; or that the employment of an expert assessor as a sub-agent is justified by the usage of the credit hire business. In either event, in my view Mr Armstrong, in acting on the plaintiff's behalf in authorising the repairs, is also to be viewed in a relationship of agency with the plaintiff.

[88] I should make clear, however, that I consider that there is a distinction to be made between a number of the roles carried out by the motor assessor appointed in

this case. On the one hand, Mr Armstrong had the functions mentioned above which he undertakes on the instruction of Crash, on behalf of the plaintiff, with a view to progressing the necessary repairs to her car. In that capacity, I consider him to be acting as an agent for the plaintiff with a responsibility, on her behalf, to act reasonably in order not to unnecessarily prolong the period of hire. On the other hand, he was also instructed by the plaintiff's solicitors to provide a report on loss which would, in due course, be relied upon in court. In that latter capacity, the question as to whether he was acting as an agent for the plaintiff is much less straightforward. The dual nature of the role performed by Mr Armstrong in this case (which could, of course, have been performed by two separate assessors) is reflected in the fact that he received a notification from Crash about the case which allowed him to commence his work in terms of authorising repairs and a separate notification from the solicitors instructed by the plaintiff which would have been directed towards the production of a report for submission as evidence. Indeed, albeit both pieces of work are dated on the same day, in this case Mr Armstrong produced two separate reports, the first being referred to in the plaintiff's booklet of appeal as a 'motor assessor's report' and the second being referred to as a 'depreciation report'. I do not need to determine in this case whether, in this second role, Mr Armstrong was acting as the plaintiff's agent.

[89] Finally, turning to the position of the plaintiff's solicitor, I see little difficulty in concluding that a solicitor acting for a plaintiff in litigation is in a position whereby, as a matter of law, they are under a duty to act in accordance with their client's best interests (subject to instructions), including acting reasonably in order to mitigate the plaintiff's loss, so that a failure to do so should not be treated as the act of an independent third party but should be imputed to the plaintiff. For these purposes, in the course of the litigation the solicitor is the *alter ego* of the plaintiff. If the solicitor acted unreasonably resulting in the plaintiff's loss (or expenditure in mitigation) being greater than it ought otherwise to be, I see no reason why a defendant should bear the additional cost of that, simply because the plaintiff placed their affairs into the hands of reputable solicitors. It is well known that a solicitor is in a relationship of trust and confidence with their client (which has been described as "*one of the most important fiduciary relations known to our law*": see *Re Van Laun* [1907] 2 KB 23, at 29). In my view, in the present context, unreasonable delay on the part of the plaintiff's solicitors which unnecessarily prolonged the period of hire should also result in a reduction in the recoverable claim.

[90] Accordingly, I consider that Crash *is* in a position relative to the plaintiff such that unreasonable delay in the taking of steps by it which it ought to take on the plaintiff's behalf towards bringing the vehicle hire period to an end can give rise to a breach of the failure to mitigate loss or to act reasonably in mitigation resulting in a reduction of the appropriate award. I am also satisfied that the relationship between Crash and its appointed assessor on behalf of the plaintiff, and between the plaintiff and her solicitor, are such that they too are each capable of giving rise to a failure to mitigate, if they act unreasonably, which can limit the plaintiff's recovery. In a case such as the present, any such failure which reduces the plaintiff's recovery will have

no practical import for the plaintiff (at least in the vast majority of cases), since the indemnity arrangement into which the plaintiff has entered means that they will not have to cover any shortfall between the hire charges for which they are residually liable and the amount recovered from the defendant in respect of hire charges. In those rare cases where the plaintiff was liable for such a shortfall, which has arisen or been increased by a failure on the part of their agent or solicitor to act reasonably, they may well have a remedy against the party who has acted unreasonably; but that is an issue for consideration on another day.

[91] Mr Montague QC suggested that there was a clear commercial link between both Crash and JMK and between Crash and Mr Armstrong which was both a matter of public record and matter of previous judicial comment or finding, of which I could take notice. Accordingly, he invited me (in terms) to treat them as one entity acting in concert on behalf of the plaintiff as her agent. It is clear, and I believe well-known, that there is some link between the various companies. For instance, Mr Jonathan McKeown is listed on the JMK website as the Chairman of JMK, which is incorporated, and on the Crash website as both Chief Executive Officer and owner of Crash; Crash and Granite Insurance Services Limited are both subsidiaries of Granite Financial Limited; and the two Granite companies have registered offices at the same address as JMK's Newry office. It was also clear from the evidence that Crash and JMK have a panel of motor assessors whom they frequently use. Mr Armstrong's evidence in cross-examination was that he estimates that he currently does about 75% to 80% of his work for Crash. Previously, he had done a lesser proportion of his work for them; but has worked for Crash for 22 years. Mr O'Donoghue QC urged me not to read too much into what he referred to as the 'commercial bond' between a number of the actors, particularly in the absence of representation of, and evidence from, Crash. In the event, I have not found it necessary to examine these issues in detail. The basis on which I consider the accident management company engaged by the plaintiff, the assessor appointed on her behalf by that company and the solicitors instructed for her in relation to her claim to be capable of giving rise to a breach of her obligation to act reasonably in mitigation is set out above and arises from her legal relationship with each of those parties and the functions they perform on her behalf. It is not dependent on any commercial bond between them.

[92] I turn, therefore, to consider whether the plaintiff, or any of those acting on her behalf, have in this case been shown to have acted unreasonably in a manner which amounts to a breach of the plaintiff's failure to mitigate her loss or to act reasonably in mitigation.

Application of the standard of reasonableness

[93] I accept the submission on behalf of the defendant that, in order for the court to disallow an element of the plaintiff's claim on the basis of failure to mitigate leading to an unduly lengthy period of vehicle hire, it is *not* necessary for the court to determine either that the period of hire has been wilfully prolonged in order to

increase the hire company's profit, *nor* necessary to find that there has been delay which may properly be termed 'exceptional'. Insofar as the plaintiff argued to this effect, I consider that that would be to erect an additional hurdle for defendants relying on a breach of the plaintiff's duty to mitigate loss which is both novel and unsupported in legal principle. The touchstone remains that of reasonableness. Plaintiffs have the benefit of the defendant bearing the burden of proof that the period of hire was unreasonably prolonged in breach of the duty to mitigate. However, where a defendant can do so, they are entitled to the benefit of that breach of duty without having to also establish that the delay was wilful or exceptional, much less fraudulent.

[94] As noted above, what a defendant must show is simply that the plaintiff, or someone whose actions are to be imputed to her, has acted *unreasonably* in failing to mitigate. Obviously, if a defendant was in a position to show that an accident management company had intentionally caused delay in the progression of a plaintiff's claim in order to maximise its return on hire, or some other party had done the same in their own financial interests or that of a party with whom they were in a commercial relationship, that would be a highly significant factor in determining whether there had been unreasonable behaviour for the purpose of assessing compliance with the plaintiff's duty to mitigate. But proof of such intention is not required. The nature of the accident management company's position – acting on behalf of the hirer but in circumstances where its own financial interests are furthered by an increased period of hire – is such that courts should in my view take a close look at whether there has been reasonable expedition or whether unnecessary delay has been allowed to creep in, albeit that the burden always remains firmly on the defendant to show unreasonable delay on the part of the plaintiff or on the part of someone for whom they are in law responsible in the particular case. As noted above (see paragraph [53]) in the *Opaku* case, it was emphasised that there was a "*need for careful and proper control of the claims by the application of the doctrine of mitigation*" in this area. This is due to what Mr O'Donoghue QC referred to as the 'elephant in the room', namely the possibility of credit hire companies 'profiteering' by dragging their heels to extend the duration of hire.

[95] In determining whether a plaintiff, or someone acting on their behalf, has acted reasonably in this respect, regard should also be had to their skill and experience. So, for instance, a professional claims management company with great experience and established contacts in the trade might be expected to act with greater expedition and efficiency than an unassisted plaintiff seeking to find a suitable repairer on their own and make arrangements for the necessary repair of their vehicle. So too an experienced and well-resourced firm of solicitors which is specialist in this field. The assessment in each case will, of course, turn on its facts.

Assessment of the vehicle hire claim

[96] As noted above, the claim for vehicle hire in this case was in the sum of £6,909.34. This was for the hire of a replacement vehicle between 19 October 2018 and 24 November 2018. The hire claim was evidenced by the signed agreement between the plaintiff and Crash and a rental invoice provided by Crash dated 30 November 2018.

[97] The Crash invoice includes a delivery and collection charge of £85.00; hire charges of £4,807.78 (representing 37 days of hire at a daily rate of £129.94); a collision damage waiver (CDW) charge of £740.00 (representing 37 days of such a waiver at a daily rate of £20.00); and an additional driver charge of £125.00 to permit the plaintiff's husband to use the car (expressed to be for 10 days at a daily rate of £12.50, which reflects the maximum payment for such a charge of £125.00 set out at clause 7.2 of the Crash Contract). That gave a total, exclusive of VAT, of £5,757.78. When VAT was included, the full sum was £6,909.34.

[98] In considering whether there has been any unreasonable delay in progressing the repairs to the plaintiff's vehicle and/or in progressing her claim so as to seek to bring the vehicle hire period to an end, it is helpful to examine the constituent steps individually.

Placing the car with the repairing garage

[99] There is no suggestion that there was unreasonable delay in the plaintiff's car being placed with the repairing garage. Ellis considers delay in instructing a garage to undertake repairs to be in a different category from delay in the carrying out of the repairs: see the discussion at page 111. This is because, in the former instance, it is the delay *of the plaintiff* in placing the car with a garage for repair, rather than delay on the part of an independent third party garage in whose hands the plaintiff has reasonably placed their vehicle for repair. In this case, the plaintiff's car was collected at the time the hire car was delivered and it was taken swiftly to an appropriate garage for repair.

Instructing the motor assessor to assess the plaintiff's car

[100] As noted above, Mr Armstrong was apparently formally instructed by JMK for the purposes of assistance with the plaintiff's claim on 26 October 2018 (eight days after the accident) but, in advance of that, had been given a 'heads-up' about the need to inspect the plaintiff's car by way of email from Crash on Tuesday 23 October 2018 (five days after the accident). I have referred – at paragraph [87] above – to what I consider to be the two distinct roles played by the assessor. His first and most urgent role is to assess the car and authorise repairs on behalf of the plaintiff in order to get the repairs underway. This role is performed on the instruction of, and on behalf of, Crash, acting as the plaintiff's agent, rather than on the instruction of the plaintiff's solicitors (albeit the assessor will in all likelihood

inspect the car only once and use that inspection as the basis for performing each of his distinct roles). It is part of the repair services package offered by Crash to the plaintiff.

[101] I do consider that there was unreasonable delay in Crash instructing Mr Armstrong. Crash was able to secure the collection of the plaintiff's car on the same day on which she contacted them, to provide a hire car to her on the same date, and to put together and issue the written agreement with the plaintiff which they wished her to sign. It advertises itself as having a 24 hour hotline and is obviously able to deal with cases, and arrange car hire, at short notice. There is no reason whatever, in my view, why it should have taken four days after hire commenced to notify the assessor by way of a 'heads-up' email that there was a new vehicle requiring inspection. I propose to disallow this period of four days on that basis.

Delay between the assessor's instruction and inspection

[102] Mr Armstrong's evidence was that he had no service legal agreement with Crash but does with JMK Solicitors, which includes provision to the effect that he should inspect a vehicle he is instructed to inspect as quickly as possible. He could not say for definite whether there was an industry standard as to how quickly an assessor should inspect a car after instruction but thought that, as a general rule, three to four working days was deemed acceptable to anyone who instructed him to carry out inspections.

[103] Mr Bruce's evidence was that a 48 hour turnaround was expected between instruction and inspection. He does not work for Crash but, in accepting instructions from a range of organisations, does about 50% of his work for credit hire companies. He has a service level agreement with one such company, ICH, the relevant terms of which were that, where a vehicle is unusable, he should make contact with the customer within 24 hours of instruction and inspect it within 48 hours of instruction. If the vehicle is drivable, the inspection should take place within 72 hours of instruction. He would typically receive instructions within 24 hours.

[104] In this case, Mr Armstrong received the email from Crash on 23 October and inspected the plaintiff's car the next day. In my view, no legitimate criticism could conceivably be made of the expedition with which Mr Armstrong inspected the vehicle after having been informed of the case by Crash. This is an issue explored in further detail in the related case of *McAteer v Clarke* where there was a greater period of delay between instruction and inspection.

Delay between inspection and provision of the assessor's report

[105] Mr Armstrong had authority to authorise the commencement of repairs to the plaintiff's vehicle and did so while inspecting the car at Agnews on Wednesday

24 October. No criticism can be made of the expedition with which the repairs were authorised.

[106] Separately, he provided a report to the plaintiff's solicitors on Monday 29 October. The purpose of the report was to be used as part of the plaintiff's evidence in support of her claim. The defendant did criticise this period of delay on the part of Mr Armstrong. Whether the delay of five days between inspecting the car and providing the report was unreasonable is in my view borderline; but, for reasons which appear below, it makes no difference to the outcome of this case in any event.

[107] The report provided to the solicitors was short. There is a one page *pro forma* giving the vehicle's details; a separate one-page typed list of necessary repairs; and an entirely separate letter, again of one page only, relating to diminution in value. Most of the required details would have been established by Mr Armstrong at his inspection of the plaintiff's vehicle. It would have taken some time to research the pre-accident value of the vehicle but that would not, in my view, be a difficult or particularly time-consuming undertaking, especially for an assessor such as Mr Armstrong. Generally, I would expect that a report of this nature could and should be provided within two working days of the inspection. I did not hear detailed evidence about Mr Armstrong's other commitments on the Thursday and Friday after the inspection; and there then followed two days of the weekend.

[108] However, the repairs to the car had already been authorised at this point. Once that had been done, and given that the plaintiff's car was in a repairable state, it was simply the duration of the repairs which was holding up the return to her of the plaintiff's own vehicle and therefore the conclusion of her need for a hire car. Even if Mr Armstrong, when providing a report to her solicitors, was both acting as the plaintiff's agent and was guilty of unreasonable delay in providing the report to JMK, in this case that made no difference whatever to the length of the period during which the plaintiff required the use of a hire vehicle. Unlike the delay in Mr Armstrong being instructed by Crash, any delay in Mr Armstrong providing his report(s) to JMK did not give rise to a protraction of the period of hire.

[109] In any event, Mr Armstrong only received his instruction from JMK on 26 October 2018. By that time, as a result of the email he had received from Crash on 23 October 2018, he had already inspected the Pplaintiff's vehicle on 24 October 2018. He provided his report to JMK one working day after having been instructed by them. In those circumstances, I would ultimately not have been persuaded that there was any unreasonable delay on his part in doing so.

[110] Turning back for a moment to the more complicated issue of whether, in acting as a witness for the plaintiff, Mr Armstrong was in that capacity acting as her agent, for the reasons I have given above this does not need to be resolved in the present case. The answer to the question probably depends on whether Mr Armstrong is engaged by the solicitors entirely independently of his previous

involvement with the case with a view to authorising repairs on behalf of the plaintiff; whether he is being engaged as an independent expert to give opinion evidence (as I understand was the case in the present proceedings) or simply being called as a witness of fact; and whether his giving of evidence is part of the package of services purchased by the plaintiff from Crash. I did not hear detailed argument or evidence on these issues and do not need to come to any conclusion on them.

Delay on the part of the garage in conducting the repairs

[111] In his report of 8 October 2019 Mr Bruce provided some observations on the duration of the repairs. Having examined the Agnews invoice, he considered that "*based on a productive day [of] 5 working hours*" the repair duration would have taken 9.7 days. He then rounded that figure up and made a further allowance of 2 days for paint curing and parts allocation, giving a total estimated repair duration (in his view) of 12 days. Mr Bruce noted, however, that this calculation made "*no provision for intervening weekend periods, potential parts delays, subcontractor delays and/or pre-repair off road period*".

[112] There was a relatively modest difference between the assessors on the repair duration and this issue was not pursued by the defendant on the appeal. It was right not to do so, since I do not consider that there is any proper basis for saying that there was any unreasonable delay on the part of Agnews in effecting the repairs; and, in any event, delay on the part of an independent repairing garage would, in my view, fall within the *ratio* of *Mattocks v Mann*.

Delay in providing the assessor's report to the defendant

[113] There was no suggestion in this case that there was any unreasonable delay on the part of the plaintiff's solicitors in providing the defendant's solicitors with Mr Armstrong's report, once it had been received. That issue arose in the related case of *Clarke v McEvoy* but was not a live issue in this appeal. Indeed, in a case where the plaintiff's car can be economically repaired, and the hire period is not therefore dependent on settlement of the claim and provision to the plaintiff of settlement moneys which will enable them to purchase a new car, this issue is likely to be of little or no consequence.

Delay in the plaintiff collecting her car

[114] Finally, a point was raised in this case about the delay in the plaintiff collecting her car after the repairs were complete. The repairs to the plaintiff's car were completed and it was ready for collection on Thursday 22 November 2018. I have recorded the plaintiff's evidence above as to why she had not felt able to collect the car sooner than the morning of Saturday 24 November. On the facts of this case and having assessed the plaintiff's evidence on this point as entirely credible, I do not consider that she acted unreasonably in failing to do so.

Conclusion on period of hire

[115] In light of the above consideration, I will disallow a period of four days hire at the start of the hire period because I consider that it was unreasonable for Crash, acting on the plaintiff's behalf, to delay instruction of the motor assessor for those four days. There is no reason why he could not have been notified of the case for the purpose of assessing the vehicle in order to authorise repairs on the same day on which the hire car was delivered to the plaintiff and her car was collected.

[116] I do not consider that any other delay such as there may have been was causative of any additional period of hire. Once the repairs had been authorised, and in light of the fact that there is no issue in this case with the duration of the repairs themselves, the only further period of delay which increased the period of hire was the two day period at the end of the period of hire during which the plaintiff was unable easily to collect her car from Agnews. I do not consider her to have been acting unreasonably in this regard.

Non-disclosure of Mr Armstrong's further input after his initial report

[117] I have set out above (at paragraphs [27]-[31]) the fact that additional information which supplemented and qualified Mr Armstrong's initial report on behalf of the plaintiff in this case was not disclosed during the course of the County Court proceedings; nor, indeed, until an unacceptably late stage of the appeal to this court. I have described this as highly unsatisfactory in the circumstances of this case where, since neither assessor attended at the county court, the judge was left in the position of only having a partial picture of Mr Armstrong's evidence. Recognising that, and in order to dispel any suggestion of intentional wrongdoing, Mr O'Donoghue QC called the solicitor with carriage of the file in JMK to give evidence and provide an explanation.

[118] I accept without reservation the evidence given by Mr Gilliland that he first saw the email from Mr Armstrong of 22 October 2019 that evening, after the case had been dealt with in court. He told me that there was a time-stamp generated when he read the email, from which he was able to see that he had not read it until 4.55 pm on 22 October 2019. When the email was sent to him, he would have been travelling *en route* to court and he would not have received a notification that a new email had arrived without going into his email to refresh it and check. He had two cases listed that day, in one of which liability was disputed. It is also fair to say that the situation was probably not helped by the late disclosure by the defendant's solicitor of Mr Bruce's report, some 13 days after it was dated and after close of business on the eve of the county court hearing. That said, Mr Gilliland had forwarded it to the plaintiff's assessor for comment and it may well have been helpful if he had been more assiduous in checking for a response.

[119] The explanation set out above deals with why Mr Armstrong's email of 22 October 2019 was brought to the attention of neither the defendant nor the county

court judge. There was no adequate explanation provided, however, as to why Mr Armstrong's earlier letter of 1 December 2018 was not disclosed in advance of the county court hearing. It was within the plaintiffs' solicitors' possession for a period of over 10 months before the hearing, without being disclosed. As to this, Mr Gilliland simply said that this was an error on his part. He accepted that he was aware that His Honour Judge Devlin had expressed exasperation about the fact that there was a lack of clarity on the issue of whether the panels had been repaired or replaced; and that he had the court file with him (on a tablet, rather than in hard copy); but said that he "*must just have overlooked*" the issue, he had no reason not to share the letter and he "*must have missed it.*"

[120] As Mr Montague QC pointed out, there was also no reasonable excuse put forward as to why Mr Armstrong's letter of 1 December 2018 and email of 22 October 2019 were not served on the defendant subsequently, during the conduct of the appeal before this court. All that could be offered in that regard was that Mr Gilliland had had carriage of the litigation in the county court but not the High Court. He had passed the file on to another solicitor within his office and could not explain why additional disclosure had not been made in the course of the High Court appeal. Mr Gilliland accepted that it was not until the course of the appeal that the defendant became aware, for the first time, that the panels on the plaintiff's car had been repaired rather than replaced; and accepted that the defendant was thereby disadvantaged.

[121] I take this opportunity to reiterate that a party's discovery obligations are part of a continuing duty. Even where the value of the case is not particularly high, litigants and the court are entitled to expect that it will be dealt with fairly and in accordance with the appropriate rules. I am satisfied that the failures to comply with the plaintiff's discovery obligations in this case were not intentional. Nonetheless, they were not acceptable; they made the county court judge's task more difficult; and they may well have added to the time and expense which these proceedings – at least insofar as dealing with the contested element of diminution in value of the plaintiff's vehicle – have required.

Conclusion

[122] For the reasons set out above, the award in this case will be as follows:

(a) £6,146.05 for agreed repair costs;
(b) £1,537.50 for diminution in the value of the plaintiff's vehicle (being 7.5% of the pre-accident value of £20,500);
(c) £2,051.61 for vehicle hire (representing 33 days of hire at the agreed rate of £62.17); and
(d) £102.00 for agreed costs of vehicle recovery and hire car delivery.

This gives a total of £9,837.16.

[123] I conclude with a number of comments and observations in relation to the conduct of credit hire claims before district judges and county court judges who hear a great many such claims in the course of their work, which I hope may be of some modest assistance to those judges and litigants in this field:

(i) First, I acknowledge that pressures of work and heavy caseloads mean that such judges will often, if not invariably, not have the time to reserve judgment on such a claim or to provide a written ruling, much less a judgment as prolix as this; nor would it be an efficient or proportionate use of court resources for them to seek to do so. This judgment is as detailed as it is largely because the parties urged on me the importance of dealing with the issues of law and principle which arose in this case, notwithstanding its modest value in terms of the sums involved. These cases will normally be amenable to the giving of an *ex tempore* judgment, without detailed reasons.

(ii) However, where a claim for vehicle hire charges is to be reduced by reason of unreasonable delay on the part of a plaintiff, or someone for whose failure the plaintiff may in law be considered responsible, the judge should explain what the unreasonable action was which has resulted in a failure to mitigate and what period of vehicle hire has been disallowed on what basis.

(iii) Where, as is common, a motor assessor has provided a report in support of a plaintiff's claim, it would be helpful if it set out a brief but clear chronology of the assessor being instructed and the actions they have taken in relation to the case, including the date of the accident, the date of being instructed (and by whom), the date of the inspection, the date when repairs were authorised by them, the date of the repairs being commenced and completed (if known), and the date of the completion and provision of their report.

(iv) Where a motor assessor is giving evidence, either on behalf of a plaintiff or defendant, it should be made clear whether they are being put forward as providing expert evidence or not. Where opinion evidence is being provided as to loss of value in a plaintiff's vehicle, ordinarily one would expect this to be provided on the basis that it represents an expert opinion. Where an assessor is being used or called to provide expert evidence, they should complete the relevant expert's declaration. Not only will this remind the assessor, by whichever side they are instructed, of their overriding duty to the court, but it will also require any conflict of interest which might arise to be disclosed and therefore subject to further consideration or enquiry. An appropriate declaration is set out in the relevant High Court Practice Direction (No 7 of 2014). I understand that no similar practice direction is in force in the county court, although the use of expert declarations there is common. This is something which might be considered by the Recorder of Belfast and the Presiding District judge. Insofar as there remains any lacuna in the insistence on the provision of expert declarations, this seems to me to be an area where county court judges could usefully follow the practice and

procedure adopted in the High Court as envisaged in Article 49 of the County Courts (Northern Ireland) Order 1980.

(v) Parties should be astute to ensure that their continuing disclosure obligations are met, including by the timely provision of supplementary or addendum material from their appointed motor assessor where an initial report from the assessor has been served. In addition, in light of the contents of this judgment, and the related judgment in *Clarke v McEvoy*, it might well be that additional discovery or information will have to be made available in this category of cases (always allowing for the legitimate protection of legal professional privilege) where the defendant has put in issue an alleged failure of the plaintiff's advisers to act with sufficient expedition to discharge the plaintiff's obligation to act reasonably in mitigation.

(vi) It would also be of assistance for the parties to liaise with each other, and ideally the relevant court office, some time in advance of the hearing in order to ascertain whether assessors' reports can be agreed and handed in without the need for formal proof or whether it is necessary for the assessors to attend. I was told that some judges prefer them to attend and others prefer not to hear from them. Insofar as possible, a judge should not be put in a position such as His Honour Judge Devlin was in this case where he *did* wish to hear from one or both of the assessors and they are not in attendance. It would also be of assistance if the assessors in a case such as this were to discuss the case in advance – perhaps simply by way of telephone – to see whether agreement can be reached or the issues can be narrowed in advance of the hearing, either on a 'without prejudice' basis or, ideally, with an agreed note of areas of agreement and disagreement being produced.

[124] I will hear the parties on the issue of costs.