Neutral Citation No. [2015] NIQB 30 | *Ref:* **STE9600**

Judgment: approved by the Court for handing down | *Delivered:* **15/04/15**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST

Plaintiff/Respondent:

-and-

COLIN FLANNAGAN
and
CAPPER TRADING LIMITED

Defendants/Appellants:

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STEPHENS J

Introduction

[1] This is an appeal by the defendants in a credit hire case in which the plaintiff secured an award in the County Court of £4,734.06 together with costs.

[2] The plaintiff's claim arises out of a road traffic collision which occurred on 4 March 2014 in respect of which the defendants have admitted liability. Ms Linda O'Hare was driving an Audi Q3 motor vehicle ("the motor vehicle") which was involved in the collision. Ms O'Hare is employed by the Business Services Organisation ("the Organisation") as Head of Procurement. The Organisation is part of the Department of Health and Social Care ("the Department"). It provides business services to Health and Social Care Trusts. Ms O'Hare is required to travel in the course of her employment and she is entitled to be provided with the motor vehicle by her employer on terms that she pays a certain amount for mileage associated with her own private use. The motor vehicle was provided to her, on behalf of her employer, by the plaintiff. The plaintiff takes on the responsibility for arranging provision of vehicles not only for those of its own employees who are entitled to a vehicle but also for such employees of other Health and Social Care

Trusts and the Organisation. This co-operation between public bodies avoids duplication of bureaucracy and leads to economies of scale. In fact the method adopted by the plaintiff to provide motor vehicles is to enter into leasing agreements which agreements are organised through the Northumbria Health Trust, again to increase efficiencies. The position in relation to the motor vehicle was that it was leased by the plaintiff from a leasing company but there was no evidence as to which leasing company or as to the terms upon which it was leased. However the defendants accept that the plaintiff, as lessor, has sufficient standing to sue in respect of the damage done to the motor vehicle.

[3] The plaintiff is registered for VAT. Any element of VAT payable on repair or hire invoices is recovered by the plaintiff in the ordinary course of its VAT returns. Accordingly the amounts claimed by the plaintiff in these proceedings exclude any element of VAT.

[4] After the road traffic collision the plaintiff entered into a credit hire agreement with Crash Services Limited ("Crash") who trade under the logo "*The Accident Management People*." Crash arranged and paid for the repair of the motor vehicle at a cost of £2,464.64. It is agreed that the defendants are liable to pay that amount. Also Crash hired two vehicles to the plaintiff, for Ms O'Hare to drive, whilst the motor vehicle was being repaired. For the first two days the hired vehicle was a Nissan Micra 1.1cc motor vehicle. The daily hire rate was £46.76 which together with daily collision damage waiver of £7.50 gave a total daily rate for this vehicle of £54.26 plus VAT at 20%. However, as I have indicated, the plaintiff does not seek to recover VAT from the defendants. Also Crash charged a fee of £25.00 as an administration charge in respect of this vehicle which was a cost associated with adding an additional driver to both of the vehicles hired to the plaintiff. From the second day the hired vehicle was an Audi A4. The daily hire rate for the Audi was £147.80 which together with daily collision damage waiver of £7.50 gave a total daily rate for this vehicle of £155.30 plus VAT at 20%. Accordingly the total claim for hire excluding VAT for the period 4 March 2014 - 20 March 2014, a period of 17 days, was £2,514.02. The defendants contend that the plaintiff failed to mitigate its loss in that a Mercedes C class vehicle, which was equivalent to the motor vehicle, could have been hired from Avis on their weekly rate at a total cost of £1,340.46 (excluding VAT) or in the alternative on the Avis daily rate at a total of £1,810.00 (excluding VAT). Accordingly the amount at issue on this appeal is the difference between £2,514.02 and either £1,340.46 or £1,810.00. So the amount at issue is either £1,173.56 or £704.02.

[5] The costs involved in these cases remains disproportionate to the amounts involved.

[6] There is no issue as to the duration of hire.

[7] There was no contention on behalf of the defendants that I should approach the case on the basis that the additional elements in the credit hire rate should be

stripped out or that I should apply a reasonable discount to the credit hire rate see paragraphs [3] - [4] of *Burrows v Ross* [2014] NIQB 99.

[8] Mr Clelland appeared on behalf of the plaintiff and Mr Lundy appeared on behalf of the defendant. I am indebted to both for their carefully prepared written and oral submissions.

Legal principles

[9] I set out the applicable legal principles at paragraphs [7] - [12] of *Burrows v Ross*. In those paragraphs I also referred to a series of cases all of which set out the legal principles to be applied. I will not rehearse what was said in those previous decisions. However in this appeal the plaintiff has raised the issue of impecuniosity. Accordingly I will set out the principles which I will seek to apply in relation to that issue.

[10] A dictionary definition of impecunious is "having no money; penniless; in want of money." Hence a dictionary definition of impecuniosity is "lack of money; pennilessness." Legally when determining whether, through impecuniosity, a plaintiff is entitled to recover the credit hire rate as opposed to the basic hire rate impecuniosity has a more nuanced meaning. Lord Nicholls in *Lagden v O'Connor* [2004] 1 AC 1067 stated:

> "There remains the difficult point of what is meant by "impecunious" in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make."

In the same case Lord Hope expressed the same test in somewhat different language as follows:

> "The full cost of obtaining the services of a credit hire company cannot be claimed by the motorist who is able to pay the cost of the hire up front without exposing himself or his family to a loss or burden which is unreasonable."

Accordingly an individual who is not penniless, can still be impecunious, because as a question of priorities he is unable to pay car hire charges without making sacrifices he could not reasonably be expected to make. Lord Nichols described this test as having an open-ended nature. For my part I consider that reasonableness in relation to sacrifices takes into account the social utility of the different priorities. Impecuniosity is unlikely to be found if a plaintiff prioritises expenditure on trivia.

Reasonableness also takes into account the amount of money available to the individual concerned and the amount of expenditure involved. There was no discovery of documents in relation to the amount of money available to the plaintiff or any evidence except of the most general nature in relation to this aspect of the equation. In relation to the expenditure side of the equation the number of non-fault road traffic collisions each year is relevant to the issue of impecuniosity and the costs involved. Those issues were not addressed by the plaintiff on discovery or except in a most general way in evidence.

[11] In *Gilheaney v McGovern & another* [2009] NIQB 38 and at paragraph [9] I expressed some reservations as to whether the plaintiff bears the burden of proving impecuniosity. The point was considered by the Court of Appeal in England and Wales in the case of *Zurich Insurance Plc v Sameer Umerji* [2014] EWCA Civ. 357. At paragraph [37] Lord Justice Underhill said

> "… I am not sure that the burden of proof is in fact of central importance in this particular case, in view of the fact that an order was made for the Claimant to (in effect) state his case. But I should make it clear that, quite apart from that order, I would regard the burden as being on a claimant to plead and prove his case on this point. The correct analysis would appear to be as follows. A claim for the cost of hire of a replacement vehicle is, strictly, a claim for expenditure incurred in mitigation of the primary loss, namely the loss of use of the damaged vehicle: see the speech of Lord Hope in *Lagden v O'Connor* at para. 27 (p. 1077H). The burden is thus on the claimant to prove (and therefore plead) that such expenditure was reasonably incurred: see the authorities reviewed by Sir Mark Potter P in *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2011] QB 357, at paras. 25-28 (pp. 367-8). There is no doubt a grey area about how much needs to be pleaded and proved to establish reasonableness before the evidential burden shifts to the defendant to show that the expenditure was unreasonable. *But in this kind of case it is clearly right that a claimant who needs to rely on his impecuniousness in order to justify the amount of his claim should plead and prove it.*" (emphasis added)

I consider that the burden of proving impecuniosity is on the plaintiff. I also consider that the issue should be identified at the stage of pre action correspondence. In *Kerr v Toal* (BUR9528) Burgess J referred to the obligation falling on all parties to provide speedy and cost effective systems and to the need to have a proper exchange of information in order to allow proper and reasonable attempts to be made by both parties to resolve issues without the necessity of engaging in the court system. He stated that in credit hire agreement cases when the plaintiff's solicitor takes instructions the question of impecuniosity should be addressed and that in the opening letter, but if not then available as quickly thereafter as possible, as much information should be given in relation to impecuniosity, if raised. For my part I consider that a letter of claim should address the issue of impecuniosity and if raised

should contain a brief outline of the plaintiff's income and outgoings. Thereafter, at the latest, if proceedings are issued then discovery should be given in relation to that issue. In this case impecuniosity was not raised by the plaintiff in the pre action correspondence or indeed in submissions or evidence in the county court.

[12] The question arises as to whose impecuniosity is to be considered on the facts of this case where the plaintiff is acting on behalf of another in hiring the vehicles from Crash. Is it the impecuniosity of the plaintiff ignoring the fact that the plaintiff was acting on behalf of other public bodies? Is it the impecuniosity of the particular organisation on whose behalf the plaintiff was acting in providing the motor vehicle and its replacement hired vehicles, which in this case was the Department? Is it the impecuniosity of all the public bodies that use and therefore fund the car leasing scheme? Is it the impecuniosity of the individual who actually drove the motor vehicle which in this case was Ms O'Hare? On the facts of this case it is not necessary to decide that issue because the outcome is the same regardless as to which body is the correct body but as a matter of principle I consider that the impecuniosity, which has to be established, is at least that of the Department on whose behalf the plaintiff was acting. There was no evidence as to the financial position of the Department. The plaintiff has not attempted to discharge the burden of proving impecuniosity in respect of the Department. Accordingly the issue of impecuniosity is decided on that ground alone in favour of the defendants.

Factual background and conclusions

[13] Mrs Williamson is employed full time by the plaintiff to run the vehicle leasing scheme which she undertakes with the assistance of a part-time employee. The scheme covers some 700 cars for some 700 employees of the various public bodies. It is economically advantageous to the plaintiff and to the other public bodies to lease vehicles and to make them available to their employees rather than paying their employees a mileage rate if they use their own vehicles. The employee pays for the private use of the vehicle at different rates depending on the type of vehicle and the amount of private miles for which the vehicle is used. No issue was raised by the defendants in this appeal that in any event Ms O'Hare would have paid a certain amount to the plaintiff in respect of the hired vehicles for her private use of those vehicles and that that amount should have been taken into account in assessing the plaintiff's loss.

[14] Mrs Williamson commenced her employment as a car scheme co-ordinator in 2003. At that time if a leased car was involved in a road traffic collision, which was not the fault of the employee, then the employee would use a replacement vehicle supplied gratuitously by the car repair company. Normally the replacement vehicles were small vehicles which were not equivalent to the vehicle which had been damaged. This caused a degree of upset to employees, who through no fault of their own, were required to use small vehicles to travel considerable distances during the course of their work.

[15] In 2009 Mrs Williamson and her then manager, Mr David Quigg, were approached by Crash who wished to provide accident management services for both fault and non-fault collisions. The plaintiff did not pursue the provision of such services for fault collisions. The reason stated in evidence for declining to pursue accident management services in respect of fault collisions was that for insurance purposes the plaintiff needed to monitor fault collisions so that proper disclosure could be made at renewal to the plaintiff's motor vehicle insurance company. However it would have been a simple matter to have required Crash to collate and provide this information to the plaintiff so that the plaintiff could pass it on to its insurer. I conclude that the negotiations did not proceed in relation to accident management services for fault collisions because it was not economically in the plaintiff's interests as the plaintiff would have had to have paid for such services either by a separate identifiable charge or by way of increased hire charges to cover all the additional elements.

[16] The position was entirely different in relation to non-fault collisions. The services provided by Crash meant that the plaintiff was relieved of the obligation to

a) organise car repairs,
b) organise car hire,
c) claim under its comprehensive motor vehicle insurance policy,
d) pay an excess of £250 to its insurance company,
e) make a claim against the at fault driver and
f) pay out any monies for car repairs, or car hire thereby improving its cash flow.

The plaintiff had the capacity to undertake all these tasks itself and would continue to do so in relation to fault collisions. However in relation to non-fault collisions the costs associated with all those elements were taken up by Crash and were then a part of the credit hire charges made by Crash but which would be paid by the insurer of the at fault driver. So in 2009 the plaintiff decided to use the services of Crash in relation to all non-fault collisions. No formal arrangement was made with Crash but after 2009 all non-fault collisions were directed by the plaintiff to Crash with on each occasion a credit hire agreement being signed on behalf of the plaintiff. The impact was that the costs of administration and of pursuing claims was removed from the plaintiff and the financial burden was passed to the "at fault" driver's insurer through credit hire charges as opposed to basic hire charges. In this particular case Mrs Williamson's evidence was clear that the only administration that was required of the plaintiff was to enquire as to whether the collision was a fault or non-fault collision. If it was a non-fault collision, then the plaintiff would sign an agreement with Crash. That she would have signed the agreement with Crash irrespective of the amount that Crash charged for the hire of the replacement vehicle or, I infer, any other charges that Crash chose to make. Indeed all the terms of the agreement were a matter of total indifference to the plaintiff. All the plaintiff was concerned about was that it did not have to pay anything irrespective as to the amount that it cost anyone else. The charges were never going to be paid by the plaintiff which as a consequence was indifferent as to the amount of those charges.

[17] Mrs Williamson stated that the Car Leasing Department was under considerable pressure of work and that the additional work involved if Crash were not engaged would result in additional expenditure by the plaintiff. There was no challenge by the defendants to either of those factual assertions which I accept. On that basis, in a time of austerity, Mr Clelland submitted that the Trust was impecunious presumably on the basis that £1 spent on administration is £1 not spent on health care. That as a matter of priorities such sacrifices by the plaintiff would be unreasonable. There was no calculation provided in evidence as to what the additional costs would have been nor, except in the most general way, was there any comparison with the overall budget of the plaintiff. It became apparent that there were some 4 - 5 non-fault collisions per month. I consider that initially it might take some time in organising car repair and car hire but that on each occasion and with experience the time involved would reduce. If the impecuniosity which has to be established is the impecuniosity of the plaintiff, rather than, as I have held, of the Department, then I consider that the plaintiff has failed to establish impecuniosity on the balance of probabilities.

[18] The plaintiff having failed to establish impecuniosity the next issues are whether the defendants have established both

a) a basic hire rate for an equivalent vehicle in the plaintiff's locality at the relevant time lower than the credit hire charges which are the subject of the claim and
b) that it would have been reasonable for the plaintiff to have hired a vehicle at that basic hire rate.

I will deal with each of those issues in turn.

[19] In relation to a basic hire rate it is the defendants' case that it has established such a rate in the locality of Belfast at the relevant time lower than the credit hire charges which are the subject of the claim. In that respect the defendants rely on hire from Avis in Belfast of a Mercedes C class vehicle. The plaintiff contends that the defendants have chosen the wrong locality for the plaintiff on the basis that Ms O'Hare resides in Rathfriland. I will assume, without deciding, that on the facts of this case the relevant locality is the locality of Ms O'Hare rather than the locality of the plaintiff. Ms O'Hare's work is based in Boucher Crescent, Belfast, though her work takes her all over Northern Ireland. She lives in Rathfriland. Accordingly it is asserted that the basic hire rates put forward by the defendants are not in the plaintiff's locality. I reject that contention. The locality is not necessarily limited to a residential locality. An individual may have two or more localities. The extent of locality will vary depending on the personal circumstances of the individual concerned. If a person's job takes them all over Northern Ireland then it might be contended that the locality is Northern Ireland. The plaintiff gave no discovery as to, or led any evidence as to where exactly Ms O'Hare was working on 4 March 2014. I consider that the test for determining the relevant locality is whether there is some clear association between the individual concerned and the locality for the purposes of obtaining the hired vehicle. I consider that Belfast is one of Ms O'Hare's localities, particularly given that the motor vehicle was predominantly used in relation to her

work. If the locality is the locality of the plaintiff, rather than the locality of Ms O'Hare, then Belfast is most certainly the locality of the plaintiff.

[20] I find that the defendants have established a basic hire rate in the plaintiff's locality at the relevant time lower than the credit hire charges which are the subject of the claim.

[21] In relation to the issue as to whether the defendants have established that it would have been reasonable for the plaintiff to have hired a vehicle at that basic hire rate there were then a number of points which were raised on behalf of the plaintiff as to why the defendant had not discharged that onus. I will set out my findings in respect of each of them.

(a) The Avis terms and conditions state that eligibility for its delivery service depends on amongst other matters a credit card being in the driver's name. The plaintiff states that it does not have a credit card and in any event the driver is Ms O'Hare. Accordingly it is suggested the Trust would not be eligible to have the hired vehicle delivered to Ms O'Hare and accordingly that the defendants have not discharged the burden of proving that it was reasonable to use Avis as opposed to Crash. I consider that it would have taken little organisation for the plaintiff to arrange with its employee to use her credit card and to put her in funds for any amount which she paid to Avis. I conclude that the defendant has discharged the burden of proof in relation to this issue.

(b) Avis terms and conditions specify that "for bookings made for a rental in the UK, you must present the payment card used to complete this transaction when collecting your vehicle." Again this is a point in relation to a credit card which has to be used not only for the delivery service but also for any vehicle hired from Avis. I come to the same conclusions in relation to this point as at (a) above.

(c) Avis delivery service provides that the customer can chose from three convenient delivery windows which are 9.00 am to 11.59 am, 12.00 pm to 2.59 pm and 3.00 pm to 6.00 pm. It is asserted on behalf of the plaintiff that this would require Ms O'Hare remaining at her home location for three hours awaiting delivery and doing nothing accordingly that the defendants have not discharged the burden of proving that it was reasonable to use Avis as opposed to Crash. However delivery could be made to her place of work where she could be usefully engaged undertaking work or alternatively as in *Burrows v Ross* she could collect the car herself and the delivery charge would be the equivalent of the damages for the costs of doing so. I reject that contention.

(d) Another issue raised by the plaintiff in relation to the delivery service is that Avis state that if that service is booked by 12.00 o'clock they can deliver the hire car to the customer's door that day. It is contended on behalf of the plaintiff that although the time of the road traffic collision was unknown this was a term which meant that the defendants had not discharged the obligation of establishing that it was reasonable for the plaintiff to have hired a vehicle at the basic hire rate rather than at the credit hire rate. I disagree. There was nothing preventing the hired vehicle from being collected as opposed to being delivered.

(e) The plaintiff states that the Avis terms specify that if a second driver is requested they must also be present when picking up the car and have their original driving licence. Crash does not require the additional driver to be present nor do they require his driving licence. Ms O'Hare's brother was an additional driver authorised by Crash. It is asserted that the defendants have not discharged the burden of establishing that it was reasonable for the plaintiff to have hired the vehicle from Avis at the basic hire rate given that Avis would have required Ms O'Hare's brother to be present with his driving licence. There was no evidence as to whether Ms O'Hare's brother actually used the car or as to his personal circumstances. The difference in price between Crash and Avis is either £1,173.56 or £704.02. I do not consider that the inconvenience that might have existed (if there had been any evidence) was sufficient to have concluded that the defendants had not discharged the burden of proof.

(f) Another issue related to the requirement in respect of Avis that an authorisation amount would be held on the driver's credit or debit card. This issue arose in *Burrows v Ross* at paragraph [25] (e). In that case it was conceded that the plaintiff was not impecunious. I have held that the plaintiff, the Department, and Ms O'Hare are not impecunious. Accordingly I consider that the defendant has established that the plaintiff would have acted unreasonably if she had chosen to pay the credit hire rate rather than the basic hire rate to avoid this requirement.

(g) The plaintiff also asserts that the defendants have not established that an equivalent car from Avis would have been available. It is recognised that Crash were not able to source an equivalent car on the day of the collision providing instead a Nissan Micra. I consider that commercial organisations, such as Avis, put considerable effort into ensuring that there is a correct balance between availability and overstocking. On that basis I consider that the defendants have discharged the burden of proving availability. In any event if an equivalent car was not immediately available the same reasonable

course could have been followed as was followed by Crash and that is by providing a smaller car for a short period of time.

I consider that the defendants have established on the balance of probabilities that it would have been reasonable for the plaintiff to have hired the vehicle from Avis at that basic hire rate.

[22] The cost of hiring a car decreases depending on the duration of hire. The longer the hire period which the client is committed to then the cheaper the rate. If an individual could reasonably anticipate the repairs to their vehicle were going to take at least a week then ordinarily they would hire on the cheaper weekly rate rather than on the more expensive daily rate. In the event the repairs took 17 days that is two weeks and three days. The issue as to whether it could reasonably have been anticipated to take that period of time was not explored in evidence and accordingly I am not prepared to hold that the Trust should reasonably have anticipated hiring the car on the cheaper weekly rate.

Conclusion

[23] I find that the defendants have proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the basic hire rate for the model of car actually hired. The basic hire rate is that charged by Avis on their daily rate. That is a figure of £1,810.00 (excluding VAT).

[24] I find that the defendant has discharged the onus of establishing that the plaintiff has failed to mitigate its loss by failing to hire at the basic hire rate.

[25] I allow the defendant's appeal reducing the award by £704.02 so that the ultimate award is £4,030.04.

[26] I will hear counsel in relation to the issue of costs and any other ancillary orders.