

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

CHRISTOPHER GILHEANEY

Plaintiff/Appellant:

-and-

ADRIAN McGOVERN  
and  
EDWARD McGOVERN

Defendants/Respondents:

STEPHENS J

**Introduction**

[1] This is a plaintiff's appeal in respect of the assessment of damages. The issue in the County Court, and on appeal, was the rate of hire for a replacement vehicle used by the plaintiff whilst his damaged vehicle was being repaired following a road traffic accident for which the defendants are liable. The claimed daily hire rate was £42.00. The learned County Court Judge, in effect, allowed a daily hire rate of £30.61.

[2] Mr Orr QC and Mr Kelso appeared on behalf of the plaintiff/appellant. Mr Montague QC and Mr David Dunlop appeared on behalf of the defendants/respondents. I acknowledge with gratitude the assistance that I received from both sets of Counsel.

**The background facts**

[3] The plaintiff, Christopher Gilheaney, the owner and driver of a Seat Ibiza motor vehicle ("the vehicle") was involved in a road traffic accident which occurred on 6 May 2007. The accident occurred near the plaintiff's home outside Enniskillen, County Fermanagh. As a result of damage sustained in the road traffic accident the vehicle was not capable of being

driven. The repairs to the vehicle were carried out at a local garage between 6 May 2007 and 13 June 2007.

[4] The defendants, Adrian McGovern and Edward McGovern were respectively the owner and driver of the other vehicle involved in the road traffic accident. There is no issue as to liability.

[5] On foot of a written agreement dated 18 May 2007 the plaintiff hired a Vauxhall Astra ("the replacement vehicle") between 18 May 2007 and 13 June 2007 from "Crash Services" which is the trade name of Granite Financial Limited. That company carries on business in Newry, County Down, as a credit hire company. The daily rate of hire in the written agreement and the rate which was charged to the plaintiff was £42.00. Accordingly the total hire charged for the period 18 May 2007 to 13 June 2007, 26 days, was £1,092.00. The hire rate is "a credit hire rate".

[6] On 21 June 2007 Crash Services issued to the plaintiff a rental advice note in respect of its charges on foot of the agreement. This claimed:-

(a) A delivery and collection charge in respect of the replacement vehicle of £30.00.

(b) A hire charge for 26 days, at a daily rate of £42.00, amounting to £1,092.00.

(c) A collision damage waiver charge for 26 days, at a daily rate of £1.35, amounting to £35.10.

The charge in respect of all three items was £1,157.10 plus VAT of £202.49. A total of £1,359.59.

### **The Issues**

[7] There were various issues which did not arise on this appeal as the defendants accepted a number of propositions.

(a) It was reasonable for the plaintiff to hire the replacement vehicle see *Giles v Thompson* [1993] 3 All ER 321 Steyn LJ at 337 letter j - 338 letter a.

(b) The replacement vehicle was of the same type as the plaintiff's vehicle see *Lagden v O'Connor* [2004] 1 AC 1067 at 1078 letter c paragraph [27] and 1092 letter f at paragraph [76] and *Mattocks v Mann* [1993] RTR 13 at 17.

(c) The period of hire was appropriate see *Clarke v Ardington Electrical Services* [2003] AC 36 at paragraphs 115 to 121, and *Mattocks v Mann* [1993] RTR 13.

(d) It was reasonable for the plaintiff to have the replacement vehicle delivered and collected see *Clarke v Ardington Electrical Services* [2003] QB 36 at paragraph [153]. Accordingly there was no issue as to the delivery and collection charge either in principle or as to amount.

(e) There was no issue as to the collision damage waiver charge either in principle or in respect of amount. At the start of the hire period the plaintiff transferred his existing insurance policy from the vehicle to the replacement vehicle. That policy had an excess. The collision damage waiver meant that he had no excess in respect of the replacement vehicle. The plaintiff was obliged to return the replacement vehicle in the same state as he received it. If the vehicle had been damaged he could defer repairs, perform amateur or temporary repairs or not bother with repairs at all. These would not be options with the replacement vehicle. Accordingly by forcing the plaintiff into a replacement vehicle the respondents had exposed him to risks which he did not previously face and accordingly his insurance needs were different. The defendant accepted that the nil excess which arose by virtue of the collision damage waiver charge was not a betterment see *Marcic v Davies* (unreported) and *Bee v Jenson* [2006] All ER (D) 352.

(e) There was no courtesy car available to the plaintiff, see *Jamison v Ellison & another* [2008] NI Cty 2 and the discussion in relation to this point in the Article entitled "Credit Hire: A short introduction to the relevant law" by DJ Richard Pates, published in volume 20 Number 1 winter 2008/9 Association of HM District Judges Law Bulletin.

[8] A credit hire rate covers the cost of benefits and services which are in addition to those which would be provided under a spot hire rate. Credit hire companies do not require the hirer to produce an acceptable debit or credit card in advance ("up front"). Nor is the hirer required to pay the hire charges in any other way. Instead when a motorist seeks a replacement car

for the period while his own car is off the road, the credit hire company provides the car sought and then seeks to recover its charges from the negligent driver's insurers. Ordinarily when seeking compensation from the negligent motorist in respect of hire charges the additional benefits and services which make up the difference between the spot hire rate and the credit hire rate have to be brought into account so that the damages recoverable are limited to the spot hire rate, see *Dimond v Lovell* [2002] 1 AC 384. However it was held in *Lagden v O'Connor* [2004] 1 AC 1067 that these additional benefits and services do not have to be brought into account if the injured party had no choice by virtue of impecuniosity but to hire a replacement vehicle on credit hire terms. An impecunious plaintiff who is unable to pay car hire charges, without making sacrifices which he could not reasonably be expected to make, would have no choice but to use the services of a credit hire company.

"So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted." See *Lagden v O'Connor* at paragraph [34].

Accordingly if the evidence shows that the plaintiff had no choice but to use the services of a credit hire company and that, if he was to make use of these services, he had no way of avoiding the additional benefits that were provided to him then he is able to recover a credit hire rate.

[9] Mr Orr on behalf of the plaintiff conceded that the burden of proof is on the plaintiff to establish that he was impecunious and therefore had no choice but to hire a replacement vehicle on credit hire terms. He is supported in that concession by *Kevan and Ellis on Credit Hire* Chapter 9 page 102 where it is stated that "the burden of proof lies with the plaintiff". I have reservations as to the correctness of that concession and as to whether in fact the burden is on the defendant to establish that the plaintiff had a choice and chose a more costly route. I have not heard any submissions in relation to this point and it is not necessary to my decision in this case.

[10] The plaintiff seeks to recover a credit hire rate. The defendants challenged the plaintiff's impecuniosity. Accordingly as a question of fact it falls to be determined whether the plaintiff had no choice due to impecuniosity but to use the services of a credit hire company. If he had no choice due to impecuniosity he is entitled to recover a credit hire rate. If he

did have a choice then he is entitled to recover a spot hire rate. That is the first factual issue in this appeal.

[11] If, as a question of fact, the plaintiff is entitled to recover a credit hire rate then it is contended by the defendant that the credit hire rate charged was unreasonable. The principles as to how to assess whether a spot hire rate is reasonable were set out by Aldous LJ in *Burdis v Livesey* [2003] QB 36 at paragraph [147] & [148]. The same principles apply to a credit hire rate. Thus the plaintiff is entitled to go to the nearest credit hire company (and by nearest I mean the most convenient either geographically or by means of a computer internet search or by reference to Yellow Pages) and is prima facie entitled to recover the amount charged whether or not the charge is at the top end of the range of credit hire rates. However that basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances. The evidential burden is on the defendant to show that it would not have been reasonable to use that particular credit hire company and that a reasonable course would be to use another company which charged a lower credit hire rate. Thus for instance the plaintiff could select by chance through Yellow Pages a credit hire company and make one telephone call to that company entering into an agreement with it. Prima facie he would be entitled to recover that rate. The evidential burden is then on the defendant to establish the reasonable steps that ought to have been taken by the plaintiff for instance to make further telephone calls which would have revealed a lesser rate. It could be anticipated that ordinarily it would not be hard to satisfy that evidential burden.

[12] The ultimate result of following the sequence which I have set out is that the plaintiff is entitled to a reasonable rate. However it should be recognised that this is the result which should not be conflated with the sequence to be followed to arrive at that result. Prima facie the plaintiff is entitled to the rate which he paid. Thereafter the burden is on the defendant to show in the particular circumstances that it would not have been reasonable to use that particular credit hire company and that the reasonable course would be to use another company which charged a lower credit hire rate. Another way to articulate the same proposition is that a reasonable rate is not necessarily the cheapest. All the circumstances have to be taken into account including the important but not necessarily decisive consideration as to where the rate lies in the range of rates being charged in the market place. In considering where the rate lies in the range of rates being charged in the market place reference can be made to the rates contained in the Association of British Insurer's General Terms of Agreement between subscribing insurers and credit hire organisations. By definition there are credit hire organisations that have agreed to those rates and those rates are available in the market place. However that is not to say that a particular plaintiff has access to a credit hire organisation who has agreed to those rates though in

the internet age I envisage that factually the number of persons who do not have access to such a credit hire organisation will be diminishing. Accordingly the rates contained in that document are not determinative and other factors have to be taken into account for instance, convenience, reliability and the personal circumstances of the individual plaintiff, including his or her ability to carry out, or to have carried, out an internet search. That is accordingly the second factual issue in this appeal.

[13] The defendants contended that the rates charged by Crash Services for credit hire are inflated and are a commercial exploitation of claims arising out of road traffic accidents. Companies exist to make profits and this was not put forward as having any other impact on the issues in this case except insofar as factually it might have an effect on the second issue as to whether the plaintiff had been acting reasonably in using Crash Services as opposed to using another company which charged lower credit hire rates. Thus for instance, if indeed Crash Services were charging exorbitant credit hire rates, then one would expect to see those rates being undercut in the market place by competitors.

#### **Evidence and Findings in relation to Impecuniosity**

[14] At the date of the road traffic accident the plaintiff was 18 years of age. He was in the middle of his "A" level exams. He lived in a rural area and used the car to and from his school. He had a part-time job at the weekend in a restaurant. He earned approximately £70-£80 per week. He had no other source of income and he spent most of his earnings on running his car including paying for comprehensive insurance cover. He had no assets. He had no credit or debit cards. He gave evidence that he would have been unable to have paid in advance for car hire charges.

[15] I find that the plaintiff was impecunious and as a result he had no choice but to use the services of a credit hire company. The plaintiff is therefore entitled to recover a credit hire rate.

#### **The facts relating to the plaintiff's choice of Crash Services as the credit hire company**

[16] After the road traffic accident the vehicle was collected by Brian Maginness the owner of a local garage business and taken to his premises which were approximately 200 yards from the scene of the accident. The plaintiff notified his insurers, Quinn Direct, by telephone. He informed his insurers that the accident was not his fault and that his car had been damaged. The plaintiff wished the repairs to be carried out by Brian Maginness as he had provided a reliable service in the past to his family. His insurers were agreeable to this but informed him that it would be quicker if the car repairs were organised and paid for by Crash Services. The plaintiff

knew nothing about Crash Services and did not know where they carried on business. He was given their telephone number by Quinn Direct. Quinn Direct was liable on foot of the comprehensive insurance policy to repair the plaintiff's motor vehicle. It was in their commercial interests to involve Crash Services because Crash Services would pay the garage owner to carry out the repairs to the motor vehicle and would then seek to recover that amount from the defendant's insurance company. Quinn Direct would be relieved of their obligation to authorise the repairs, to make a payment under the comprehensive policy of insurance and then to recover the amount from the defendants' insurers. There was an advantage to Crash Services as they intended to factor the bill owed by the plaintiff to the garage for the repairs. Accordingly Quinn Direct gave the plaintiff the telephone number of Crash Services and advised the plaintiff to contact them in relation to the repairs to the vehicle. The plaintiff then telephoned Crash Services and they in addition to arranging the repair of the damage to the vehicle asked whether he wished to hire a replacement vehicle on credit hire terms. He replied that he did and a verbal agreement was entered into to that effect. There was no mention of the hire rate during that telephone call and the first occasion on which the plaintiff was aware of the hire rate was when he collected the replacement car from Brian Maginness' garage and signed the written agreement with Crash Services. In short he did not pay any heed to the daily rate. His choice of Crash Services was not influenced by the provision of collision damage waiver. He did not ring round any other credit hire company. The only enquiry that the plaintiff made in relation to Crash Services was of Brian Maginness, the garage owner, who informed the plaintiff that they were a reliable organisation. The plaintiff explained his lack of attention to the daily rate and the fact that he did not make any enquiries as to comparative rates on the basis that he was in the middle of his A level exams and accordingly did not have a great deal of time to research the market place. It was not suggested to him that he should or could have carried out an internet search for a credit hire company.

### **Alternative credit hire rates**

[17] The defendants called Mr McKinney a Director of Reliable Cars Limited which carries on business in Belfast providing credit hire. He gave evidence that his company was set up in 2004 and that it presently had an entry in Yellow Pages and an internet web page. He did not produce a copy of the entry in Yellow Pages nor a print out of the web site for Reliable Cars Limited. He stated that the company operated across Northern Ireland and had a stock of 53 vehicles with procedures in place to source alternative vehicles. The amount that Reliable Cars Limited would have charged the plaintiff was £32.75 per day, which was the rate contained in the Association of British Insurer's General Terms of Agreement between subscribing insurers and credit hire organisations. This rate is significantly less than the rate charged by Crash Services of £42.00 per day.

[18] In cross-examination Mr McKinney agreed that:

(a) Reliable Cars Limited did not have any entry in Yellow Pages in 2007-2008 and that the current entry in Yellow Pages only gives the address and telephone number without any indication that the company carries on business as a credit hire company.

(b) That in contrast to Crash Services Reliable Cars Limited did not advertise on billboards, TV, newspapers or carry on promotions through garages or other businesses.

(c) That there was no garage or business in County Fermanagh that promoted Reliable Cars Limited in 2007.

(d) In 2007 the only way of finding out about Reliable Cars Limited for an 18 year old in County Fermanagh such as the plaintiff was on the internet.

(e) The internet presentation for Reliable Cars Limited in 2009 was the same as it had been in 2007.

(f) Reliable Cars Limited had no restriction on or special terms in respect of hiring cars to persons less than 21 years of age.

(g) Reliable Cars Limited did not and still does not provide collision damage waiver.

(h) Reliable Cars Limited charged an administrative fee of £30 but did not charge for delivery of the replacement vehicle.

(i) Reliable Cars Limited is a second tier subscriber to the Association of British Insurer's General Terms of Agreement between subscribing insurers and credit hire organisations. To be a first tier subscriber a credit hire organisation has to provide vehicles on a national basis. Reliable Cars Limited provides vehicles on a provincial basis and therefore is a second tier subscriber.



[19] The defendants did not call any other evidence as to credit hire rates. There was an affidavit from Majella Laird, a legal secretary in the defendant's solicitors firm. This gave spot hire rates exhibiting web pages with those rates. It did not exhibit any web pages in relation to credit hire rates nor did it list out any other companies that provided credit hire terms in Northern Ireland.

**Conclusion as to whether the defendants have established that it would not have been reasonable for the plaintiff to use Crash Services and that a reasonable course would have been to use Reliable Cars Limited.**

[20] The plaintiff made no attempt to consider the rate of hire. He simply signed the hire agreement being indifferent as to the amount to be charged. I also find as a fact that he was indifferent, within reason, as to which company provided the replacement vehicle and that if he had made enquiries he would have selected a credit hire company on the basis of price. Accordingly if he had known of Reliable Cars Limited he would have used that company. Similarly if he ought to have known of Reliable Cars Limited through reasonable enquiries then he ought to have used that company.

[21] The plaintiff did not know of Reliable Cars Limited. Ought he to have known? The evidence established that Reliable Cars Limited did not have a visible presence in the market place in County Fermanagh. There was no evidence from the defendant that an internet search would have been relatively straightforward. The web page of Reliable Cars Limited was not produced by the defendants in evidence. There was no evidence as to what sites would have been produced by a Google search for motor vehicle credit hire companies in Northern Ireland. There was no evidence as to how long such an internet search would have taken. Such evidence may be forthcoming in other cases and if it is then even for those facing exams it might be established that such a comparative search of the market place would not be particularly arduous or time consuming. However in this case, absent such evidence and with particular emphasis on the fact that the plaintiff was in the middle of his "A" level exams, I conclude that the defendants have not established that it was unreasonable for the plaintiff to use Crash Services. I accordingly allow the plaintiff's appeal and award £1,092 plus VAT in respect of the hire charge as opposed to £795.86 plus VAT awarded in the County Court.

### **Costs**

[22] I will hear counsel in relation to the order to make in relation to costs given the amount of the difference between the award in the County Court

and on appeal. A question may also arise as to the appropriate order to make given the involvement of senior counsel for both parties.