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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

ONAPPEAL FROM THE COUNTY COURT
FOR THE DIVISION OF BELFAST

_____

BETWEEN:

WILLIAM McATEER

Plaintiff/Appellant:

and

STUART KIRKPATRICK

Defendant/Respondent:

_____

McCLOSKEY J

I INTRODUCTION

[1] The battle between insurance companies and credit hire organisations rages on. The High Court listed four "credit hire" appeals for hearing on 10th June 2011. Only one of these proved capable of settlement, with the notable assistance of a lodgement. In two of the other three contested cases, the amount in dispute between the parties was less than £300.

[2] The over-riding objective governing litigation in the High Court – enshrined in Order 1, Rule 1A – requires the court (*inter alia*) to deal with each case in a manner

proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. Moreover, the court is enjoined to allocate to every case "*an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*". The over-riding objective is about to celebrate its tenth anniversary, having been introduced on 5th September 2001 (by SR 2001 No. 254). It co-exists with its County Court counterpart, enshrined in Order 58 of the County Court Rules and introduced with effect from 4th November 2002 (by SR 2002 No. 255).

[3] The mechanism of arbitration – popularly known as "small claims" – was introduced by Article 30(3) of the County Courts (NI) Order 1980 ("the 1980 Order") which, in its original incarnation, conferred jurisdiction on the Small Claims Court in cases where the amount claimed or the value of specific chattels claimed did not exceed £200. With the passage of time there have been progressive increases, with the result that the present jurisdictional limit is £3,000, effective from 2nd May 2011 (by SR 2011/69). By virtue of Article 30(3), the arbitration of claims where the amount in dispute is less than £3,000 is obligatory "*save as otherwise provided by County Court Rules*".

[4] Ever since the operative date of Article 30(3) there has been a category of excluded claims. From the outset, claims for damages for personal injuries and claims for damages "*in respect of a road traffic accident*" have been excluded from the jurisdiction of the Smalls Claims Court. As a result, all cases belonging to these two excluded categories are heard either by the District Judge (with a jurisdictional limit of £5,000) or a County Court Judge (with a current jurisdictional ceiling of £15,000). These exclusionary provisions have important consequences for appeal rights. By virtue of Articles 30 and 60 of the 1980 Order:

(a) In a small claim, an appeal lies to a County Court Judge on a question of law.

(b) Where the aforementioned appeal route is not pursued, there is the possibility of an appeal by case stated on a question of law to the Court of Appeal.

(c) In contrast, in all cases determined by a District Judge or County Court Judge, not being small claims, there is an automatic right of appeal to the High Court. In such cases, the decision of the High Court is final unless a case is stated for the opinion of the Court of Appeal on a point of law, in which case the decision of the Court of Appeal is final: see Article 60(3) and Article 62 of the 1980 Order.

[5] The net effect of the statutory arrangements is that there is an automatic right of appeal to the High Court in every credit hire case, irrespective of the amount involved, the importance of the case or the complexity of the issues. The justification

for this in credit hire cases involving trivial amounts of money, no point of principle and no point of law seems increasingly questionable.

[6] The categories of case excluded from the Small Claims Court were considered by the Civil Justice Reform Group, under the chairmanship of Campbell LJ. In its Interim Report, published in April 1999, the Group, having noted the contrary practice in England, made the following observations:

> "*7.20 The Group itself has a number of reservations regarding the incorporation of personal injury litigation into the small claims procedure. In particular, the Group is concerned that even small personal injury actions may involve a significant degree of complexity in matters of substantive law as well as evidence, rendering such matters open to legal representation and the additional expense occasioned by medical reports and expert witnesses. Given the 'no costs' rule, even a successful claimant would have to incur such expenses out of his or her own pocket, thus reducing the net value of any award – and therefore the incentive to make such a claim in the first place. Concern was also expressed that claimants might come to court unprepared and without a full appreciation of the true extent of their claims, thus running the risk of obtaining much less in the way of damages than they were legally entitled to be awarded. Such dangers are more likely where an inexperienced and unrepresentative claimant is opposed by a legally sophisticated Defendant backed by an insurance company. At the same time, the Group is anxious that those who receive very minor injuries have ready access to justice*".

The Group's interim conclusion was that the issue was a finely balanced one and it invited further representations prior to formulating its recommendation. In its Final Report, published in June 2000, the Group recommended the maintenance of the exclusion from the Small Claims Court of personal injury cases, having noted that most consultees supported this course. Notably, the Group emphasized its espousal of this position "*… with a view to protecting the interests of unrepresented claimants*" particularly.

[7] The Civil Justice Reform Group also examined the exclusion of road traffic accident cases from the Small Claims Court. In its final report, it concluded:

> "*The Group has concluded that, on balance, most claimants who become involved in road traffic accident litigation will continue to want and require legal support. Unrepresented claimants are likely to find themselves pitted against much more legally sophisticated opponents. Although arguments*

> *to the contrary were persuasively advanced, the Group remains of the view that to allow such cases into the Small Claims Court would reduce, rather than increase, access to justice. In a forum where even successful claimants are not entitled to their legal costs, there is a risk that legitimate cases may not be pursued or that disadvantageous settlements may be accepted through fear of adding expense and further reducing any damages payable. Claimants in Northern Ireland are facilitated by a County Court system that allows low value road traffic claims to be litigated before District Judges at a reasonable (and recoverable) cost and with the minimum of delay. …*
>
> *The weight of opposition to inclusion, not only from legal practitioners but most notably from the General Consumer Council, has convinced the Group that the balance of advantage lies in continuing to exclude road traffic accident litigation from the Small Claims Court*".

These two specific exclusions are reflected in Order 26, Rule 2 of the County Court Rules.

[8] The phenomenon of credit hire litigation in this jurisdiction largely postdates the Civil Justice Reform Group Reports. In credit hire cases, the Plaintiff is invariably legally represented (consistent with his written contract with the credit hire organisation). So also is the Defendant, who is backed by an insurance company. This is the first noteworthy feature of this *genre* of litigation. The second is (in the experience of this court) that, in the majority of cases, the issues in dispute between the parties relate to the claims for credit hire and, occasionally, some other related item of financial loss. Disputed personal injuries issues are, in the experience of this court, most uncommon. Increasingly, the only issue of substance in dispute between the parties is the daily rate of hire, giving rise to appeals to the High Court involving very small sums of money, frequently well under £500.

[9] Given these considerations, one might legitimately wonder whether, in credit hire cases, there is any enduring justification for the application of the Small Claims Court exclusions. This could, perhaps, be usefully debated by the County Court Rules Committee. In particular, consideration might be given to simply adding the words "*except where the Plaintiff is legally represented*" or "*except where both parties are legally represented*" to Order 26, Rule 2(a) and (b) of the County Court Rules. In principle, this would address the mischief which was a matter of concern to the Civil Justice Reform Group. This tentative suggestion is stimulated by the disproportionate exhaustion of court time, expertise and resources in cases involving very small amounts of money and no new issues of law of substance. The second stimulus for this observation is the apparently insatiable appetite which both insurance companies and credit hire organisations have for contested litigation in the smallest of cases. It would appear that large numbers of these cases are

contested at first instance and a disproportionately high percentage are the subject of an ensuing appeal to the High Court. Virtually none of these appeals requires the determination of any point of principle or question of law of substance. Rather, the vast majority involve the application of well established legal principles to the particular factual matrix. In these circumstances, the enduring justification for an automatic right of appeal to the High Court in such cases seems increasingly dubious.

Credit Hire Litigation

[10] The basic framework of most cases belonging to this field is both familiar and recurring. In ***Turley –v- Black*** [2010] NIQB 1, it is described in the following way:

> "[2] *Cases belonging to this group typically have the following features:*
>
> *(a) The Plaintiff claims damages against the Defendant tortfeasor arising out of a road traffic accident, in which the Plaintiff's vehicle is damaged.*
> *(b) An element of the Plaintiff's claim relates to the hire of a substitute vehicle following the accident in question.*
> *(c) There is a commercial supplier of vehicles, who provides the vehicle in question to the Plaintiff during the relevant period.*
> *(d) The supply arrangement has a financing dimension, involving a credit hire company, with whom the Plaintiff contracts.*
> *(e) There is usually a commercial relationship between the vehicle supplier and the credit hire company.*
> *(f) The Plaintiff normally obtains, pursuant to his contract with the credit hire company, benefits over and above the basic use and enjoyment of the substitute vehicle –to be contrasted with a simple hire arrangement.*
> *(g) In most cases, the Plaintiff's claim in respect of the substitute vehicle is not one for out of pocket losses actually sustained as a result of making payments for the service. This is the normal scenario. In such cases, if the court determines to make any award to the Plaintiff in respect of the vehicle hire, the ultimate beneficiary of such award will be the credit hire company, by virtue of the agreement which it has struck with the Plaintiff. Sometimes the credit hire company itself can pursue the claim, by virtue of subrogation rights acquired under the financing contract.*
> *(h) In virtually every case, the amount claimed by the Plaintiff in respect of vehicle hire is strongly contested by the*

> *Defendant, on the ground that it is excessive and unreasonable.*
>
> *As will be readily apparent, the agencies who are really doing battle in these cases are the credit hire company and the Defendant's insurers, rather than the Plaintiff and the Defendant."*

Further noted in ***Turley***, credit hire cases come before the High Court under one of the following three guises:

> *"(a) **A substantive appeal**. In this category, the High Court becomes seized of an appeal by a dissatisfied Plaintiff or Defendant against the decree of the District Judge or County Court Judge. In most of these cases, the only aspect of the decree seriously under appeal is that relating to the vehicle hire claim.*
> *(b) **Interlocutory appeals**. In this category, the High Court becomes seized of appeals against interlocutory orders made by the District Judge or County Court Judge. These orders are typically made in the context of applications relating to (i) discovery of documents, (ii) the service of interrogatories or (iii) the service of a subpoena on some person other than the Plaintiff or Defendant or any servant or agent of either.*
> *(c) **Interlocutory appeals from the Master**. Cases belonging to this distinct category reach the High Court initially by means of a simple appeal against the substantive decree of the District Judge or the County Court judge. Thus, at the outset, they belong to category (a). However, having reached the High Court, one of the parties (normally the Defendant) decides to pursue an interlocutory application, for the first time, usually of the type described in (b) above. This generates a ruling by the Queen's Bench Master which is challenged by an appeal to the High Court Judge."*

The Present Appeal

[11] The present appeal has no untypical features and belongs to the broad framework outlined above. The Plaintiff (viz. the credit hire organisation) and the Defendant (viz. the Defendant's insurance company) are in dispute about one issue only: *the rate of hire*. The credit hire organisation concerned is Crash Services Limited ("*Crash*"). The Plaintiff executed a standard form credit hire agreement with Crash. This contained the following provisions:

> *"**Hire Vehicle (or similar vehicle)***

Vauxhall Astra 1.8 or similar

Maximum daily rate

£51.50".

Crash duly supplied the Plaintiff (through its agent) with a Vauxhall Astra vehicle for a period of twenty-one days. In the event, the daily rental rate levied in the Crash invoice to the Plaintiff was £48.50, giving rise to a total figure of £1,018.50. The Defendant's insurers contended initially that the daily rate should not be in excess of £37.33, giving rise to a competing figure of £789.83. Thus the parties were, in consequence, in dispute about the sum of £234.57. Ultimately, during the trial, following due adjustment of the Defendant's competing rate to the amount of £44.33 *per diem*, the amount in dispute upon the hearing of this appeal was reduced to the princely sum of £91.57. Given the factors of legal representation and (effective) costs and outlays indemnity for both parties, any suggestion that this type of case does not truly belong to the forum of the Small Claims Court seems to me unsustainable.

Governing Principles

[12] The judicial determination of cases belonging to this sphere of litigation engages a series of inter-related principles. These are the following:

(i) The principle **of *restitutio in integrum***: this being a claim in tort and not in contract, damages are designed "*… to place the injured party in the same position as he was before the accident as nearly as possible*". (Per Lord Hope in ***Lagden –v- O'Connor*** [2004] 1 AC 1067, paragraph [30]. See also McGregor on Damages (18th Edition), paragraph 1-023 and following).

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

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

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

> *"But the principle is that he must take reasonable steps to mitigate his loss. The injured party cannot claim reimbursement for expenditure by way of litigation that is unreasonable…*
>
> *If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle."*

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

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

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

And per Aldous LJ:

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

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

whether via the mechanism of the Civil Evidence (Order) 1989 or otherwise.

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

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

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

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

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

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

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

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

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

> *"How does one estimate the value of these additional benefits that Mrs. Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay First Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car. As the judge said, First Automotive charged more because they offered more. The difference represents the value of the additional services which they provided. I quite accept that a determination of the value of the benefits which must be brought into account will depend upon the facts of each case.* ***But the principle to be applied ... seems to me to lead to the conclusion that in the case of a hiring from an accident hire company, the equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided****". (*Per Lord Hoffmann, my emphasis).

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

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

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

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

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

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

> *"So he will be at risk of being worse off than he was before the accident. That would be contrary to the elementary rule that the purpose of an award of damages is to place the injured party in the same position as he was before the accident as nearly as possible". (**Lagden –v- O'Connor,*** paragraph [30]).

(xi) **The principle of res inter alios acta**. The essence of this principle is expressed by Nicholson LJ as "*the well known legal principle that a tortfeasor cannot require the injured party to invoke his contract with his insurers in order to mitigate his loss*". ***McMullan –v- Gibney*** [1999] NIJB 17, at p. 18. See also ***Giles –v- Thompson*** [1993] 3 All ER 321, per Sir Thomas Bingham MR at p. 349 and the pithy statement of Longmore LJ in ***Bee –v- Jenson*** [2007] EWCA. Civ 923 – "*The fact that* [the Plaintiff] *is*

> *insured should be irrelevant to his claim …"*: paragraph [23]). The reach of this principle did not serve to redeem the unenforceable agreement in ***Dimond –v- Lovell***. The simple rationale of this conclusion was that to hold otherwise would defeat the policy of the legislation, which was to declare unenforceable the type of agreement under consideration. However, absent a vitiating factor such as unenforceability, this remains a doctrine of some potency in this sphere of litigation.

Principles (i) and (iii) – (ix) are engaged in the circumstances of the present appeal.

Evidence and Argument

[13] The Plaintiff's accident occurred on the afternoon of Good Friday, 2nd April 2010. He confirmed that at the time of executing his agreement with Crash and receiving a substitute vehicle the following day his expectation was that the other (blameworthy) parties' insurers would be responsible for the rental cost. He stated in cross-examination that he did not enquire about the rental rate, nor was there any discussion about this matter. He knew nothing about the vehicle hire facilities of other providers in the market. No factual controversy of substance emerged from the Plaintiff's evidence.

[14] Evidence was given on behalf of the Defendant that a suitable vehicle at the rate of £37.33 per day would have been available from Independent Car Hire Limited "*ICH*") and Ram (NI) Limited ("*Ram*") at the relevant time. The significance of the daily rental rate of £37.33 is that it coincides with the so-called "ABI" rate. The latter rate emanates from an agreement between subscribing insurers and credit hire organisations. This is dated 1st August 2009. It provides, in paragraph 1.1:

> "*These terms of agreement set out the arrangements between subscribers for the provision of replacement vehicles to third party motorists … and, where appropriate, the undertaking of repairs. Whilst intended to provide comprehensive guidelines, these are entirely voluntary between the subscribers involved, who may elect to un-subscribe from* [**sic**] *the* [agreement] *at any time*".

This agreement makes provision for, *inter alia*, maximum daily rates of hire. Subscribers to the agreement are spread throughout the United Kingdom. Neither Crash nor ICH subscribes to the ABA agreement. Ram does not subscribe to the agreement either. However, ICH and Ram *electively* apply the ABA agreement rates. Furthermore, as regards each of these providers, there is an additional cost:

(a) ICH adds collision damage waiver *and* a delivery and collection charge to the daily rate.

(b) Ram adds a standard administration fee of £25 to the daily rate.

Accordingly, the present case does *not* resolve to a simple contest between daily rental rates of £48.50 and £37.33. Rather, the gap between the two competing figures is narrower than this. In the specific case of ICH, the daily rate of £37.33 is, with the aforementioned additions, adjusted upwards to £44.33. As regards Ram, the increase is smaller, approximately £1 *per diem*.

[15] The evidence established that both ICH and Ram (and, for that matter, *any* provider in this market) determine their daily rental rates according to their perception of what is commercially viable in a highly competitive market. As neither is a party to the ABA agreement, their application of ABI rates is elective. ICH has been in business since February 2010 and, from the perspective of a member of public, its existence and services are broadcast through the medium of a single line advertisement in the yellow pages of the telephone directory. ICH does not operate a website. During the initial phase of its existence, members of the public accounted for less than 1% of ICH's business. The current figure is estimated to be a maximum of 2%. Ram is a very different type of provider. It is a small scale operation located in West Belfast, operating a fleet of approximately 40 vehicles. While, according to the affidavit evidence, this provider has a website its manager (Ms Hall) testified that a credit hire Google search would not elicit its existence.

[16] Applying the civil standard of the balance of probabilities, I accept all of the evidence rehearsed in paragraphs [13] – [15] above and make findings of fact accordingly.

[17] It was submitted by Mr. O'Donoghue QC (appearing with Mr. Dunn) on behalf of the Defendant (insurance company) that this appeal raises the following issue: what is the constraining mechanism to be imposed in circumstances where a "client capture" operation causes a reasonable Plaintiff not to search for other, cheaper vehicle hire rates? Mr. O'Donoghue drew attention to the factors of commercial realities and industry competition. The replying submission on behalf of Mr. Cleland on behalf of the Plaintiff (credit hire organisation) was, in a nutshell, that the application of the governing principles set out above impels to a finding in his client's favour.

Conclusions

[18] The parties were agreed – and I concur – that the central issues in this appeal are those of mitigation of loss and burden of proof, within the ambit of the general principles set out above. In ***Stokes –v- McAuley*** [2010] NIQB 131, this court stated:

> "[18] … *Where mitigation of damage is canvassed, the burden is on the Defendant to establish that the Plaintiff failed to take reasonable steps to mitigate his loss – bearing*

> *in mind that the loss, properly analysed, is the loss of use of his vehicle – or acted unreasonably in purported mitigation thereof*".

I acknowledge that, in reality, there may be no distinction of substance between act and omission in this respect, the present case arguably being a paradigm illustration. The application of the governing principles to *any* case will, unavoidably, be an intensely fact sensitive exercise. In the present case, I take into account and find that the Plaintiff's accident occurred late on Good Friday; he acted promptly in securing a rough estimate from a reputable repairing agency; his attempts to keep his car on the road were thwarted by its unexpected breakdown, due to the accident; the repairing agency referred the Plaintiff to Crash; he followed the guidance and advice of both the repairing agency and Crash thereafter; in doing so, he acted predictably and reasonably; and there was nothing unusual or unreasonable about his unawareness of either the existence of ICH or Ram *or* the services offered by these entities. I find that, in his particular circumstances, he acted entirely reasonably at all times.

[19] Next I turn to consider in greater detail the evidence relating to the availability of a cheaper rental rate from the two providers identified above. It is abundantly clear that the first of these providers, ICH, attracts virtually no members of the public and engages in extremely limited advertising. Approximately 98/99% of its customers are insurance brokers, repairing garages, recovery agents and solicitors. Furthermore, when fully analysed, the ICH daily rental rate would have been just £4 less than the Crash rate. In these circumstances, I find that the Plaintiff acted entirely reasonably throughout. The Defendant has failed to discharge its evidential burden of establishing that the Plaintiff should have engaged the services of ICH. Ram is a small scale operator carrying on business many miles from where the Plaintiff resides. The Plaintiff knew nothing about either company. I find this entirely unsurprising and I note the evidence that a Google search would not have elicited this company's existence.

[20] As regards Ram, the difference between the two daily rates is approximately £9. I find nothing startling about this, in a competitive commercial market. The mere existence of a somewhat lower daily rate does not, *ipso facto,* render unreasonable a rather higher daily rate. Furthermore, it is no function of the court to stifle legitimate profit making and competitive commercial activities. In this respect, I give effect to what was stated by Stephens J in ***Gilheany –v- McGovern*** [2009] NIQB 46, in circumstances where the difference between the competing rates was, as in one of the instances in the present appeal, approximately £10 per day:

> "[12] … *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.*"

Stephens J added:

> "[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.*"

I also concur fully with the following passage in ***Clark –v- Ardington Electrical Services*** (*supra*):

> "*[150] … We had the assistance of written submissions from Michael Brindle QC, who appeared for Centrus Limited, which was given leave to intervene. He provided us with information on the Association of British Insurers ("ABI") scheme and suggested that the appropriate measure of damage for loss of use should be that set out in the scheme or based upon it. No doubt the scheme is, and will be of benefit to insurers, the accident hire companies and the public;* ***but the ABI figures cannot be taken in hostile litigation as being the appropriate figures of loss. They reflect a***

> ***compromise agreed between the parties rather than an assessment of loss***."

[My emphasis].

It follows that I concur also with the following formulation in ***Kevan and Ellis on Credit Hire*** (p. 94):

> "*It is not appropriate for Defendants to rely upon ABI rates …*
>
> *The simple truth is that the ABI rates and the General Terms of Agreement are not relevant to the court's task in these cases. They will be left out of account.*"

[21] I conclude that the Defendant has not discharged its burden of proof in the sense explained above. At first instance, the district judge awarded a daily rate of £37.33. This court was informed that, in doing so, the judge stated that he was awarding the "ABI" rate. For the reasons outlined above, I consider, with respect, that he was in error in doing so. In the abstract, it is possible that, in a particular case, where the Defendant *does* discharge its evidential onus the ABI rate might coincide with what the court finds to have been the recoverable rate. However, if a court were to conclude that the Defendant's onus has been discharged and that, in consequence, a lower daily rental rate should be awarded, the rationale would be that, in the particular factual matrix, the Plaintiff's failure to avail of a lower rate from some other commercial provider constituted a failure to take reasonable steps in mitigation of his loss (being the loss of use and enjoyment of his vehicle). As in the case of the present appeal, any such conclusion would be unavoidably fact sensitive, made in the context of the particular evidential matrix before the court and the court's specific findings of fact.

Value Added Tax

[22] The parties were in agreement that the VAT rate has increased from 17.5% to 20% since the generation of the Crash invoice and the Defendant conceded that the higher rate should be awarded. Giving effect to the principle of *restitutio in integrum*, I concur with this. Furthermore, the operative VAT rate is that applicable at the time of payment: see Regulation 90 of the Value Added Tax Regulations 1995, together with the HMRC VATT0S9155/9160 and 9165 (the relevant statutory Notices). Accordingly, the vehicle hire element of the degree will be £1,778.50 viz. 21 days at a daily rate of £48.50 plus VAT @ 20%. I would add that, as a general rule, the court would expect the agreed documentary evidence to include an amended invoice specifying the higher rate of VAT.

Disposal

[23] The Plaintiff's appeal succeeds accordingly. The decree of the court at first instance was £1,532.44. I vary this to £1,778.50. Finally, I record that the Plaintiff expressly abandoned his claim for interest pursuant to Article 45A of the 1980 Order. In the course of argument at the hearing, I suggested, tentatively, that interest is unlikely to be recoverable in cases of this nature, bearing in mind the expedition with which County Court claims can be processed and determined and taking into account also that the beneficiary of awards in these cases is a non-litigant, a commercial organisation, rather than the Plaintiff.

[24] The Plaintiff is entitled to recover costs above and below.

Postscript

[25] The court was persuaded to prepare a reserved written judgment in this appeal having been informed that there may be a not insignificant number of credit hire cases in which, *prima facie*, the decisions at first instance are not readily reconcilable with the governing principles set out above. In particular, it was suggested that the so-called "ABI" rate may be prevailing in certain courts. For the reasons explained above, I respectfully disagree with any approach which does not adhere strictly and faithfully to the governing principles. I trust that the promulgation of this judgment will be of assistance in achieving the important goal of consensual and, hence, less expensive resolution of disputes belonging to this sphere of litigation.