Neutral Citation Number: [2022] EWCA Civ 497

Case No: CA-2021-000577 (formerly B2/2021/0797)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE COUNTY COURT AT WALSALL
Recorder John Benson QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE SINGH
and
LORD JUSTICE DINGEMANS

- -

Between :

MS LORNA ARMSTEAD	**Claimant/ Appellant**
- and -	
ROYAL SUN ALLIANCE INSURANCE COMPANY LIMITED	**Defendant/ Respondent**

- -
- -

Benjamin Williams QC and Ben Smiley (instructed by **Principia Law**) for the **Appellant**
Quentin Tannock (instructed by **DAC Beachcroft Claims Ltd**) for the **Respondent**

Hearing date : 31 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 9.45 hrs on 28 April 2022.

Lord Justice Dingemans :

Introduction

1. This appeal raises the issue of whether the hirer of a motor car (Ms Lorna Armstead) can rely on terms which she agreed with the hire company (Helphire Limited) who rented the motor car to her, to establish the quantum of her claim for damages against the insurers (Royal Sun Alliance Insurance Company Limited) of a negligent driver of another motor car, who had driven into Ms Armstead's hire car.

The first road traffic accident and the replacement Mini Cooper hire car

2. As a matter of background the appellant, Ms Armstead, had a road traffic accident for which she was not at fault in which her own motor car was damaged. Liability for the accident was admitted by that other person who had collided with Ms Armstead's car. That first road traffic accident explains why Ms Armstead was driving a hire car at the time of the second and material road traffic accident.

3. Ms Armstead was provided with a Mini Cooper motor by Helphire Limited ("Helphire") pursuant to a vehicle credit hire agreement dated 9 November 2015 ("the Helphire agreement"), while her original car was being repaired. The daily rental charges under the Helphire Agreement for a 1-6 day period was £168.30; for a 7-27 day period was £145.30; and for a period over 28 days was £130.

4. The following were material terms of the Helphire agreement. There was a CDW (collision damage waiver) charge of £60. There was a declaration that the hirer "acknowledges its obligations to return the hire vehicle in its pre-hire condition and its obligations to pay in default in accordance with the provisions of clauses 11, 12, 13, 14, 15, 16, 17, 19 and 20". The period of hire could be terminated on 24 hours notice pursuant to clause 3. In addition:

   (1) Clause 14 provided that "You must return the hire vehicle in the same condition as it was … at the start of the hire and (even if there is a policy of insurance covering such loss) shall … indemnify and pay the lessor immediately on demand for any loss of, and/or damage to, the hire vehicle."

   (2) Clause 16 provided that: "You will on demand pay to the lessor an amount equal to the daily rental rate specified overleaf up to a maximum of 30 days in respect of damages for loss of use for each calendar day … whether the hire vehicle is unavailable to the lessor for hire because … the hire vehicle has been damaged."

5. The evidence showed that terms such as clause 16 of the Helphire agreement were common in other motor car rental agreements, and Avis, Thrifty and Europcar had broadly similar terms.

The second road traffic accident and the damage to the Mini Cooper hire car

6. On 23 November 2015 Ms Armstead had another road traffic accident involving a collision between the Mini Cooper car and a Ford Transit Connect motor vehicle driven by Pawel Galewski. Mr Galewski drove the Ford Transit motor vehicle from a parking space into the road and collided with the nearside of the Mini Cooper motor car.

7. Mr Galewski was insured by the respondent Royal & Sun Alliance Insurance Company plc ("RSA"). Ms Armstead was not at fault, and it was common ground that the accident was caused by the negligent driving of Mr Galewski.

8. It became common ground on appeal, although there had been no findings of fact to this effect in the courts below, that the damage to the nearside of the Mini Cooper motor car did not prevent Ms Armstead from continuing to use the Mini Cooper motor car during her period of hire. She returned the Mini Cooper motor car to Helphire after her original car was returned to her and her period of hire concluded.

9. When it was returned to Helphire, arrangements were made for the Mini Cooper motor car to be taken for repairs. The Mini Cooper car was repaired from 8 January 2016 to 21 January 2016, being 12 days. The repairs cost £1990.65.

10. On 14 May 2018 (over two years after the repairs had been carried out) Ms Armstead received a formal demand, sent on behalf of Helphire, for payment for the hire costs for the 12 days that the Mini Cooper was being repaired. The demand was for £1743.60, being 12 days at £145.30. It is not apparent why the rate was claimed at £145.30 per day, which was the daily rate for hires of between 7-27 days, and not the daily rate of £130, which was the daily rate for hires over 28 days. As the car had been hired to Ms Armstead from 9 November 2015 until 8 January 2016, which was over 28 days by the time at which it was returned, and it had then been immediately repaired, it might be thought that the daily rate should have been at the rate of £130 per day. When this point was put to Mr Williams QC at the hearing of the appeal, he said he was content to claim £130 per day and not £145.30 per day. This would give a claim of £1560.

11. RSA did not pay for either the cost of the repairs or the hire costs and disputed any liability to do so.

The proceedings

12. Ms Armstead brought proceedings against RSA pursuant to the provisions of the European Communities (Rights Against Insurers) Regulations 2002 ("the 2002 Regulations") for losses caused by Mr Galewski's negligent driving. Under "vehicle damage" it was pleaded that "following the index accident, her vehicle of which she was bailee, suffered damage and a consequent immediate diminution in value". The cost of repairs to the Mini Cooper were pleaded at £1990.65. Under the heading "losses consequent on negligent vehicle damage" it was pleaded that pursuant to clause 16 Ms Armstead was obliged to pay the lessor, Helphire, a sum equal to the daily rental rate set out in the agreement. It was pleaded that the repair "took 12 days to carry out, during which time the hire vehicle was unavailable to the lessor", and hire costs for the 12 days that the Mini Cooper was being repaired were £1743.60.

13. In the defence RSA denied that Ms Armstead could bring the claim against RSA pursuant to the 2002 Regulations, and it was pleaded that RSA was refusing an indemnity to Mr Galewski. RSA noted that the invoice for the cost of repairs was made to Total Accident Management and therefore denied that Ms Armstead had suffered any loss and denied that Ms Armstead could bring a claim for subrogated losses.

14. RSA noted the claim for the hire charges when the Mini Cooper motor car was being repaired and pleaded that clause 16 was an unfair term under sections 62 and 63 of the

Consumer Rights Act 2015, was unenforceable as a penalty and that Ms Armstead should mitigate her loss by refusing to pay the sums.

15. RSA accepted that it would be under a duty to pay Ms Armstead a sum that Helphire reasonably demanded as compensation under clause 14 of the Helphire agreement, which provided that Ms Armstead should return the car in its pre-hire condition.

The judgment of the District Judge

16. Ms Armstead's claim was heard on 1 July 2019 before Deputy District Judge Fawcett ("the District Judge") in the County Court at Walsall. Counsel appeared on behalf of both Ms Armstead and RSA. Ms Armstead gave evidence and was cross examined.

17. The District Judge gave an extempore judgment. The judgment was recorded, although it appears that there was some immaterial corruption of the recording. A transcript of the judgment has been produced.

18. The District Judge introduced the claim and summarised the evidence given by Ms Armstead which was to the effect that she knew she would be liable for the hire costs, but also knew that they would be paid by the other side. She had been the driver and went along with what her insurers had decided to do. The District Judge recorded that the principal objection to the amount claimed was that it was an economic loss for which RSA ought not to be held liable because it was "an unforeseeable or too remote loss".

19. The District Judge referred to the "no recovery rule" set out in Clerk & Lindsell on Torts and authorities to the effect that there was a requirement for property of the claimant to be damaged. The District Judge considered that the current case was similar to claims for pure economic loss "as the claimant did not have any proprietary interest in the property. She does not hold title to the goods and simply held the vehicle as the hirer …". The no recovery rule was justified by both proximity and fairness. The District Judge specifically noted that Helphire had not brought the claim in their own name. The District Judge therefore dismissed the claims made by Ms Armstead.

The appeal to the Recorder

20. Ms Armstead appealed against the dismissal of her claim and a respondent's notice was lodged. By the time of the appeal it was common ground that the District Judge was wrong to disallow the claim for the cost of the repairs in the sum of £1990.65. The issue remained whether the claim for loss of use arising under the Helphire agreement could be pursued.

21. The appeal was heard on 21 and 22 January 2021 before Mr Recorder John Benson QC ("the Recorder") and counsel appeared on behalf of both Ms Armstead and RSA. Judgment was reserved. On 13 April 2021 the Recorder delivered a written judgment in which he dismissed Ms Armstead's appeal so far as it related to the claim for a daily rental rate under the Helphire agreement.

22. The Recorder summarised the list of disputed issues prepared by the parties identifying the issues to be whether the claim was "an unacceptable extension of the proprietary fiction in bailment"; whether the claim was a "relational economic loss" and

irrecoverable; whether RSA's driver had a duty of care to prevent [losses arising from] liabilities agreed by Ms Armstead with Helphire; and whether clause 16 of the Helphire agreement was enforceable against Ms Armstead.

23. The Recorder noted that it was common ground that Ms Armstead was a bailee and Helphire was a bailor, and a bailee may recover for the full value or cost of repair of a chattel as if they were the absolute owner, something which had been termed the "proprietary fiction". The Recorder stated at paragraph 24 that the respondent argued before him that "the proprietary fiction does not extend beyond giving the claimant the right to recover damages for the loss or damage of the bailed hire car and that her claim for consequential loss is unsustainable as a matter of law". The Recorder set out some passages from Palmer on Bailment before finding, in paragraph 28 of the judgment, that Ms Armstead was not using the hired car as a profit earning chattel on her own behalf and advanced no claim for her own loss of use of the vehicle. The Recorder said he considered that the reality of the loss being claimed was that of Helphire and that "the reality is that the claimant is claiming for and on behalf of Helphire to compensate for their loss of use".

24. The Recorder said that loss of income to a revenue earning chattel is a category of recoverable economic loss but that the respondent asserted that the sums due under clause 16 were a relational economic loss which was not recoverable. The Recorder referred to passages from Chitty on Contracts and Clerk & Lindsell on Torts. The Recorder said that the case which "exemplifies the relational economic loss definition is *Cattle v Stockton Waterworks Co* 1875 LR 10 QB 453". In paragraph 38 of the judgment the Recorder confessed to "having had some difficulty with the relational economic loss definition in its application to this case". This was because in one sense the claimant was the victim as she was in the car when the defendant's insured drove into her, in another sense the victim was Helphire who owned the car. In the event the Recorder concluded that the respondent's argument was to be preferred.

25. In dealing with other arguments the Recorder concluded that clause 16 was a means to circumvent the decision of the Court of Appeal in *Beechwood Birmingham v Hoyer Group UK Limited* [2011] QC 357. The judge considered issues of foreseeability and the tests for recovery of damage from *Caparo v Dickman* [1990] 2 AC 605. The judge set out substantial parts of the judgment of the Court of Appeal in *Network Rail Infrastructure v Conarken Group* [2011] EWCA Civ. 644; [2012] 1 All ER (Comm) 692 and considered the attempts to rely on it by Ms Armstead and the attempts to distinguish it by RSA before concluding in paragraph 57 of the judgment that "the scope of the defendant's duty of care did not extend to avoiding the claimant's liability to Helphire under the contract". The Recorder also found that it was not fair, just and reasonable to impose a duty of care of a nature and extent such as to avoid the claimant from having a contractual liability to a third party.

26. The Recorder then addressed some other County Court decisions relied on by Ms Armstead, but did not accept that they should alter his conclusion. The Recorder dismissed Ms Armstead's appeal because the sums claimed were relational economic loss, and in any event it was not fair, just and reasonable to impose liability on RSA for Ms Armstead's liability to Helphire, and because RSA's insured did not owe a duty of care to Ms Armstead to avoid her incurring a contractual liability.

The issues and respective cases on this appeal

27. Mr Benjamin Williams QC on behalf of Ms Armstead advances six grounds of appeal, but it is apparent there is an overlap between them. The grounds are: (1) the Recorder was wrong in law to find that the claim for special damages was precluded by the principle concerning relational economic loss; (2) the Recorder was wrong in law to find that the claim for special damages was precluded as not being a reasonably foreseeable consequence of the tort; (3) the Recorder was wrong in law to find that the claim for special damages was outside the scope of the tortfeasor's duty of care to the Appellant; (4) the Recorder was wrong in law to conclude that the claim for special damages constituted "an unacceptable extension of the proprietary fiction in bailment"; (5) the Recorder was wrong to have regard to the fact that the loss sought by the Appellant might have been greater than the claim for loss of profits which might have been brought directly by Helphire; and (6) the Recorder was also wrong to hold that the losses from clause 16 of Helphire's agreement were unreasonable as between Ms Armstead and RSA's insured driver.

28. In oral submissions Mr Williams complained on behalf of Ms Armstead of what he called "a blunderbuss" approach taken by the RSA to the claim made by Ms Armstead where every point regardless of merit had been taken against her. Mr Williams submitted that this was not a case which involved special principles for bailors and bailees, it was simply about applying established principles of the law of negligence. The Recorder had been wrong to rely on the decision in *Beechwood* because the car in that case was not a revenue generating asset. The Recorder had been wrong to consider that the compensation due under clause 16 of the Helphire Agreement was radically different from what would have been recovered at common law, and clause 16 represented a reasonable liquidated damages clause, similar to the one accepted by the Courts in *Network Rail Infrastructure v Conarken*. Mr Williams submitted that a similar approach had been taken in *Ehmler v Hall* [1993] 1 EGLR 137.

29. Mr Williams submitted that an application of the six questions identified by the Supreme Court in *Manchester Building Society v Grant Thornton* [2021] UKSC 20; [2021] 3 WLR 81 and *Meadows v Khan* [2021] UKSC 21; [2021] 3 WLR 147 showed that the sum due from Ms Armstead under clause 16 of the Helphire agreement was a recoverable head of loss from RSA's driver. There was nothing in Palmer on Bailment or in any principles of bailment which prevented recovery, and various dicta from the Master of the Rolls' judgment in *The Winkfield* [1902] P 42 should not be read as preventing Ms Armstead as bailee relying on her contractual liability to Helphire as bailor as the quantum of recoverable loss in this case. In short written submissions filed after the hearing, Mr Williams and Mr Smiley maintained that the only point established by *The Winkfield* relevant to the appeal was that possession is title. For all of these reasons the Recorder had made errors of law in his judgment.

30. Mr Tannock on behalf of RSA submitted that the loss claimed in this case was not consequential on the physical damage of the road traffic accident. The scope of the duty of care owed by RSA's insured driver did not extend to the kind of loss claimed under clause 16 of the Helphire agreement. If, however, it was within the scope of the duty of care, the quantum of the loss claimed was unreasonable as between Ms Armstead and RSA's insured driver because the sums claimed included amounts due for the cost of providing credit for the hire and pursuing the recovery for Ms Armstead. Helphire might have been able to supply another car from their stock of cars meaning

that their claim for damages would be limited to loss of interest and depreciation for the reasons given in *West Midlands Travel v Aviva Insurance* [2013] EWCA Civ 887; [2014] RTR 10, showing that the Recorder's reliance on *Beechwood* was not misplaced.

31. Mr Tannock submitted that the "proprietary fiction" in bailment did not extend to permitting this type of loss and the loss claimed, properly analysed, was a relational economic loss, which Mr Tannock analysed as a subset of economic loss. The six *Manchester Building Society v Grant Thornton* questions, when properly answered, showed that this loss was not recoverable and the Recorder was right to dismiss Ms Armstead's appeal against the dismissal of her claim for damages representing her liability under clause 16 of the Helphire agreement.

32. I am very grateful to Mr Williams and Mr Tannock, and their respective legal teams, for their helpful written and oral submissions.

Some relevant legal principles

33. Given the issues addressed in the judgments below and the submissions to this Court, it is necessary to set out some relevant principles relating to: the irrecoverability of damages for pure economic loss in negligence; damages for loss of use; and rights of those in possession of chattels.

34. The modern law about the irrecoverability of claims in tort for pure economic loss is said to start with *Cattle v Stockton Waterworks*. In that case a contractor who had agreed to construct a tunnel through an embankment was held not to be entitled to make a claim against a party which had installed a leaking water pipe on the embankment which had caused the ground to become waterlogged and which had increased the costs of constructing the tunnel. Blackburn J gave the judgment of the Court. He expressly recorded that the objection was "technical and against the merits, and we should be glad to avoid giving it effect." However he gave an explanation which has since been referred to as the floodgates argument, noting that if liability was accepted then "in such a case as that of *Rylands v Fletcher* LR 1 EX 265; LR 3 HL 330 the defendant would be liable, not only to action by the owner of the drowned mine, and by such of his workers as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done … It may be said it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so … No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited." The claim was dismissed. This approach to pure economic loss has been followed in numerous other cases including, for example, *The Aliakmon* [1986] AC 465. It is not necessary to analyse what exceptions exist to this general principle, because it is common ground that those exceptions are not engaged on this appeal.

35. Claims for economic loss consequential on physical damage are recoverable and have not been treated as claims for pure economic loss. This explains why a worker whose tools were damaged by the flooding at the mine could bring a claim for lost wages if he could prove that he was unable to work for a period of time because of the loss of or damage to his tools, in contrast to the position of the worker who had only a contractual right to work at the flooded mine who could not bring a claim for lost wages.

36. When chattels such as ships or cars are damaged, an owner may bring a claim for the economic loss of use of the chattel, see *Owners of No.7 Steam Sand Pump Dredger v Owners of Steamship Greta Holme ("The Greta Holme")* [1897] AC 596. This means that when a motor car is damaged in a collision the owner of a car which has been damaged by the negligence of another driver may bring an action both for the costs of repairs and for loss of use of the car when it is being repaired, see generally *Dimond v Lovell* [2002] 1 AC 384.

37. There may be difficult questions about how damages for loss of use should be assessed, see the shipping and motor cases examined in: *Beechwood* at paragraphs 33 to 47; and *West Midlands Travel v Aviva Insurance* [2013] EWCQA Civ 887; [2014] RTR 10 at paragraphs 5 to 27. These issues about the quantification of damages can apply even where the asset is "revenue generating", as was the damaged bus in *West Midland Travel*. In that case because the bus had been replaced from a stand-by bus kept for that purpose, the losses were limited to the costs of capital tied up in the bus, wasted expenses and depreciation. The car which was damaged in *Beechwood* was not revenue generating but had been provided to an employee for personal use. It could have been replaced from the fleet of additional cars owned by the claimant car dealership. Again in the particular circumstances of that case reasonable compensation was limited to an award on the interest and capital employed and any depreciation during the period of repair, see *Beechwood* at paragraph 52.

38. If a motor car needs to be repaired as a result of a road traffic accident, and the owner does not have a fleet of otherwise unused vehicles, the owner may hire a replacement motor car. So long as the hire agreement complies with the law and the hire costs charged are not excessive, the hire costs may be recovered. The "Basic Hire Rate" for a replacement motor car is proved by attempting to find from the lowest hire rate for a similar car from mainstream hire companies, see *Stevens v Equity Syndicate Management Limited* [2015] EWCA Civ 93; [2015] 4 ALL ER 458. In *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067 it was held that a driver may also recover the costs of approaching a credit hire company, such as Helphire, to obtain a replacement motor car where the innocent driver is not in a position to afford the daily Basic Hire Rate to obtain a replacement motor car. Hiring a Rolls-Royce to replace a Rolls-Royce while it is being repaired may be reasonable, see *HL Motorworks v Alwahbi* [1977] RTR 276

39. In order to avoid being a claim for irrecoverable economic losses in tort, the claim for economic losses consequential on physical damage to a chattel needs to be made by the owner or a person having a possessory interest in the chattel. Whether a person has a sufficient interest in the property which has been damaged, or needs to join the owner of the property to bring a claim for economic losses consequential on physical damage can raise difficult issues, see for example *Shell UK Limited v Total UK Limited* [2010] EWCA Civ 180; [2011] QB 86. In that case beneficial owners of a pipeline damaged by a fire negligently caused by the defendant were held to be entitled to bring a claim for their loss of profits caused by the damage, in circumstances where they had joined the legal owners to the claim, see paragraph 142.

40. A person who possesses, but does not own, a chattel such as a motor car is a bailee of the motor car. The common law has long recognised the right of those in possession of the damaged chattel to bring a claim for the cost of repairing the damage and for consequential economic losses under the law of bailment. The history of the law of

bailment was traced in the Attorney-General's argument in *The Winkfield* [1902] P 42 by reference to the fifth lecture on the common law by Oliver Wendell Holmes, Jr. It was suggested that the law had developed from remedies made available to those affected by cattle stealing at a time in history described in the lectures as "the primitive condition of England". The person in possession of the cattle at the time of the theft had authority to pursue the wrongdoer and was entitled to exercise the authority of the owner to follow the cattle and to raise a claim for their return. This seems to have been on the basis that the person in possession of the cattle would have been liable to the owner for the loss of the cattle.

41. In *The Winkfield* there was a collision between two ships near Cape Town. One was a troop ship travelling to South Africa and the other was a ship carrying passengers, crew and mail to the United Kingdom. The ship carrying mail sank, and some mail parcels were lost. The owners of various mail parcels gave the Postmaster-General authority to represent them in the action as a bailee of the mail parcels. An objection was taken to this course by the cargo claimants on the basis that unless the bailee Postmaster-General was liable to the bailor owners of the mail parcels, which it was common ground was not the position in that case, there could be no claim by the bailee. The objection was upheld at first instance but the Court of Appeal allowed the appeal by the bailee Postmaster-General. Collins MR said at page 54 "the position, that possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it, is well established in our law … it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant". The sums recovered by the Postmaster-General would be held on trust for the owners of the mail parcels. The reference to "jus tertii" is a reference to the right of a defendant to plead that there was an identified third party who had a better right to the interest claimed in the chattel, which might in certain circumstances amount to a defence to various claims for wrongful conversion of goods. The defence has been put on a statutory footing by section 8 of the Torts (Interference with Goods) Act 1977 ("TIGA 1977").

42. Collins MR noted that although the position was established in law, the reasons for the existence of the law of bailment given in some cases "are not quite satisfactory". Later, at page 55 of the report, Collins MR also said "the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor".

43. Consistently with the approach to claims by a bailee set out in *The Winkfield* it is established that a driver in possession of a motor car but who is not the owner, may bring a claim for damages for loss of use of a car, see *O'Sullivan v Williams* [1992] RTR 309 at page 405B. In that case the girlfriend of the owner of the car, who had possession of it at the material time and was therefore a bailee, was unable to make good her claim for loss of use because her boyfriend had also brought a claim for loss of use in the same action as the girlfriend bailee's claim. The boyfriend's claim had been compromised, albeit "without prejudice" to the girlfriend's claim. The Court held that a settlement which was without prejudice to the claim could not create a claim where none previously existed, and since the owner had settled his loss of use claim, the bailee's claim did not exist.

44. The law reports establish that difficult questions can arise about whether claims are impermissible claims for pure economic loss, or permissible claims (either by owners or bailees) for economic losses consequential on physical loss. *Network Rail Infrastructure,* on which Mr Williams placed much reliance, was a case where a lorry drove into a railway bridge causing damage to the bridge and railway line. Under the scheme for privatisation Network Rail owned the track on which train operating companies ("TOCs") ran train services. When the track was damaged and unusable, there were sums payable under contractual arrangements by Network Rail to the TOCs to compensate the TOCs for the fact that the trains would run late and passengers would not use trains again. It was common ground between the parties in that case that the quantification of those claims was reasonable, and it seems that the relevant clauses identifying the sums to be paid had been negotiated between Government departments and commercial entities at arm's length, see paragraphs 6 and 11 of the judgment. It was held that these sums were recoverable from the negligent driver who had collided with the bridge. Pill LJ accepted that Network Rail's liability to pay sums to the TOC's was the direct consequence of damage to the tracks, see paragraph 68, which he had earlier accepted were revenue generating assets. Pill LJ stated that if the sums were not reasonable then they would not have been foreseeable and would not have been recoverable, see paragraph 78. Moore-Bick LJ agreed at paragraph 118 with the approach of the trial judge, who had considered that the losses claimed were economic losses directly consequential upon physical damage to the tracks. Jackson LJ considered that this was a type of economic loss flowing directly and foreseeably from physical damage to property which was recoverable, see paragraphs 145(i) and (ii) and 150.

45. A similar approach had been taken in *Ehmler v Hall* [1993] 1 EGLR 137 when the owner of a car showroom which had been damaged by a van could recover the sums he had to pay under the tenancy agreement to the person renting the showroom when it was out of use. Nolan LJ held at paragraph 139 that both physical damage and consequential financial loss were foreseeable, and therefore recoverable.

46. It might also be recorded that in *Metrolink Victoria Pty Ltd v Inglis* (2009) 54 MVR 145 a majority of the Court of Appeal in Victoria, Australia had held that a tram company could recover contractual penalties that it had to pay to the State of Victoria for delays after a tram had been damaged by a carelessly driven car.

47. It is therefore possible to identify some relevant propositions. First a claimant must have legal or possessory title to bring an action for the costs of repairs and consequential economic losses to a chattel such as a motor car. Secondly Ms Armstead was a bailee of the Mini Cooper motor car and had possessory title to the motor car. Ms Armstead was therefore entitled to bring an action for the cost of repairs and the consequential economic or financial loss for the loss of use of the "income generating" hire car. It was common ground that the claim might also have been made by Helphire, as owner of the Mini Cooper motor car, but in this case it was not. Thirdly if a bailee recovers damages for the bailor in excess of her personal loss as bailee, then those damages are held on trust (as between the bailee and bailor) by the bailee for the bailor.

Ms Armstead not able to recover damages by reference to clause 16 of the Helphire agreement

48. I accept that there was some force in Mr Williams' submission on behalf of Ms Armstead that every possible point has been taken against the claims made by Ms Armstead in this case. This is perhaps best illustrated by the fact that the claim for cost of repairs to the Mini Cooper motor car was originally, and successfully, contested on behalf of RSA before the District Judge. This part of the claim was finally conceded on appeal before the Recorder. There was never a defence to that part of Ms Armstead's claim because Ms Armstead, as bailee, could claim for the cost of repairing the damage caused by RSA's insured driver. It is only fair to point out that RSA have been ordered to pay some of the costs of taking the approach that they did to the issue of repairs. Further by the end of the submissions on the appeal there was much common ground between the parties as set out below.

49. RSA accepted that Ms Armstead was as a bailee of the Mini Cooper motor car at the time of the accident able to recover the cost of repairs. RSA accepted that Ms Armstead was as a bailee of the Mini Cooper motor car at the time of the accident entitled to claim damages for Helphire's loss of use of the Mini Cooper motor car when it was being repaired, although there remained a dispute about the basis on which that claim would be assessed, either a claim for interest as the cost of capital, wasted expenditure and depreciation in accordance with *West Midlands Travel* or for the daily hire rate in accordance with *Lagden v O'Connor*. Ms Armstead accepted that she could not claim damages under clause 16 of the Helphire agreement if the losses claimed did not represent a genuine and reasonable attempt to assess the likely losses to be incurred as a result of loss of use of the motor car. Mr Williams made this concession based on the decision in *Network Rail Infrastructure*. The parties remained divided about whether Ms Armstead could claim as damages her liability under clause 16 of the Helphire agreement.

50. In my judgment Ms Armstead is not entitled to recover against RSA as damages, the sums payable by her under clause 16 of the Helphire Agreement. This is for a number of reasons set out below.

51. First clause 16 of the Helphire agreement represented damages that Ms Armstead (as bailee) was liable to pay Helphire (as bailor). This was an internal arrangement between the bailee and bailor. As Collins MR pointed out in *The Winkfield* at page 55 "the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor". Mr Williams is right that this was said by Collins MR in a case where the main issue was the right of the bailee to bring proceedings in circumstances where the bailee was not liable to the bailor. In my judgment, however, the fact that Helphire should not be entitled to value its own loss by reference to clause 16 of the Helphire agreement so that it can be recovered by Ms Armstead, accords with both principle and common sense in this case.

52. As far as principle is concerned, the internal contractual arrangements between the bailor and bailee cannot be a basis for recovering losses. This is because the law of bailment treats the bailor and bailee as having one set of rights to claim for the damage and loss of use of the motor car. This is for good procedural reasons which have commended themselves to the law over centuries, but the effect of this means that (issues under section 8 of the TIGA 1977 apart) the bailee and the bailor are treated as one when it comes to claiming damages. In these circumstances there is a loose analogy

between the attempt to quantify damages by reference to clause 16 of the Helphire agreement and a situation where one branch of a large company might invoice another branch of a large company (under the company's own internal arrangements) for losses caused by an incident for which a third party is liable. The invoiced sum might or might not accord with the losses which might be proved in an action by the company, but such an internal arrangement can hardly form the basis for proving the loss and bind the third party to pay the invoiced sum.

53. So far as common sense is concerned, it might fairly be noted that clause 16 in the Helphire agreement was in an agreement under which Ms Armstead had no expectation of paying anything because she had collision damage waiver insurance from the insurers of the Mini Cooper motor car, who were providing insurance to Helphire for the Mini Cooper motor car. There was no arm's length negotiation between Ms Armstead and Helphire over the terms of clause 16, and Ms Armstead's only interest was that she should not pay anything. Although by the time of the appeal to this court there were no longer issues about unfair terms under the Consumer Rights Act 2015 and penalty clauses, there were still issues about whether clause 16 represented a genuine and reasonable attempt to assess the likely losses to be incurred as a result of loss of use of the motor car, as appears from the fifth and sixth grounds of appeal.

54. Secondly this case is different from those cases where one party has, by reason of the negligence of a third party, suffered damage to their property and as a result incurred contractual liabilities reasonably agreed with an independent third party, as was the case in *Network Rail Infrastructure* and *Ehmler v Hall*. This is because there was no true independent agreement made by Ms Armstead and Helphire about the likely losses to be suffered by Helphire in the event of damage to the hired car.

55. Thirdly clause 16 of the Helphire agreement did not represent a genuine and reasonable attempt to assess the likely losses to be incurred by Helphire as a result of loss of use of the motor car. The full loss is claimed for a credit hire daily rate, even if the sum is reduced to the daily rate for periods of hire in excess of 28 days as contemplated in paragraph 10 above. As Lord Hoffmann pointed out in *Dimond v Lovell* the credit hire rate included charges for providing credit for the hire charges. There was no guarantee that someone such as Ms Armstead would be impecunious and so entitled to recover that credit hire rate as opposed to the Basic Hire Rate (compare *Lagden v O'Connor*) and the credit hire rate included charges for the costs of bringing claims to recover the damages on behalf of Ms Armstead. In fact, with a 24 hour notice period in the Helphire agreement, it seems that the loss of the ability to hire during the period of repair would always be Helphire's loss, although recovered by Ms Armstead on Helphire's behalf. Although Mr Williams is right that many hirers would be unable to afford to hire a car in addition to their usual outgoings if it were to be damaged in a road traffic accident (and so able to claim the credit hire rate) it would not be the case that every hire made by Helphire would be at the full credit hire rate. An average daily hire rate for the Mini Cooper motor car achieved by Helphire might have provided the answer to this. Further, it seems very probable that there would have been other cars available to be hired by Helphire in the place of the Mini Cooper motor car for at least some of the period of repair. This might be proved by the percentage net usage rates for Helphire's cars. This would have led to a reduction of the rate claimed in clause 16 of the Helphire agreement. The actual assessment of damages for loss of use by a party such as

Helphire will be for decision in future cases, but this analysis shows that clause 16 does not represent a reasonable sum to claim against RSA's insured driver.

56. Fourthly, in my judgment, the loss claimed for damages under clause 16 of the Helphire agreement was, in the particular circumstances of this case, an economic loss which was remote and not foreseeable. This is because the liability arose from the internal agreement between Helphire and Ms Armstead. It is not necessary to attempt to analyse the differences, if any, between a relational economic loss and this irrecoverable economic loss.

57. Fifthly, in these circumstances the loss was, as a matter of law not reasonably foreseeable and too remote to be recoverable. This is because a reasonably foreseeable loss which was not too remote, would have been one pursuant to a clause which represented a genuine and reasonable attempt to assess the likely losses to be incurred as a result of loss of use of the motor car.

58. It will be obvious from the reasons given above that in my judgment the claim for damages representing Ms Armstead's liability to Helphire under clause 16 is not a recoverable head of loss in the claim for damages for negligence. However I have, by way of cross check (and very much in the way that both Mr Williams and Mr Tannock had done in their submissions) assessed whether the claim made against RSA for Ms Armstead's liability under clause 16 of the Helphire agreement satisfies the six fold test set out by the Supreme Court in *Manchester Building Society v Grant Thornton* and *Meadows v Khan*. In my judgment it does not, as set out below.

59. As to the first question, although Ms Armstead could bring a claim for loss of use of the Mini Cooper motor car, the damages payable under clause 16 are not actionable in negligence because clause 16 is an internal agreement between bailor and bailee. As to the second question, the loss of use of the Mini Cooper motor car as it was being repaired fell within the risks of harm which RSA's insured driver had a duty to take care, but the quantification of that loss in clause 16 of the Helphire agreement was not within the scope of that duty. As to the third question, RSA's insured driver drove without reasonable care and skill and therefore became liable for a claim for loss of use of the motor car, but did not become liable to a claim under clause 16 of the Helphire agreement. As to the fourth question, the reason why the Mini Cooper motor car was not available for hire was because it had been negligently damaged by RSA's insured driver, but Ms Armstead's liability under clause 16 arose because of the terms of the Helphire agreement. As to the fifth question, there was not a sufficient nexus between the claims under clause 16 of the Helphire agreement and the duty on the part of RSA's insured driver to drive with the skill and care of a reasonable, prudent and competent driver. As to the sixth question, the element of harm, the damages claimed under clause 16 of the Helphire agreement are an irrecoverable economic loss, remote and not reasonably foreseeable.

60. In these circumstances the claim made by Ms Armstead for damages representing her liability to Helphire under clause 16 of the Helphire agreement is not a recoverable head of loss against RSA. As is apparent from what has been set out above, however, Ms Armstead could have made a claim for loss of use of the Mini Cooper motor car when it was being repaired for 12 days, even though the claim would have represented Helphire's loss of use.

61. It seems likely that the average daily hire which Helphire would have lost, and the average number of days that the car would have been used in the 12 day period of repair, could be assessed without particular difficulty. Mr Williams, however, did not ask for the claim to be remitted to the courts below to be determined on the correct basis, as it seems that this appeal has been pursued to establish whether damages representing Ms Armstead's liability under clause 16 of the Helphire agreement could be recovered. In these circumstances I would dismiss this appeal.

62. I have read the judgment of Lord Justice Singh and I agree with it.

Lord Justice Singh :

63. I agree that this appeal should be dismissed for the reasons given by Lord Justice Dingemans.

64. As it seems to me, this follows from fundamental principles of the law of negligence. The fact that Ms Armstead was a bailee as the hirer of the car is relevant because it gives her title to sue even though she was not the actual owner of the property. But this begs the question: what can she sue for? The position was helpfully summarised by Jackson LJ in *Network Rail Infrastructure Limited v Conarken Group Limited* [2011] EWCA Civ 644; [2012] 1 All ER (Comm) 692, at paragraph 145. Although Jackson LJ disavowed any attempt to offer a comprehensive review of the principles, nevertheless he helpfully suggested that four principles can be discerned from the authorities, the first two of which are also relevant to the present case:

(i) Economic loss which flows directly and foreseeably from physical damage to property may be recoverable. The threshold test of foreseeability does not require the tortfeasor to have any detailed knowledge of the claimant's business affairs or financial circumstances, so long as the general nature of the claimant's loss is foreseeable.

(ii) One of the recognised categories of recoverable economic loss is loss of income following damage to revenue generating property.

65. In the present case, it is now common ground that Ms Armstead was entitled to recover damages for the physical damage to the car even though she was only a bailee and not the actual owner of it. She was in principle therefore entitled to damages for the cost of repair of the car. In principle she would also have been entitled to damages for loss of the use of the car but, as a matter of fact, that did not arise.

66. When it comes to the crucial issue in this appeal, which concerns her liability under clause 16 of her agreement with Helphire, that, in my view, is an example of pure economic loss. It is not economic loss which flows directly and foreseeably from the physical damage to the car so far as Ms Armstead is concerned. That loss flows from her contractual liability to Helphire. It is therefore pure economic loss and is irrecoverable in this claim for negligence against the negligent driver who was insured by RSA. Ms Armstead may or may not have made a bad bargain with Helphire but she cannot use the law of negligence to shift her contractual liability to the negligent tortfeasor who damaged the car.

Lord Justice Bean :

67. I agree with both judgments.