Neutral Citation Number: [2023] EW Misc 1 (CC)

Case No: H11YJ541

IN THE COUNTY COURT AT BRADFORD

Date: 29 March 2023

Before :

HHJ MALEK

- -

Between :

MR TARIQ MEHMOOD	**Claimant**
- and -	
(1) AIG EUROPE LTD	**Defendants**
(2) MR JONATHON SIMPSON	

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Mr Dominic Joyce (instructed by **QC Law**) for the **Claimant**
Mr John Brown (instructed by **Plexus Law**) for the **Defendants**

Hearing date: 1 Februay 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Malek:

Introduction

1. The claim arises out of a road traffic accident which occurred on 11 April 2016 on Dewsbury Road, Wakefield. Mr. Mehmood, the Claimant, seeks to recover the sum of £1,800 for damage to his vehicle, £107,340.00 representing the cost of him of hiring a replacement motor vehicle on credit and the sum of £13,860.00 for credit recovery and storage.

Liability

2. The parties did not address me at any length on the law as it related to liability and, indeed, given the nature of the dispute there was no need for them to do so. Nevertheless, I remind myself that it is for the Claimant to prove his case on the balance of probabilities. Therefore, in order to succeed the Claimant must show, on the balance of probabilities, that the Second Defendant's driving fell below the standard to be expected of a reasonably competent driver.

3. The Claimant's case is that he was correctly proceeding along Dewsbury Road when the Second Defendant emerged from the exit of Morrisons petrol station, when it was unsafe to do so, without keeping a proper lookout, and drove into collision with his vehicle.

4. The Second Defendant's case is that, having visited Morrisons petrol station, he was stationary at the exit waiting to turn right. The traffic on Dewsbury Road was heavy and the single lane of traffic to his right was stationary and blocking the exit. The traffic started to move slowly forwards and a van, which was the vehicle immediately to the right of the exit, remained stationary and allowed a gap in the traffic to form. The van driver flashed his lights to signal to the Second Defendant that he had stopped to let him out. It's his case that he pulled out slowly and came to a stop when the front of his bumper was level with the side of the van. He says he remained stationary and at 90 degrees to the road whilst waiting for a gap in the traffic coming from his left. At that stage, it is alleged, the Claimant who had overtaken the stationary van immediately to the Second Defendant's right, attempted to drive into the gap left in front of the van and

drove into collision with the front bumper of the Second Defendant's stationary vehicle.

5. I accept that it is more likely than not that there was, at the time of the accident, slow moving traffic on Dewsbury Road leading up to the traffic lights and that a van allowed a gap to emerge in the traffic and stopped to let him out. I further accept that the Second Defendant moved out slowly. I do not, however, accept that he was stationary at the point of impact. Under cross examination, the Second Defendant, Mr. Simpson, accepted that he might have been moving slowly and I conclude that this is more likely than not to have been the case.

6. Even accepting that another road user indicated that it was safe for him to pull out and that he did so with some caution, I am led to the conclusion that where Mr. Simpson was required to give way (as in the present case) he should only have pulled out when it was safe for him to do so. I agree, therefore, with Mr. Joyce's submission that given section 111 of the Highway code (which states that it should never be assumed that flashing headlights are a signal inviting parties to proceed) Mr Simpson should have used his own judgment and only moved out when it was safe for him to do so. Whilst I accept that Mr Simpson moved out slowly he, nevertheless, appears to have relied upon the judgment of the driver of the van to inform him that it was safe for him to come out. Likewise, whilst I accept that Mr Simpson moved out cautiously and kept a look out for traffic to his left (i.e. in the lane that he was about to join) he should also have continued to keep a look out to his right to make sure that it remained safe in that direction. If he could not properly see in that direction then it was palpably not safe for him to come out. It follows, therefore, that in my view Mr. Simpson's driving fell below the standard to be expected of a competent driver. Breach of duty is, therefore, made out.

7. However, that is not the end of the matter. It seems to me also to be clear, despite the Claimant's protestations to the contrary, that he was attempting to overtake the van at the point of collision. The Claimant's evidence on this point was confusing, but he was, in the end, forced to accept during cross examination that he had "gone around" the van. Whilst I accept that the Claimant did not cross the

white lines denoting the middle of the road (it being clear that the road was wide enough for two cars to pass on the road in the direction that the Claimant was travelling); by going around the van in front of him he was, nevertheless, overtaking it.

8. In my view Mr. Mehmood attempted to overtake a vehicle in front of him when it must have been obvious to him that there was a real risk that he would come into conflict with other road users as a result. Had he properly addressed his mind to it, he must have been aware of the risk or possibility that the van in front of him had slowed or stopped so as to allow another vehicle to come out from the petrol station. He must, further, have been alive to the possibility that any vehicle that the driver of the van in front of him allowed out of the petrol station might have been turning right instead of left and that overtaking the van would bring him into conflict with that vehicle. For the avoidance of doubt, I reject the Claimant's evidence that the van was turning into the petrol station rather than letting someone out; but even if that had not been the case it still follows that, by overtaking or going around the van as it was turning in, he would have opened himself up to foreseeable risk.

9. It follows, therefore, that Mr. Mehmood was also negligent and that his own negligence contributed to the harm that he suffered. For the reasons given above I assess his contribution to be 50%.

10. There were no causation issues or factors identified or argued before me. So, I move on to dealing with quantum.

Quantum

11. As set out above there are three heads of damage: credit hire, credit recovery /storage and vehicle damage. I deal with them in the order of magnitude.

Credit hire

12. The Claimant hired a replacement plated taxi from 12.04.16 to 11.07.17, being a total period of 456 days, at a daily rate of £195 plus VAT. The total hire charges amounts to £107,340 which includes a Collision Damage Waiver of £10 plus VAT per day and Unlimited Mileage charge of £10 plus VAT per day. The equivalent

gross daily rate charged is therefore £235.39. The total amount claimed is, in the context of a vehicle worth £2,190, an extraordinary sum.

13. Credit hire is a well established head of loss. The nature of the claim was summarised by Lord Hope in *Lagden v O'Connor [2004] 1 AC 1067* at paragraph 27 of his judgment and it bears repetition:

> "*...Mr Lagden's claim was, in essence, a claim for the loss of use of his car while it was in the garage undergoing the repairs which needed to be done as a result of the accident. There was no evidence that he would have suffered financial loss as a result of being unable to use his car during this period. But inconvenience is another form of loss for which, in principle, damages are recoverable. So it was open to him, as it is to any other motorist, to avoid or mitigate that loss by hiring another vehicle while his own car was unavailable to him. The expense of doing so will then become the measure of the loss which he has sustained under this head of his claim. It will be substituted for his claim for loss of use by way of general damages. 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 mitigation that is unreasonable.*"

14. It is now well established that where a claimant was impecunious and could not afford to pay the cost of hire upfront s/he will not have failed to mitigate her his / her loss by entering into a credit hire agreement

15. However, slightly different considerations apply when one is dealing with a profit earning chattel. In *Hussain v EUI [2019] EWHC 2647 (QB)* Pepperall J held at par 16:

> *" ...In my judgment, the following principles apply to claims for financial losses suffered by self-employed drivers when their vehicles are off the road pending repair or replacement:*
>
> *16.1 The starting point is that the professional driver's vehicle is a profit-earning chattel and that the true loss is the loss of profit suffered while the damaged vehicle is reasonably off the road pending its repair or replacement: Commissioners for Executing the Office of Lord High Admiral of the United Kingdom v. Owners of the Steamship Valeria [1922] 2 A.C. 242; Clerk & Lindsell on Torts (22 nd Ed), para. 28-121.*

16.2 Of course, a claimant might choose instead to hire a replacement vehicle in order to be able to continue trading. Properly analysed, this is a claim for expenditure incurred in mitigation of the primary loss: Lagden v. O'Connor, at [27]; Umerji v. Khan [2014] EWCA Civ 357, [2014] R.T.R. 23, at [37]. Like any other expense incurred in a reasonable attempt to mitigate a claimant's loss, such hire costs are prima facie recoverable. Where, for example, the claimant successfully mitigates his or her loss by hiring a replacement vehicle at a cost lower than the hypothetical loss of profit, the court will award the lower hire charges.

16.3 A claimant cannot recover any additional loss suffered by reason of a failure to take reasonable steps to mitigate his or her loss: British Westinghouse Electric & Manufacturing Co. Ltd v. Underground Electric Railways Co. of London Ltd [1912] A.C. 673, at 689; Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 20, at page 25.

16.4 Claimants cannot, however, be expected to weigh precisely their losses. In Banco de Portugal v. Waterlow & Sons Ltd [1932] A.C. 452, Lord Macmillan observed at page 506: "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures. merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

16.5 Accordingly:

a) where a claimant acts reasonably in hiring a replacement vehicle at about the same cost as the avoided loss of profit, the court will not count

the pennies and hold the claimant to the hypothetical loss of profit if it turns out to be a little lower; but

b) where the cost of hire significantly exceeds the avoided loss of profit, the court will ordinarily limit damages to the lost profit.

16.6 Even where the cost of hire significantly exceeds the avoided loss of profit, the claimant may still succeed in establishing that he or she acted reasonably:

a) First, any business must sometimes provide a service at a loss in order to retain important customers or contracts. For example, a chauffeur might not want to let down a regular client for fear of losing her. Equally, a self-employed taxi driver might risk being dropped by the taxi company that provides him with most of his work. Properly analysed, these are not, however, exceptions to the general rule since in such cases the claimant is really saying that, but for his or her actions in hiring a replacement vehicle, the true loss of profit would not have been limited simply to the pro rata loss calculated on the basis of the period of closure but that future trading would itself have been compromised. Again, claimants are not required to weigh these factors precisely, and a claimant who reasonably incurs what at first might appear to be disproportionate hire costs in order to avoid a real risk of greater loss, will usually be entitled to recover such hire costs from the tortfeasor.

b) Secondly, many professional drivers use their vehicles for both business and private purposes. Where such a claimant proves that he or she needed a replacement vehicle for private and family use, a claim for reasonable hire charges, even if in excess of the loss of profit that was avoided by hiring the replacement vehicle, will ordinarily be recoverable in the event that a private motorist would have been entitled to recover such costs.

c) Thirdly, it might be reasonable for a professional driver to hire a replacement vehicle even though the cost of doing so was significantly more than the loss of profit because he simply could not afford not to work. The tortfeasor takes his victim as he finds him and impecunious self-employed claimants cannot be expected to be left without any income and

forced to look to the state to provide for their families on the basis that they might eventually recover their loss of profit some months or years later."

Discussion

16. The starting point is that Mr. Mehmood is a professional taxi driver using his vehicle in the course of his business. The vehicle is, accordingly, a profit earning chattel and, therefore, his true loss is the loss of profit suffered whilst his damaged vehicle is reasonably off the road pending repair and replacement.

17. Next, I am satisfied, and it was not seriously in contention before me, that the cost of hire to Mr. Mehmood over the relevant period significantly exceeded any loss of hypothetical profit over the same period and accordingly damages ought, ordinarily, to be limited to the lost profit.

18. Having established that Mr. Mehmood's damages ought, ordinarily, to be limited to his loss of profit I deal with the "exceptions" identified in par 16.6 of Pepperall J's decision. The first point to note is that the overall test remains whether the claimant has acted reasonably in hiring a vehicle where the cost of hire far exceeds the loss of profit. In my judgment the "exceptions" identified by Pepperall J go to show whether or not the claimant has acted reasonably and nothing more. The court, in my judgment, must consider whether, overall, the claimant has acted reasonably as well as considering the "exceptions". This may, of course, be implicit in the reasoning given by a judge.

19. The second point is that, in my judgment, the burden of proving the exceptions lies with the party asserting the exceptions (i.e. the claimant).

20. Thirdly, it seems to me that, properly analysed, the first exception in the case of a taxi-driver would not apply simply because s/he might risk being dropped by the taxi company that provided him or her with most of his/her work. That might be a starting point, but the exception will only truly apply where a claimant is able to demonstrate that future trading (in this case as a self-employed taxi driver) would itself be compromised. In the present case

the Claimant offered no evidence with regards to this exception and I say no more about it.

21. The second exception applies where a claimant is able to demonstrate that the vehicle in question was used for both business and private purposes. Mr Brown submits that (a) the Claimant has failed to evidence private use of the vehicle or if he has it is *de minimus*, and (b) if there is mixed use then the measure of damages ought to be the cost of a vehicle for domestic purposes plus the loss of profit.

22. Whilst I accept that Pepperall J's judgment does not, explicitly, deal with the point it seems to be to be a matter of logic and common sense that where the vehicle in question has a mixed business and private use then, subject to an argument that either use is minimal or *de minimus*, there ought to be apportionment between the two uses and the proper measure of damages for the loss of business use is loss of profit. Therefore, save where it can be shown that the loss of business use was *de minimus* there is, in my view, no reasonable basis for awarding the cost of hire as an appropriate measure of damages for the loss of <u>both</u> business and private use.

23. In the present case I agree with Mr. Brown's primary contention that the Claimant has failed to demonstrate that any private use of the vehicle was no more than minimal. This was because:
    i) The Claimant accepted during the course of cross-examination that the vehicle was, in reality a "business vehicle" and that any personal use was "fairly minimal".
    ii) There was no evidence that anyone else in Mr. Mehmood's household used, or was insured to drive, the vehicle. The Claimant further accepted during the course of cross examination that his wife, who was at the relevant time an agency nurse, used public transport to travel to work and carry out shopping.
    iii) Most importantly, the Claimant's accounts and tax returns do not appear to recognise any element of personal use in relation to the vehicle and Mr. Mehmood accepted during cross examination that he "expensed"

the entirety of any repair costs relating to the vehicle (other than the cost of repair resulting from the incident in question- which he had apparently not expensed at all). If there had been anything more than minimal private use then the Claimant was obliged to make a corresponding reduction in his business expenses relating to the vehicle. For example, he should not have, for tax purposes, deducted the entirety of his fuel, insurance and repair costs as costs incurred "wholly and exclusively" for the purposes of his business. He could, of course, have properly deducted a proportion. There was nothing in the evidence to suggest that any apportionment had been considered by Mr Mehmood (or by those advising him on the preparation of his accounts) let alone applied to his accounts or tax returns. This is, to my mind, cogent and contemporaneous evidence that points to the vehicle being used exclusively or almost exclusively for business use at the relevant time.

24. If I am wrong about that and there was some element of personal use which was more than *de minimus* then that personal use was likely to have been, in any event, fairly minor – on the evidence something in the order of 10%. Having come to that view I would have, as I have set out above, provided damages for loss of profit for 90% of the time that Mr. Mehmood was reasonably without his vehicle. I would then have provided for the cost of hiring a vehicle (again for a reasonable period of time) which would have served his personal needs (i.e. not a taxi-plated vehicle) and reduced this by 90%.

25. The final exception is that which is often termed "impecuniosity". However, the thrust of the exception, in my view, is to deal with the situation where the claimant simply cannot afford not to work without making unreasonable sacrifices or in the words of Pepperall J be "forced to look to the state". This has been taken to mean that "impecunious" in this context has the same meaning as given in *Langden v O'Connor*. Support for this may be garnered from Paragraph 17 of *Hussain v EUI*. For my part I have come to the tentative (because the point was not fully argued before me) conclusion that whilst this

is often the case it may not always be so. This is because, it seems to me, that in *Langden v O'Connor* consideration was being given to the claimant's "*inability to pay car hire charges without making sacrifices that the plaintiff could not reasonably be expected to make* "[per Lord Nicholls at par 9]. In the present case a slightly different question is under consideration: the claimant's inability to give up work without making unreasonable sacrifices. Theoretically, this could give rise to two different answers.

26. In the present case I am entirely satisfied that Mr. Mehmood was not impecunious (either in the sense that he could not afford not to work or pay car hire charges without unreasonable sacrifice) at all material times. His evidence was entirely lacking in this regard. By way of example:
    i) He failed to provide a proper and accurate picture of his personal finances. Firstly, he failed to mention, until he was cross examined on the point, that his wife worked and also contributed to their living expenses. In particular he was forced, during cross examination, to admit that his wife paid for or contributed towards the utility bills and council tax – contrary to what he had said in witness statement earlier. Secondly, he appeared to admit during the course of cross examination that he split the cost of the mortgage with his wife -again contrary to what was said in his witness statement. Thirdly, and rather implausibly, he claimed, at one point, to have no knowledge of his wife's finances or whether or not she had a bank account.
    ii) He failed, in the context of admittedly being engaged in a cash business, to provide an accurate picture of his earnings from that business. He failed to disclose any sort of primary records that would go to support his alleged income or make up his accounts. I agree with Mr. Brown that in such a situation simply producing a profit and loss account is not enough.
    iii) He was able to fund two trips to Pakistan – staying on one occasion for approximately four months. Of particular note and concern is the first trip to Pakistan prior to 23 Jan 2017. Given that this was during the period of hire I find it remarkable that Mr. Mehmood failed to mention this in his witness statement. He must have known that he

should mention such trips because he explains in his statement that he went to Pakistan on 18 July 2017 returning on 19 November 2017 (the second trip). It was only during cross examination when he was confronted with the relevant exit stamp in his passport that he was forced, with much reluctance, to accept that he had made the first trip. Even then, he continued to maintain that he had no memory of the first trip and could not help with its duration or detail how it was funded (other than to vaguely assert that he must have borrowed the money).

iv) He was, on his own account, able to borrow money when it came to funding his second trip to Pakistan.

27. In short Mr Mehmood's evidence on this issue was not only lacking, but highly unsatisfactory.

28. Having dealt with the exceptions I need spend only a moment or two on whether, overall, the Claimant acted reasonably in incurring £107,340 in hire charges where the cost of repair (at the highest) was some £1,800. It is clear to me, for the reasons given, that the Claimant has not so acted.

29. It being clear that the proper measure of damages in this case ought to be a loss of profit, I next turn to the mechanics of that calculation. It is common ground that Mr. Mehmood was making approximately £9,021 profit for the year ending 31 March 2017. Given that I have found that he was not impecunious at all relevant times he had the means to affect a repair within a reasonable period of time -being, in my judgment, some two weeks. Using a profit figure of £9,021 per annum as a good measure of his likely level of profit we can calculate his actual loss of profit as follows: 2/52 x £9,021 = £346.

Credit recovery and storage

30. I accept that the Claimant incurred recovery charges and the Second Defendant appears not to challenge the sum claimed. Accordingly, I would allow this aspect of the claim. I further accept that Mr. Mehmood was not in a

position to park his vehicle at or near his home at no cost. He did not have access to a driveway or garage and he was, rightly, concerned about the security of his damaged vehicle if parked on the street. Accordingly, I would also allow the claim for storage – limited, of course, to a period of two weeks.

Vehicle damage

31. It is clear from the evidence (including photographs taken at the scene and subsequently) that Mr. Mehmood's vehicle was damaged in the accident. His particulars of claim provide that he repaired his vehicle on 12 July 2017 expending the sum of £1,800. He annexes a repair "receipt" in that sum to his particulars. However, it became apparent during the course of cross examination that this document was not a receipt. At best it might be described as an estimate. During the course of cross-examination Mr. Mehmood at one point said that the mechanic who had repaired his vehicle was a friend (and that is why he got a favourable rate of £1,800 for the repair) only to renege on this later. He said that he had borrowed the money for the repairs, but was unable to give any more details. He explained the discrepancy in his accounts (where he had claimed the sum of £585 for vehicle repairs) by saying that this related to other expenses and that he had not "expensed" the £1,800 repair because he had borrowed the money to fund the repairs. None of this is, in my judgment, plausible – particularly when one takes into account the other failings in Mr. Mehmood's evidence which I have detailed elsewhere in this judgment.

32. In summary, Mr. Mehmood cannot show that he had his vehicle repaired on 12 July 2017. He does not have a receipt or any evidence from the recipient of the money that he paid across the sum of £1,800. Nor is he able to evidence the payment being made (other than by bald assertion) or provide proper detail about any borrowing used to fund the repair. Lastly, his accounts do not show the expenditure. I would, accordingly, disallow this aspect of Mr. Mehmood's claim on the basis that he has failed to properly evidence it so as to discharge the burden upon him.

Conclusion

33. For the reasons given I award the Claimant the following sums:
    i) £346 for loss of profit,
    ii) £250 for recovery, and
    iii) £350 for storage.

34. These sums will need, of course, to be adjusted in light of Mr. Mehmood's contributory negligence.

35. I will now hear submissions on costs.