Neutral Citation Number: [2024] EWCC 16

Case No: K02YJ192

IN THE COUNTY COURT AT BRADFORD

Date: 5 November 2024

Before :

HHJ MALEK

- -

Between :

Mr Mazahar Hussain **Claimant**

- and –

EUI Ltd **Defendant**

- -
- -

Mr Poole (instructed by **Kaizen Law Solicitors**) for the **Claimant**
Mr Richmond (instructed by **Horwich Farrelly Solicitors**) for the **Defendant**

Hearing dates: 23 September 2024

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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. In this case the Claimant was involved in a road traffic accident on 27 May 2021. He brings a claim for personal injury, vehicle damage (in the sum of £5,116.87) which has been admitted and paid by the Defendant, storage and recovery (in the sum of £1,008), credit hire (£33,140.52), engineers fee (£150) and a taxi license fee (£165).

2. By the start of the trial liability had been conceded. It was also evident that given the admission and payment made in respect of the vehicle damage that this was not going to be an issue before me. Further, it was properly conceded by Mr. Poole that the engineer's fee was properly a matter for costs.

3. This meant that the only two issues of any significance remaining for me to decide were credit hire and storage and recovery. Whilst the law in relation to both issues is relatively well settled there is a particular aspect in respect of the former (that of the treatment of profit earning chattels) that continues to cause difficulties. Therefore, despite having given a comprehensive reserved judgment on very similar facts in *Mahmood v Liverpool Victoria Insurance Company [2023] EW Misc 6 (CC)* ("*Mahmood*"), a decision the parties referred me to, I have taken the opportunity to reserve my judgment in this case in order to provide further clarity and, I hope, some help to parties as to the likely approach of the court in applying *Hussain v EUI Ltd [2019] EWHC 2647 (QB)* ("*Hussain*").

Evidence

4. Mr. Hussain was the only person called to give oral evidence. He was cross-examined and there was an opportunity for me to ask questions of him.

The claim for credit hire

5. On, 27 May 2021, being the day of the accident, the Claimant was working as a self-employed private hire taxi driver and was the owner and driver of a Toyota Avensis motor. On 29 May 2021 he entered into a credit hire agreement with "Bespoke Credit Hire" in respect of a Toyota Auris. By reason of this agreement the Claimant became obliged to pay hire charges of £185.46 per day plus £18.00 per day in respect of a collision damage waiver– a total of £203.46 per day. Mr Hussain continued in hire until 1 November 2021 at a total cost of £33,140.52.

Need for a (taxi plated) vehicle

6. The Claimant seeks to recover the cost of hiring a replacement taxi-plated vehicle whilst his own vehicle was being repaired and / or not capable of being used as a taxi. There is no dispute between the parties that where profit earning chattels are concerned the proper measure of damages is the loss of profit. Neither was it in dispute that, as a professional driver, the Claimant's claim for damages will be limited to his loss of profit and it is only exceptionally that he will be able to argue that he hired, in mitigation of his loss, a replacement vehicle at a greater cost compared to his loss of profit. Whether or not he is able to make out an exception ultimately depends upon whether or not he acted reasonably in mitigating his loss.

7. The issue was most notably tackled by Peperall J in ***Hussain*** wherein he provides three examples of exceptions to the normal rule. What Peperrall J says at paragraph 16.5, 16.6 & 17 of his judgment in *Hussain* is worth setting out in full:

"*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.

17. Cases said to be in the third category identified above raise the same issues of impecuniosity as the courts are used to dealing with in respect of claims by private motorists to recover what would otherwise be disproportionate credit hire charges following the decision in Lagden v. O'Connor. Any claimant wishing to justify hire costs on this basis will therefore have to comply with the directions given by the court in respect of the disclosure of documents as to his or her income, outgoings, assets, liabilities and access to credit. Even where the

claimant's income is low, the court will not simply accept an assertion that he or she could not afford not to work without proper evidence of impecuniosity."

8. The Claimant argues that he falls within the first and/or second exceptions in *Hussain.*

Burden of proof

9. The first point to note is that the burden is on the Claimant, who makes the assertion that he falls within one or more of the *Hussain* exceptions, to prove that he does. To the extent that the contrary was argued by Mr. Poole I reject such a submission. The Defendant has asserted that the vehicle involved in the accident was a profit earning chattel and that the cost of hire to the Claimant significantly exceeded any loss of hypothetical profit over the same period. These were assertions made by the Defendant and it must follow that the Defendant bears the burden in proving them before we move onto the *Hussain* exceptions. It was, as I have already said, not in contention that the vehicle in question was a profit earning chattel and it was expressly conceded by the Claimant that the cost of hire significantly exceeded any hypothetical loss of profit over the relevant period. In the natural order of things there then follows an assertion by the Claimant that he falls within one of the *Hussain* exceptions. Having asserted that this is the case it is for the Claimant to evidence. I am supported in this conclusion by virtue of the fact that the evidence needed to establish all of the exceptions lies almost entirely in the preserve of the Claimant and placing the burden on the Defendant in such a situation (where in effect it is being asked to prove a negative) would be unfair.

The first exception: providing services at a loss to maintain a valuable trade, contract or relationship

10. As Pepperall J observed in *Hussian*, exceptions in the nature of the first exception are not really exceptions at all, because what is really being said is 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*". The simple point is that this exception is not a true exception to the general rule that the true measure of damages for the loss of a profit earning chattel is limited to the loss of profit over the relevant period. Here, all that is being said is that the potential future loss of profit also needs to be measured and added to the pro-rata loss of profit calculation.

11. In my judgment there are a number of steps that need to be taken. The starting point requires an understanding of the Claimant's profitability prior to the accident. That enables a calculation to be made of the pro-rata loss of profit over the relevant period. The next step in the calculation is to estimate the hypothetical loss of profit that might arise from the fact that by not providing his services a professional driver risks the permanent impairment of his trade.

12. In the case of a self-employed professional private hire taxi driver plying his trade, whether by using the services of one or more taxi "bases" or not, requires the consideration of two things. The first, and easiest to work out, is the profitability of his or her trade. The next is the likelihood that his business (of being a self-employed private hire taxi driver) will be permanently impaired. This involves not only a consideration of whether or not he may be "dropped"

by one "base", but also whether or not he is able to move to another "base" or take advantage of an online platform such as Uber.

13. Another, and perhaps better, way of looking at the same thing is to ask how long is it reasonable for a business to continue to operate at a loss (by for example hiring a vehicle) in order to ensure that future business is not permanently impaired? The answer to the question will depend on (a) how profitable the business is, (b) the size of the loss, and of course (c) the likelihood that the business would be permanently impaired absent the mitigation. Clearly, the less profitable the business and/or the greater the loss (i.e. greater the cost of hire) the less likely it is to be a reasonable course of action. Likewise, if there is little likelihood that the business will be permanently impaired then the less reasonable it will be to spend significant sums in mitigation.

14. It might, fairly, be said that the approach I have set out above is overly technical and no professional driver would address his mind to these matters in the way that I have set out. Whilst I accept that the way I have set out the considerations might be seen as overly theoretical I think it does a disservice to professional drivers to suggest that they are not able to address their minds to these issues. Any businessman who is faced with the dilemma of having to operate at a loss in order to ensure that his business is not permanently affected will give careful consideration to the profitability of the business, the size and duration of the loss and the likelihood that, absent running at a loss for a period of time, the business will be permanently impaired. Whilst s/he may not give express voice or set out each separate consideration in the way that I have I am sure that no rational or reasonable decision can be made absent such considerations. Allied

to that I also accept that claimants who find themselves the victims of acts of negligence are not expected to weigh matters to "a nicety" when attempting to mitigate their losses. However, they will, as a matter of logic if nothing else, have had, at the very least, to have given some thought to all of these matters before s/he can be heard to say that s/he acted in mitigation.

15. Neither will a bare assertion that the claimant has thought about mitigation suffice. The court will need to understand whether the proposed course of action taken by a claimant is an act of reasonable mitigation bearing in mind the individual circumstances. The profitability and likelihood of permanent impairment of the business are key to making such an assessment and, accordingly, a claimant should come to court fully prepared to evidence these matters.

16. In this case the Claimant provides absolutely no financial information or evidence of his profit (or hypothetical loss of profit in the event his trade was compromised) or even hint at having given this any thought before opting to hire a vehicle which would cost him £203.46 per day. Accordingly, he cannot hope to persuade a court that the first exception in *Hussain* applies to him.

17. Even if I am wrong about the above and the Claimant need not evidence his profitability as a self-employed driver, the evidence that he does provide, which appears to be aimed at demonstrating that his future trading would be compromised, is woefully inadequate. All that the Claimant is able to muster by way of evidence is a letter from "Barkerend Taxis" addressed to him in which it is said:

"*We put you on notice that you are required to work with a licensed vehicle that is in a suitable condition with the relevant licensing documentation within the next 7 days. If you do not return to work within the prescribed 7 days you will be disconnected from our dispatch system. A driver who has been disconnected, cannot rejoin on a later date*".

18. As a starting point, it seems to me to be inherently unlikely that Barkerend Taxis would seek to end its relationship (and permanently so) with a driver (who on the evidence had been with them for some 8-9 years) because he was unable to provide his services as a taxi-driver for more than 7 days. Not only would this mean that the Claimant could not be on holiday, for example, for more than 7 days without losing his position (again inherently unlikely), but Barkerend Taxi's position (as set out in the letter appended to the Claimant's witness statement) is implausible to say the least. Barkerend Taxis, on the evidence, appear to work as a conventional taxi "base" operating a "dispatch system". Such businesses, of which fact I am able to take judicial notice, apply a charge or license fee to each taxi driver working with them with such fees being colloquially referred to as a "radio fee" and charged, typically, on weekly or monthly basis. The income of these businesses is derived directly from the "radio fees" that they charge and telling a driver that s/he cannot return if s/he is absent for more than 7 days would, on the face of it, be an act of self- harm resulting, as it would, in the loss of revenue. There may, of course, be good reasons as to why a taxi base business may wish to end a relationship with a taxi-driver even if it results in a loss of revenue. In this case it is said by Mr. Hussain (and notably not Barkerend Taxis) that the reason why Barkerend Taxis would not want to continue their business relationship with the Claimant if he

was not available to drive for more than 7 days is because they "*needed to have sufficient number of drivers available to maintain their contracts and service levels...*". The difficulty with this is that this is, again, inherently implausible. If Barkerend Taxis were so busy, as seems to be the implication, that the unavailability of even one driver for more than 7 days, would jeopardise their "contracts" and service levels then what could they hope to gain by permanently excluding an otherwise good driver? This would clearly just make matters worse for them.

19. Given what I say above I treat the letter from Barkerend Taxis to the Claimant with some caution. In addition, the letter relied upon by the Claimant appears to be from "Barkerend Taxis" (it being unclear whether this is a company, sole trader or partnership business), signed by a "A M khan" who is otherwise unidentified (either by reference to his full name, address, or relationship with Barkerend Taxis) and is undated.

20. Further, the letter was received (on the Claimant's own evidence) by him 2-3 days after he had his accident. It was the Claimant's evidence that he had, previous to the receipt of the letter in question, been unaware that he was at risk of losing his position with Barkerend Taxis if he was unavailable to work for more than 7 days and had not previously ever received such a "notice". If the letter was received 3 days after the accident then the Claimant had already entered into a hire agreement by this stage. If it was received on the second day then it was received on the day that he entered into hire, and in all likelihood, after he had made the decision to go into hire having, more than likely, already set the mechanics of the hire up. On the balance of probabilities the letter from

Barkerend Taxis is unlikely to have been the operative cause of the Claimant entering into a credit hire agreement.

21. More fundamentally, I agree with Mr. Richmond that the letter seems to be an attempted unenforceable unilateral variation of the contract (whatever the exact terms of the latter may have been) between the Claimant and Barkerend Taxis. However, this is not the same as an argument on the enforceability of a hire agreement, but rather the court needs to ask itself whether or not the Claimant acted reasonably in relying upon the letter that he received, irrespective of the legal merits of it. I accept that the Claimant may not have appreciated the legal nuances of the position that he found himself in. However, it seems to me perfectly reasonable to expect him to have taken legal advice or at the very least queried the contents of the letter with the author – after all a valuable future relationship (apparently worth preserving even at the expenditure of thousands of pounds on credit hire) was at stake. On his own evidence the Claimant did neither. Had the Claimant taken legal advice it is likely that such advice would have been to the effect that the threatened unilateral change to his contract with Barkerend Taxis was unenforceable.

22. It follows then that, for the reasons I have given, the Claimant is unable to establish that he falls within the first exception in *Hussain*.

The second exception: business and private use

23. As I have set out in *Mahmood* the second exception in *Hussain* "*means that a professional driver who uses his vehicle for business and private purposes will, usually, have acted reasonably in mitigating his loss by hiring a replacement vehicle even where the cost exceeded his loss of profit provided always that a*

private motorist would have been entitled to recover such costs". A private motorist would not, in my view, be entitled to recover any costs over and above those associated with private motoring. So, a private motorist, would not, for eg, need a taxi plated vehicle for his / her private use and the additional costs associated with the business use of the vehicle would be irrecoverable."

24. What this means, in practical terms, is that if a claimant hired a vehicle suitable for his use as a private motorist he would not be restricted to a claim for loss of profit (if the latter was lower) just because the car involved in the accident was also a profit earning chattel. However, he would not, for example, be able to argue, as the Claimant does, that he couldn't hire from car hire firms such as Enterprise, Hertz or Avis because they do not provide "private hire" or "tax-plated" vehicles. Such "taxi-plated" vehicles are not required for private use.

25. In the present case it was not seriously contended on behalf of the Defendant that the Claimant did not have a personal need for the vehicle in which he had an accident. It was, therefore, reasonable for him to seek to mitigate his personal loss for use of his vehicle by hiring a suitable replacement vehicle for private use in the usual way. However, that vehicle would clearly not need to be licensed to carry passengers, be "taxi-plated" or otherwise adapted for use in the Claimant's business.

Third exception: cannot afford not to work

26. The third exception in ***Hussain*** was not pursued by the Claimant given that he had conceded that he was pecunious at all relevant times. Other than the observation that I make below, I, therefore, say no more about it.

27. It seems to me that, as a general rule, there is a tension for the self-employed professional drive in demonstrating profitability in order to come under the first exception and showing impecuniosity under the third exception. Whilst, of course, there might be situations where it is possible to "thread the eye of the needle"; in most cases claimants will, likely, have to nail their colours to the mast- and I would suggest early on in proceedings.

28. For the reasons I have given the Claimant does not fall under the exceptions set out in *Hussian* (or does so only to the limited extent outlined above under the second exception).

Rate and period

29. As I have indicated earlier in this judgment the Claimant was entitled to hire a vehicle for his private use. Given that he accepts that he was pecunious at all relevant times the relevant hire rate must be the applicable "spot" rate. Whilst both parties produced rates evidence neither chose to address me on the applicable rate on the basis that this should be capable of agreement once I had made my decision on the points raised under *Hussain*.

30. As to period, given that the Claimant was pecunious, and accordingly able to affect his own repairs, the Defendant submits that it should have taken the Claimant no more than 5 weeks from the date of the accident within which to have his own vehicle back on the road. I agree that this was ample time. Much of the delay was apparently caused by the failure by Bradford City Council to authorise the Claimant's new vehicle for use as a taxi for private hire. For the reasons already given that is irrelevant.

Storage and recovery

31. The Defendant argues that the Claimant had ample room on his driveway to store his damaged vehicle and in fact did so for two days after the accident. During cross-examination the Claimant accepted that this was the case, but seemed to say that he was concerned that visiting children (there being only adults who lived with him) passing by on the drive might injure themselves and that is why he removed his vehicle from his driveway into storage. The photo of the Claimant's damaged vehicle shows damage to the driver-side front wheel arch. It is fair to say that the body work in this region is misshapen and protrudes slightly.

32. In my judgment it is not unreasonable mitigation to expect the Claimant to use his available driveway to store his damaged vehicle. The risk posed to visiting children is remote at best and, in any event, could easily have been mitigated against by ensuring that the vehicle was parked in a way that the damaged area was furthest away from the path any visitors are likely to take.

Personal injury

33. Dr Afshah Jahanzeb provides a medical report on behalf of Claimant. She records that the Claimant suffered from pain and stiffness in the neck, right shoulder and upper and middle back which she attributed to the accident that he was involved in. The Claimant took two days of work post-accident and recovered from these symptoms in line with Dr. Jahanzeb's prognosis of 8/9 months. Whilst symptomatic the Claimant's sleep, ability to lift heavy items and do the shopping was moderately to mildly restricted.

34. Bearing in mind the relevant bracket in the JSB Guidelines, and accounting for any overlap in pain suffering and loss of amenity, I would assess general damages in the sum of £4,000.

Conclusion

35. Counsel are both invited to agree a consequential order and let me have it (via my clerk) for my approval. In the event that such an order is agreed and sent to me for my approval in advance of the handing down of this judgment then the parties and their representatives are excused from attendance at the handing down of this judgment.