Appeal Ref. BM90083A
Claim no.D26YY375

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BIRMINGHAM
BETWEEN:

ANDREW BUNTING

Claimant / Appellant

and

ZURICH INSURANCE PLC

Defendant / Respondent

COUNSEL'S NOTE OF APPEAL DECISION - HEARING BEFORE PEPPERALL J ON 13.5.20

1. The hearing was held remotely via Skype video.

2. The Claimant was represented by Helen Rutherford (counsel) instructed by Principia.

3. The Defendant was represented by **Steven Turner** (counsel) instructed by **Jade Batstone** of **DAC Beachcroft**.

4. *This Note is intended for information only pending receipt of a transcript of Pepperall J's judgment*.

Status

5. The decision is a High Court appellate decision. It will accordingly bind County Court Judges.

Background

6. The Claimant's Lotus Exige was damaged in a no-fault accident on 24th June 2015. The vehicle remained driveable. 10 months later, the Claimant hired an equivalent class of vehicle (a Mercedes C220) from Helphire for a period of 84 days. Hire charges totalling £28,551.84 were incurred at the rate of £338.76 per day.

The rates evidence

7. The case was allocated to the fast track and directions given. Both parties were given permission to rely upon a short survey of basic hire rates to be adduced by way of a witness statement identifying who conducted the survey; when and in what way the survey was conducted; and whether the survey / evidence established that equivalent vehicles were available for hire at the time the Claimant hired.

8. The Claimant elected not to serve BHR evidence.

9. The Defendant served a statement from Mr Rose of Whichrate UK, along with a hearsay notice. Mr Rose's statement was in conventional form, setting out 1 and 7 day rates from three BHR providers (Thrifty, AMT and Bespokes) for hire commencing on the date in question. The BHR rates were contemporaneous, but Mr Rose gave no information as to likely deposits payable or the date on which the original data had been harvested by Whichrate. There was thus no way of knowing whether the Whichrate data had been harvested the day before the requested hire dates or whether it had been harvested at some more distant point in time. Mr Rose's statement said that hire companies would allow hires beyond their maximum hire cycle days and that a hirer would simply need to enter into a fresh hire agreement; he

said that where a vehicle was showing on a website he considered it to be available, as the screen shots would otherwise say 'not available at this location' or 'sold out'.

The trial

10. The trial was heard by Recorder Poidevin QC at Northampton on 1st November 2018. Period was agreed at 78 days. The Claimant (who had been debarred from asserting impecuniosity) gave short and unremarkable evidence as to his need to hire and general ignorance as to the cost of hire and likely duration of repairs. He confirmed that his annual mileage was around 12,000 miles p.a. (230 miles per week).

11. An unconventional (and questionable) approach was then adopted to Mr Rose's evidence. The Claimant had failed to serve the requisite application for permission to cross-examine a witness whose evidence had been served with a hearsay notice (see CPR 33.4(2)). Instead, the Claimant summonsed Mr Rose to court and then sought permission to call him as a witness for the Claimant. Defendant's counsel (presumably having confidence in Mr Rose) did not object.

12. Mr Rose gave oral evidence confirming and reinforcing the points in his witness statement re. the ability to extend hires beyond the maximum stated contractual period and vehicle availability (and in particular that an equivalent substitute would be provided if the booked vehicle was not actually available). He said that odd days (i.e. those that are not multiples of 7) would be charged at 1/7 of the weekly rate etc. When challenged as to the basis for his views expressed, he cited his 'experience'.

13. In closing, Claimant's counsel (Ms Rutherford, as for the appeal) sought to persuade the Judge to disregard Mr Rose's evidence altogether on the basis that it did not comply with the specifics of the BHR directions Order. In the alternative, she argued that weaknesses in Mr Rose's evidence meant that the Defendant had failed to discharge the burden of demonstrating a difference between the credit hire rate claimed and the BHR. In particular, she pointed to the fact that the Thrifty rate (the lowest rate identified by Mr Rose) had (1) a 30 day maximum hire limit; (2) a limit of 500 miles per week; and (3) required payment of an unknown amount of deposit. She also argued that a 1 day, rather than 7 day rate should be used as the Claimant did not know the duration of repairs in advance.

14. The Defendant (via Mr Bunting, counsel) conceded need to hire in closing and urged the court to adopt the 'sanguine' approach endorsed in *Darren Bent v Highways and Utilities Construction Ltd*. [2010] EWCA Civ 292 (aka *Bent no.1*) and *McBride v UK Insurance* [2017] EWCA Civ 144. He invited the court to award the Thrifty rate as identified within Mr Rose's statement.

The decision below

15. In his judgment, the Recorder noted the Defendant's concession on need and found that the Claimant had acted reasonably in hiring the type of car hired. He then reminded himself that the Claimant was debarred from asserting impecuniosity and so, as a result, a stripping out exercise needed to be performed. He spent several paragraphs weighing the submissions in relation to Mr Rose's evidence before concluding that, though the Claimant made some 'good points', these did not render Mr Rose's evidence either inadmissible or something to which he should pay no regard. The Recorder said that he would use the Thrifty 7 day rate identified by Mr Rose, but he

would then uplift it by £10 per week to reflect the fact that there was no detail as to the deposit payable, the mileage limit and the 30 day contractual point. He termed his £10 uplift a 'rough and ready adjustment'.

16. The net result was that the Claimant recovered £3,989.14 for hire, far below the Defendant's Part 36 offer of £12,231.15.

The arguments on appeal

17. The Claimant filed lengthy Grounds of Appeal seeking the full credit hire rate. The Claimant argued that the Recorder should have disregarded the Defendant's BHR evidence given the absence of information as to who had conducted the original Whichrate harvesting exercise, as to the data collection methods used and as to the date the original harvesting exercise had been undertaken. The Claimant further argued that the Recorder had erred by failing to exclude the Thrifty rate on the basis of the 30 day maximum hire limit, the absence of evidence as to availability, the lack of information as to deposits, the mileage restriction and the fact that the Defendant had produced screenshots of advertised rates rather than actual reservation pages. Added to all that, the Claimant also argued that the Recorder had been wrong to find that there had been no breach of the directions Order and by using 1/7 of the 7 day rate for the 78th day (which did not fall within a multiple of 7).

18. The Defendant (by now represented by Steven Turner) responded by arguing: (1) that questions of admissibility had been rendered academic by the Claimant's decision to call Mr Rose as his own witness. Once the evidence had been admitted, the question was one of weight for the trial Judge; (2) the Recorder's decision was a text-book application of the 5 stage structured approach advocated at paragraph 73 of *Pattni v First Leicester*

Buses Ltd. [2011] EWCA Civ 1384; (3) it could not be said that it was perverse of the Recorder to place weight on Mr Rose's evidence. He was entitled to adopt the only BHR evidence that had been put before him, even if it was less than perfect; (4) Nor could it be said that the decisions to choose the Thrifty rate and/or to uplift it by so little and/or to use Mr Rose's 7 day rates were perverse. Once the Defendant had demonstrated that there probably was a difference between the credit hire rate claimed and the BHR (i.e. satisfied *Pattni* stage (iv)), the court then had to do its best it put a figure on that difference (*Pattni* Stage (v)). The Defendant cited *McBride, Bent no.1* and various other non-credit hire authorities supporting the argument that the court had to do its best on imperfect evidence so as to ensure that justice was done; (5) in respect of availability, the Defendant pointed out that Jacob LJ's comments in *Bent no.1* (to the effect that rates from a year or so later could be used to ascertain the BHR) would make no sense if a Defendant had to go so far as to demonstrate availability of a particular car on a particular day.

Permission to appeal

19. Permission to appeal was refused on paper but granted by Murray J following an oral permission hearing on 10th March 2020.

The decision on appeal

20. Pepperall J had no hesitation in dismissing the Claimant's appeal. He found the Claimant's arguments to be a 'nit-picking challenge' that came nowhere near the threshold for demonstrating that the Recorder's decision had been perverse.

21. In more detail, Pepperall J found as follows:

22. The complaint that Mr Rose's evidence was not in full compliance with the directions Order went nowhere as the Claimant had not objected to his evidence and, indeed, had called him as his own witness.

23. The Court accepted the Defendant's submission that the Recorder had impeccably followed the structured approach laid down at paragraph 73 of *Pattni*: Need, reasonableness of hiring and impecuniosity had all been addressed before the Recorder moved on to consider whether the Defendant had proved a difference between the credit hire rate and the BHR. Once the Recorder concluded that the Defendant had demonstrated a difference, he then went on to consider adjustments.

24. The court found that the real issue in the case was the question of how the Judge should have approached imperfect evidence. The court held that there had been a long tradition of the Court of Appeal encouraging County Court Judges to do their best to ensure justice on less than ideal materials. The Judge endorsed the Defendant's citation of cases such as *Latimer v Carney* [2006] EWCA Civ 1417 and *Crewe v Silk* CA 2.12.97 (unreported) from a non-credit hire context which made that point.

25. The court then specifically endorsed the 'sanguine approach' of Jacob LJ as set out at paragraphs 8 and 9 of *Bent no.1*., to the effect that a County Court Judge would be wrong to require evidence from precisely the time of the accident.

26. The Recorder had been absolutely entitled to rely on Mr Rose's evidence and was entitled to find that the Thrifty BHR was indicative of the BHR for a 78 day rate, even though there was a 30 day contractual limit.

27. The Recorder was also entitled to infer that a car would have been available at the time of hire. As Jacob LJ made clear in Bent no.1, the court does not require evidence of availability of a particular car on a particular date before awarding a BHR.

28. The Recorder was also entitled to use 1/7 day of the 7 day rate to make up the 78th day of hire.

29. As for the £10 upward adjustment that the Recorder made to the Thrifty rate, the Court accepted the Defendant's submission that this was in fact generous to the Claimant:

    a) Questions of deposit are irrelevant in a case where a Claimant is not asserting impecuniosity;

    b) The mileage restriction was irrelevant because the Thrifty rate allowed more than double the Claimant's average weekly mileage;

    c) The 30 day limit point did not justify any uplift as the charge per week for any hire beyond the first 4 weeks was unlikely to be more than the cost of the first 4 weeks.

30. In any event, the court held, such 'reasonable adjustments' are precisely the sort of thing that a trial Judge is empowered to do.

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13th May 2020

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Counsel's End-note:

A transcript of this decision will be circulated as soon as it becomes available. This (binding) decision should go some way to undermining the overly-prescriptive 'nit-picking' approach to BHR evidence which some Claimants continue to urge upon the courts. Pepperall J's specific comments in relation to deposits, 30 day contractual limits, mileage limits and availability should, in particular, help to neuter some of the ill-judged and 'nit-picking' arguments which CHO's such as Auxillis continue to advance.

Finally, on costs, the Defendant was awarded full costs claimed as per the Schedule filed at Court. Payable within 21 days.