Neutral Citation Number: [2023] EWHC 2375 (KB)

Case No: CLAIM NO G83YX146/APPEAL: QA-2021-000157

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM CROYDON COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

NICOLA MORGAN-ROWE	**Appellant/ Defendant**
- and –	
LAURA WOODGATE	**Respondent/ Claimant**

- -
- -

Mark Roberts (instructed by **Weightmans LLP**) for the **Appellant**
Robert Weir KC (instructed by **True Solicitors LLP**) for the **Respondent**

Hearing date: **20 March 2023**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 27 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Julian Knowles:

Introduction

1. This is an appeal with the permission of Stewart J by Nicola Morgan-Rowe (the Appellant/Defendant) against the judgment on damages of Mr Recorder Swirsky on the claim brought against her by Laura Woodgate (the Respondent/Claimant).

2. For clarity, I will refer to Ms Woodgate as the Claimant and Ms Morgan-Rowe as the Defendant.

3. The claim arose out of a road traffic accident on 9 December 2019 in which the Claimant's and Defendant's vehicles collided and were damaged. Fortunately, neither party was injured.

4. In an order dated 12 April 2021, made following a one day fast track remote trial, the Recorder:

   a. gave judgment for the Claimant, subject to a finding of 50% contributory negligence;

   b. ordered that the Defendant pay the Claimant damages in the sum of £14,861.18 by 4.00 pm on 4 May 2021 (these were primarily comprised of credit hire charges and repair costs);

   c. ordered that the Defendant pay the Claimant's costs, summarily assessed in the sum of £13,680, by 4.00 pm on 4 May 2021.

5. On the appeal Mr Roberts appeared for the Defendant and Mr Weir KC appeared for the Claimant. Neither of them appeared below. Mr Roberts settled the Defendant's Grounds of Appeal, which are dated 23 April 2021.

Factual background

6. The accident occurred at the junction of the A22 and Hammerwood Road in Sussex. In his judgment (of which I have an agreed note) the Recorder described the accident:

> "1. On 9 December 2019 a road traffic collision took place. The accident happened at about 12pm, on a day that was bright and sunny. There is in fact no dispute about most of what happened. The issue on liability relates mainly to the Claimant's use of an indicator. The Claimant was driving a Land Rover on the A22 and wanted to turn left into Hammerwood Road. She slowed down and signalled to turn left, the reason being she intended to turn into Hammerwood Road which is a minor road. I have seen extension photographs [sic] of the junction. I can see how it narrows and veers sharply away from the A22 in the direction that C was driving.

> 2. She says that about 15-20 metres from the junction, she noticed that Hammerwood Road was blocked or effectively blocked. She said there was a line of cars, and on the right lane there was a lorry that had stopped which was blocking the carriageway. The effect of that was that she took the view that Hammerwood Road would be difficult to drive down, so she continued on. She said she remembers cancelling the signal, about 20 metres out from the junction. She conceded under cross examination that given there was at least 6 metres thinking time from when she saw Hammerwood Road to when she cancelled the signal indicating her intention to turn into the junction, she would have been somewhat nearer the junction when she cancelled the signal.
>
> 3. In her statement the Claimant says she could see the Defendant looking left and not right, which should have put the Claimant on notice if the Defendant was at the junction and indicating that she was intending to turn right. The Claimant says she continued to drive when she saw the Defendant begin to pull out. She said she tried to take evasive action, however, the vehicles collided at about the point of the front passenger sidewheel. I have seen evidence of the damage.
>
> 4. The Defendant says she was waiting at the junction, stationary, indicating that she was going to turn right. She said she saw the Claimant coming, and that she was indicating. The Defendant says there was a white lorry behind a Land Rover waiting to turn down Hammerwood Road on the outside carriageway of the A22. She saw the Claimant slow down, then looked left to see if it was clear, and then looked right again and saw the Claimant had slowed down and was still indicating. At that point she was at about the junction, the lorry flashed, and the Defendant then pulled out. She says after the incident the Claimant got out of her car, said sorry, and then the Defendant reversed her car."

7. The Recorder's decision on liability was as follows:

> "6. I remind myself that I must decide this case on a balance of probabilities. I have heard from both witnesses, there is not much dispute between the parties. I accept that this is not a case where anyone is being deliberately untruthful. Both parties are doing their best to remember what happened.
>
> 7. What is clear is the Claimant intended to turn left before she was almost at the junction. She would have needed to

see down the road. In my judgment, the Claimant must have been closer to the junction than she said in her evidence. That is consistent with what the Defendant says about the case. It is also consistent with what the Defendant says the Claimant said, namely that she changed her mind, which is also consistent with the Defendant's questionnaire.

8. I therefore accept the Defendant's evidence about this, but I do not attach much weight to it, because what people say in the immediate aftermath is often coloured by shock.

9. The lorry driver, however, must have thought the Claimant was turning left because why else would he flash to the Defendant?

10. As I have said the decision not to turn left must have been made at the very last moment. I am not satisfied that the Claimant did change her signal in sufficient time. I am, however, satisfied that the Claimant did change her signal. However, that is not the end of the matter. The Defendant was in a minor road, turning onto a major road. She had an obligation to be careful. The Defendant said today that the Claimant was committed to the turn. She therefore assumed that the Claimant was turning left, she pulled out without checking the Claimant's whereabouts. If she had checked, she would not have pulled out.

11. In my judgment, this incident was caused by both drivers. The Claimant left it too late to change her signal and having noticed the Defendant was stationary, wasn't looking properly. The Defendant, on the other hand, pulled out across a main road without properly checking it was clear.

12. I can see that both parties have impeccable driving records, and this is a single unfortunate incident that happened in seconds.

13. I have to therefore apportion responsibility. I have been referred to the case of *Wadsworth v Gillespie* [1978], where the facts where superficially similar to this case, and 2/3 split was made by the trial judge. That case set out no rule of law, and each case is likely to depend on its own facts.

14. Having considered the facts of this case, in my judgment this is a 50/50 case, so therefore the correct order I should make is that there will be judgment for the

> Claimant with a 50% reduction for contributory negligence."

8. The Recorder then turned to damages. The largest head of claim was for credit hire charges for a replacement vehicle hired by the Claimant whilst her own car (a Land Rover) was off the road being repaired. In her Updated Schedule of Loss the Claimant sought £25,830.72 by way of such charges for the period 10 December 2019 – 19 February 2020, and £10,022.24 for repairs, and other small items, as I have mentioned. The pre-accident value of the Claimant's car was £20,735.

9. There is much case law in relation to credit hire charges, which are commonly claimed in road traffic accident cases. Credit hire rates are charged where the replacement vehicle is supplied on credit (ie little or no upfront payment is taken from the claimant by the credit hire company), as opposed to the claimant paying upfront for the hire in the usual way when the vehicle is hired.

10. In *Diriye v Bojaj* [2020] EWCA Civ 1400, [4], Coulson LJ gave the following helpful summary of the key principles:

> "4. It is well-established that a claimant in an RTA claim is entitled to recover the reasonable cost of hiring a replacement vehicle: see *Lagden v O'Connor* [2014] 1 AC 1067. Reasonableness will be assessed by reference to need, rate and duration: see *Zurich Insurance PLC v Umerji* [2014] EWCA Civ 357. A claim to recover the significantly higher credit hire rates (as opposed to basic hire rates) will usually depend on the claimant demonstrating that he or she was not in a position to pay the ordinary rates upfront; that the claimant was, in the jargon used in the cases, 'impecunious' (see *Lagden*, and *Zurich* at paragraph 9(3)). Although there had been some debate as to the whereabouts of the burden of proof in such a situation, Underhill LJ was clear at paragraph 37 of *Zurich* that 'in this kind of case it is clearly right that a claimant who needs to rely on his impecuniousness in order to justify the amount of his claim should plead and prove it'. If a claim for credit hire charges fails, a claimant can still recover basic hire rates (what are sometimes referred to in the authorities as 'spot rates')."

11. The Claimant put her alleged impecuniosity in issue in her Particulars of Claim. She said she had not been in a financial position to pay upfront the hire charges and security deposit for a replacement vehicle while her own was being repaired.

12. The evidence from her witness, Lee John of APU Ltd (an accident services company), was that the spot rate for 72 days would have been £9,053.28.

13. In her Defence dated 27 August 2020, the Defendant pleaded as follows on impecuniosity:

> "13. The burden is on the claimant to prove impecuniosity (*Zurich Insurance Plc v Umerji* [2014] EWCA Civ 357). The claimant is put to proof of the same and the defendant request all documents relating to her financial situation, including but not limited to:
>
> (a) All wage slips, bank and savings accounts statements (including joint accounts and showing overdraft limits) all credit card statements (including joint accounts and showing credit limits and available credit), all details of overdraft and loan facilities and any other relevant information as to her finances the three months prior to the commencement of hire to three months after the hire ended.
>
> (b) Details of the claimant's net annual income at the time of hire.
>
> (c) The defendants aver [sic] that the financial disclosure should also extend to relevant members of the claimant's family and anyone else who utilised the vehicle."

14. The Claimant then filed and served a Reply to Defence dated 13 October 2020, in which she said at [10]:

> "10. As to paragraphs 13-13c the Claimant was at all material times impecunious and is therefore entitled to recover the rate of hire claimed. The Claimant will give disclosure in the normal way. To the extent that it may become relevant, the Defendant is put to proof on the issue of the applicable basic hire rate on appropriate terms and conditions and for a car available to the Claimant when she needed one [*Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA Civ 55; *Bent v Highways & Utilities Construction* [2011] EWCA Civ 1384; *Stevens v Equity Syndicate Management Limited* [2015] EWCA Civ 93; *McBride v UK Insurance* [2017] EWCA Civ 144]. In the event that the Defendant fails to prove an applicable basic hire rate, the rate of hire claimed is recoverable in any event."

15. In her witness statement of 20 October 2020 the Claimant said at [32]:

> "32. Throughout the hire period I did not have the money or resources available to pay for a hire vehicle, and as a result I had no alternative but to hire a replacement vehicle on credit."

16. On 15 December 2020 DJ Coonan made an order giving various directions, including allocating the case to the fast track. Relevant for present purposes are his disclosure directions, and specifically in relation to the Claimant's plea of impecuniosity:

> "4. Disclosure of documents will be dealt with as follows:
>
> a. By 4pm on 11 January 2021 both parties must give standard disclosure of documents by list.
>
> b. By 4pm on 25 January 2021 any request must be made to inspect the original of, or to provide a copy of, a disclosable document.
>
> c. Any such request unless objected to must be complied with within seven days of the request.
>
> …
>
> 6. As the claim relates to an alleged road traffic accident:
>
> …
>
> (d) The Claimant shall be debarred from relying upon the fact of impecuniosity for the purposes of determining the appropriate rate of hire unless:
>
> (i) by 4pm on 11th January 2021 the Claimant files and serves a Reply to Defence setting out all facts in support of any assertion that the Claimant was impecunious at the commencement of and during the hire of the vehicle in question; and
>
> (ii) by 4pm on 25th January 2021 the Claimant serves copies of the following documents which are in his (*sic*) control:
>
> (1) copies of the Claimant's wage slips or equivalent documentation evidencing the approximate level of available income to the Claimant for the period of three months pre-accident and covering the period of hire; and
>
> (2) copy bank and credit card statements for a period of three months pre-accident and covering the period of hire.
>
> (e) Each party has permission to rely on a short survey of 'spot' hire rates in the Claimant's locality. Those factual surveys must be incorporated in or exhibited to a witness

statement and must be exchanged by 4pm on 25th January 2021. The witness statement must include the following facts:

(i) who conducted the survey;

(ii) when and in what way the survey was conducted;

(iii) whether the survey established that equivalent vehicles were available for hire and the cost of the hire (to be set out in a concise schedule);

(iv) whether there is any evidence to suggest that an equivalent vehicle would probably have been available at the time of the commencement of the hire."

17. On 11 January 2021 the Claimant filed and served a 'Reply to Defence on the Issue of Impecuniosity' (which was verified by a Statement of Truth from a paralegal employed by her solicitors):

"1. In accordance with direction 6) d) i) of the order dated the 15/12/2020 from District Judge Coonan, this additional reply to defence is provided to address solely the issue of impecuniosity.

2. As pleaded at paragraph 12 of the Claimant's initial Reply to Defence dated 13th October 2020, the Claimant asserts to have been impecunious at the time of hire.

3. After all monthly outgoings were taken into consideration, the Claimant avers that it was not financially viable for her to hire a replacement vehicle from her disposable income.

4. At the time of the accident/hire, the Claimant had a current account with Nat West, a joint account with HSBC and an ISA.

5. At the time of the accident/hire, the Claimant did not have a credit card. She actually opened a credit card in March 2020 i.e. after the hire had ended.

6. The Claimant has pointed out that the funds in her ISA account at the material time were earmarked to pay the mortgage and other bills.

7. For the benefit of the court the Claimant was given a 6 month mortgage break, which ended in October 2020. Without this the Claimant has advised that she would have been unable to make ends meet.

> 8. Appropriate financial disclosure in support of the above has been/will be provided in accordance with paragraph 6) d) ii) 1 & 2 of the court order."

18. The Claimant gave disclosure of financial records. These consisted of: bank statements for the HSBC joint account she held with her husband; statements for the NatWest account in her sole name; a statement for the HSBC ISA account in her sole name, showing a balance of about £12,000 with no withdrawals during the relevant period; and her NHS payslips. As I shall explain, one of the joint bank statements from September 2019 showed a payment into that account from another account, then a payment out to a credit card, in relation to neither of which had any disclosure been given.

19. Turning back to the trial, the Claimant was the only live witness on *quantum*. Unfortunately, there is no transcript available of her evidence. On damages, the Recorder said this:

> "14. Turning to *quantum*, there is only special damages. Most are agreed: there is an insurance excess of £350, repairs of £10,022.24 and two lots of removal charges. As is so often the case, it is hire charges that are the real issue.
>
> 15. In this case, the key issue is impecuniosity. Mr Cunningham made two points: firstly, that the Claimant is debarred because there has not been full disclosure. The standard direction for disclosure was made, and Mr Cunningham points out that the Claimant has not given disclosure of the records of a bank account and statements for a credit card. It is apparent these exist by reference to the joint account statement that has been disclosed. The Claimant's evidence was that the other account related to her husband, and the credit card was in his name. There was no evidence that Mr Woodgate was ordered to give disclosure. I do not accept that the Claimant should be debarred. In my judgment, the Claimant is not debarred.
>
> 16. The other point that is raised is more difficult. It relates to an ISA that is held by the Claimant. We have seen that the ISA statement, which was included within her Disclosure; she has about £12k in the ISA which gains interest. There is no evidence about what sort of access the Claimant would have to the funds. What she did tell me was that the money was earmarked for mortgage payments, however no withdrawals were made. Because of this, the Defendant says that the Claimant could have used this money to pay for hire upfront and not use a credit hire agreement.
>
> 17. In response to this argument Mr Delaney has referred me to the well-known case of *Lagden v O'Connor* [2003] UKHL 64 [2004] 1 AC 1067]. That states an inability to

> pay car hire without unreasonable sacrifice effectively amounts to impecuniosity. Mr Delaney also referred me to the recent case of *Irving v Morgan Sindall* PLC [2018] EWHC 1147 (QB), in which Mr Justice Turner dealt with an appeal where a Claimant had said that they were impecunious but did have a small ISA. The trial judge concluded that if the Claimant had put together all his sums, including the ISA, he could have paid for a car and the tortfeasor would not have needed to pay the costs of a hire. The appeal was allowed. In short, impecuniosity need not lead to penury.
>
> 18. The facts here are different. The Claimant has £12k in her ISA. The cost for a like for like vehicle would have been somewhere between £8k to £9k, so the Claimant would have had a £3k cushion. Of course, she was not to know at the outset how long she would have needed to hire a vehicle. Further, she would, by using her ISA, if she could (because there may have been a delay in accessing the funds), be effectively running the risk of reducing her capital down to nothing. If any other emergency expenditure were necessary, she would be unable to pay for it.
>
> 19. I find that while the Claimant was not living in penury, she was impecunious within the meaning of that word when used in credit hire cases. To give up almost all her savings, leaving herself nothing to cover further issues, would be making a sacrifice the Claimant could not reasonably be expected to make.
>
> 20. It follows from that that I am satisfied that it was reasonable for the Claimant to enter into a credit hire agreement. Having said that, any claim must be limited to the sums in the agreement itself."

20. The Recorder reduced the amount for credit hire from that on the Claimant's Updated Schedule of Loss on the basis he explained in [20]. The actual figure awarded by the judge (subject to the 50% reduction) was £18,655.20.

Grounds of appeal and submissions

21. In order to understand the issues arising on the appeal, it is necessary to trace through how the appeal has been put since 23 April 2021, when the Defendant's Grounds of Appeal were filed and served.

22. The Appellant's Grounds of Appeal, in essence, were that the Recorder's conclusion that the Claimant had been impecunious in December 2019 was perverse and/or an error of law, given the £12,000 in her ISA and her own evidence showed the spot rate would have been about £9,000. The Grounds of

Appeal also maintained (at [2(f)]) that the Claimant's claim that the ISA had been earmarked for mortgage payments and bills had not been in her statement or corroborated by the documents. (In fact, as Mr Roberts accepted at the hearing before me when it was pointed out to him, this had been said in the Claimant's 'Reply to Defence on the Issue of Impecuniosity' at [6].)

23. Mr Roberts' Skeleton Argument of 1 June 2023 put the appeal on a different basis. Two new matters in particular were raised, neither of which had featured in his Grounds of Appeal.

24. Firstly, he said that the Claimant should have been debarred from relying on impecuniosity 'by a combination of disclosure and statement failings'. As to disclosure – the first new point - Mr Roberts showed me one of the HSBC bank statements for the joint account held by the Claimant and her husband, into which there had been a transfer of £945 from an account ****2754 on 14 September 2019, which on the same day was then paid out to a Gold Card account. Mr Roberts said there had been no disclosure of either of these accounts, and so pursuant to the order of DJ Coonan, the Claimant should have been debarred from relying on impecuniosity and she should have been deemed to be pecunious (and thus only able to recover the spot rate).

25. Second, the Skeleton Argument no longer maintained the earlier argument that the Claimant should only have been entitled to the spot rates for the full period. Instead, it was submitted that the repairs could have been done in a couple of weeks, during which the Claimant would have been entitled to credit hire rates, it being accepted she was not pecunious as to both repair and hire costs.

26. It is important to note, for reasons that I will come to, that at trial the repair period of 72 days had been conceded (Defendant's Trial Skeleton Argument, [15]).

27. Paragraph [4(l)-(o)] of the Defendant's Skeleton Argument on the appeal said:

> "l. However, substantively, the presence of £12,000 in the ISA account, sufficient to cover the entirety of repairs at all stages, should not have given rise to a conclusion as to overall impecuniosity even having regard to C's elaborated evidence.
>
> m. The simple fact is that C was not impecunious as to the cost of repairs at the very least, irrespective of her ability to meet ongoing hire charges.
>
> n. In essence C's case is that the money had been earmarked for a family emergency. This was a family emergency. It should have been taken advantage of accordingly.
>
> o. The only reasonable conclusion to be reached in the circumstances is that C was pecunious as to repairs.

> Repairs should then have been concluded within a matter of a couple of weeks at most, thereby reducing the need for hire to the same period."

28. Mr Roberts accepted this was a new point not raised below but said that the Claimant was not prejudiced by it. He did not put forward any explanation or evidence for the Defendant's change of position.

29. Mr Roberts submitted that the Recorder's conclusion was perverse and/or constituted an error of law. He said (Skeleton Argument, [5(a)]-[5(e)]) that:

> "a. The Learned Judge accepted at face value C's evidence as to the ISA account and its purpose. He then reached the conclusion that it represented an unreasonable sacrifice on the part of the Claimant to use the ISA funds to have her own vehicle repaired. Accordingly D's argument as to a failure to mitigate was rejected.
>
> b. The Learned Judge has erred in law by failing to have regard to the evidential burden reinforced by *Diriye* [*v Bojaj* [2020] EWCA Civ 1400] and *Haider* [*v DSM Demolition* [2019] EWHC 2712].
>
> c. Further and in any event, the conclusion that impecuniosity was made out on the basis of an emergency which was evidenced neither by way disclosure or in C's statement is perverse.
>
> d. The Learned Judge has placed too much emphasis on C's uncorroborated evidence as to mortgage payments.
>
> e. The Learned Judge has placed too little or no emphasis on the fact that: -
>
> (i) This was a family emergency.
>
> (ii) No such mortgage payments were ever made from that account."

30. The Defendant's evidence from Gary Haynes of Whichrate (UK) on spot rates for a 72 day period from a range of hire companies (Thrifty, Sixt, etc), plus a premium to cover the excess in the event of a fault accident to the hire car, ranged from £5333.87 (Thrifty) to £10173.07 (Avis Prestige).

31. Thus, the nub of the Defendant's case as put forward in the Skeleton Argument was that the Claimant had had around £12,000 available in her ISA, and that this could and should have been utilised to have a quick repair done, the period put forward by Mr Roberts for that repair being two weeks. Paragraph 6 of the Skeleton Argument concluded:

> "a. The decision represents both an error in law and/or is perverse.
>
> b. The period of hire should be reduced to a period of approximately 2 weeks."

32. In response, Mr Weir submitted as follows.

33. Firstly, he pointed out the change in the Defendant's case. He said the former argument about the Claimant's pecuniosity for the spot rate over the full period of 72 days had been abandoned.

34. Mr Weir said that the Defendant should be held to the case as set out in the Skeleton Argument on period, and not the case as set out in the Grounds of Appeal.

35. Mr Weir said there had been no disclosure or statement failures. The point about mortgage payments and bills had been expressly raised in pre-trial pleadings. It had not been said for the first time in evidence. As to disclosure, DJ Coonan's order had been complied with. At [5] of her Reply to Defence on the Issue of Impecuniosity she had said that she did not have a credit card at the relevant time. At [6] she had dealt with the mortgage payment point. The Defendant received financial disclosure in January 2021, and so could have applied for specific disclosure of the husband's bank statement and/or credit card, but she did not do so, and so could not now be heard to complain.

36. On the substantive issue, Mr Weir said that it was now too late raise any issue about the repair period, and whether the Claimant could have paid for the repairs, because period had been conceded at trial. He relied on *Singh v Dass* [2019] EWCA Civ 360 on new points being raised on appeal, a case which I will return to. He said that the Defendant was seeking to raise a new point on appeal which would have necessitated new evidence and resulted in the trial being run differently. In any event, it was impossible to understand how the Claimant being able to fund the repairs privately would have led to them being undertaken more promptly than they were. The Claimant's Skeleton Argument stated:

> "28. … D's counsel seeks to give evidence that the repairs would have been 'concluded within a matter of a couple of weeks at most' (appeal skeleton argument at para 4o).
>
> 29. No evidence given on this issue because the issue was not raised. It was not a live issue because, as set out above, D had expressly conceded the 'period' in her trial skeleton argument.
>
> 30. … Whether the repairs were to be paid by C's insurer or C herself is beside the point; the repairs took as long as they took for reasons unrelated to the source of the funding."

37. Finally, Mr Weir said the Recorder, had he been asked, would have been entitled to find that the Claimant had been impecunious as to repairs (Skeleton Argument, [31]]. Mr Weir said the reasoning of the Recorder applied across to the cost of repairs, given they were in excess of £10,000 and the spot rate on Mr John's evidence was c. £9,000. In other words, given the Recorder found that the Claimant could not have been reasonably required to use the ISA to meet he spot rate, it followed *a fortiori* that the Recorder would have found that the Claimant had not been reasonably required to use the same ISA to fund the repairs.

Discussion

The test on appeal

38. This is contained in CPR r 52 r 52.21(3):

> "(3) The appeal court will allow an appeal where the decision of the lower court was -
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

Was the Recorder wrong not to debar the Claimant from relying on her asserted impecuniosity by reason of a disclosure failure ?

39. I accept (per *Diriye*, [4]) that the burden lay on the Claimant to demonstrate her impecuniosity. I also accept DJ Coonan made a specific order placing disclosure obligations on the Claimant, and that a failure to comply with them would have led to her being debarred. I also accept that had she been debarred she could not have recovered the credit hire rate, but only the lesser spot rate. I further accept there are sanctions under the CPR for non-disclosure: see CPR r 31.21.

40. All that said, in my judgment the Recorder was right to reject the argument that the Claimant should be debarred, and thus that she should only have been entitled to recover the spot rate rather than the credit hire rate.

41. The way the argument was put in the Defendant's trial Skeleton Argument at [17] was as follows:

> "17. The Claimant contends to be impecunious, and has provided bank statements and wage slips in support (p277 – 355). However, the Defendant avers that the Claimant has failed to provide complete disclosure of all her bank accounts and/or credit cards, and thus remains debarred from relying on the fact impecuniosity pursuant to the Order of District Judge Coonan (p296(d)). The following accounts have not been provided: (a) account number ****2754 (eg transfer on 14 Sep 2019 (p277)); (b) Gold

> credit card ****4192 (eg transfer on 14 Sep 2019 (p277)).”

42. I begin with CPR r 31.8, which deals with a party’s general duty of disclosure:

> “(1) A party’s duty to disclose documents is limited to documents which are or have been in his control.
>
> (2) For this purpose a party has or has had a document in his control if –
>
> (a) it is or was in his physical possession;
>
> (b) he has or has had a right to possession of it; or
>
> (c) he has or has had a right to inspect or take copies of it.”

43. The Recorder accepted the Claimant’s evidence that the accounts referenced in the 14 September 2019 transaction were in her husband’s sole name. I cannot go behind that finding of fact. There is accordingly no basis for concluding the associated statements fell within CPR r 31.8 so that they should have formed part of standard disclosure. There is no evidence that any of the three limbs of CPR r 31.8(2) was satisfied.

44. Earlier I set in full the relevant part of DJ Coonan’s order, indicating what disclosure the Claimant was required to give. In my judgment, she complied with that order. It was expressly limited to documents which were ‘in his [sic] control’. Absent any evidence, I reject the suggestion that the associated statements were in the Claimant’s control for these purposes. They were not. A married couple who have separate bank accounts or credit cards do not have control of their spouse’s bank statements or credit card statements simply by virtue of being married to them. The statements were in the control of the Claimant’s husband, but DJ Coonan’s order did not apply to him. Nor, it seems to me, could it have done so. The district judge could not properly have ordered the Claimant’s husband to make disclosure as part of standard disclosure directions, or made an order of his own motion against him. That is on the simple basis that the husband was not a party to the proceedings.

45. The Defendant’s legal team were plainly alive to the point before the trial, because it was put to the Claimant in cross-examination. Hence, once she had made disclosure of her financial records, it seems to me that the way forward for the Defendant should have been for her to make an application for third party disclosure against the Claimant’s husband, seeking the relevant statements, pursuant to CPR r 31.17 (Orders for disclosure against a person not a party):

> “(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
>
> (2) The application must be supported by evidence.

> (3) The court may make an order under this rule only where –
>
> (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.
>
> (4) An order under this rule must –
>
> (a) specify the documents or the classes of documents which the respondent must disclose; and
>
> (b) require the respondent, when making disclosure, to specify any of those documents –
>
> (i) which are no longer in his control; or
>
> (ii) in respect of which he claims a right or duty to withhold inspection.
>
> (5) Such an order may –
>
> (a) require the respondent to indicate what has happened to any documents which are no longer in his control; and
>
> (b) specify the time and place for disclosure and inspection."

46. The Defendant did not make such an application. I cannot speculate why not, and make no finding about it. However, one possibility that occurs to me is that this was a tactical choice by her legal team. They may have reasoned that there was too great a possibility that disclosure would not help her case, eg, if the credit limit or available balance on the husband's credit card had been low, or if his bank account had had insufficient funds to have paid spot rate of about £9000. They may have reasoned the Defendant. would be in a better position to deal with the matter by way of cross-examination (as it was), and then to make the argument they made at trial, and have repeated on this appeal.

47. Be that as it may, the Defendant's argument rightly failed before the Recorder and it fails before me. That is simply because there was no non-compliance by the Claimant with DJ Coonan's order and she was under no duty to disclose her husband's financial records, which were not hers to disclose.

48. For completeness, the Defendant's other complaint about non-disclosure, namely of the earmarking of the ISA for mortgage payments and bills, has now fallen away. It was asserted by the Claimant during the pleading stage, and did not emerge for the first time at trial as the Defendant initially claimed. Similarly with the fact that the Claimant did not have a credit card until March 2020, which was also referred to in the pleadings before trial.

The Defendant's argument that the period of repair should be limited to two weeks and she should have funded the repair costs herself

49. As I have explained: (a) this argument emerged for the first time in Mr Roberts' June 2022 Skeleton Argument; (b) it was not contained in his Grounds of Appeal; (c) no application was made to amend those Grounds; (d) it is fundamentally at odds with how the Defendant ran the case at trial.

50. I am quite clear that I should not permit this ground to be raised now. That is for the following reasons.

51. Firstly, by raising a wholly new argument in the Skeleton Argument without first seeking permission to amend the Grounds of Appeal, what the Defendant was doing, in effect (I do not say intentionally) was to circumvent CPR r 52.17, which provides that:

> "An appeal notice may not be amended without the permission of the appeal court."

52. Second, not only did the Defendant not contest the repair period claimed by the Claimant, it was *expressly conceded*. Paragraph 15 of the Defendant's trial Skeleton Argument stated, under the heading 'Need and period':

> "These are accepted."

53. As Mr Weir said, this concession meant the issue of period was removed from the Recorder's consideration because, under our adversarial system, it is for the parties to frame the issues. For this reason, there was no exploration of this issue in evidence, and no witnesses were called to deal with it (although a Civil Evidence Act 1995 notice was served for Arif Latif's witness statement, so it was formally in evidence). I will return to Mr Latif in a moment.

54. In *Singh v Dass* [2019] EWCA Civ 360, [15]-[18], Haddon-Cave LJ set out the legal principles applicable where a party seeks to raise a new point on appeal which was not raised below:

> "15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
>
> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] RTR 22 at [29]).”

55. The most recent case on this point is *Hudson v Hathaway* [2022] EWCA Civ 1648, cited in *Blacklion Law LLP v Amira Nature Foods Ltd* [2023] EWCA Civ 663. In the former case at [34]-[35] Lewison LJ considered the authorities including *Singh v Dass*, as follows:

> "34. There is no doubt that the court has the power to entertain a new point on appeal. In *Singh v Dass* [2019] EWCA Civ 360 Haddon-Cave LJ set out the principles which this court generally applies in deciding whether a new point may be advanced on appeal:
>
> > ‘[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
> >
> > [17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial…
> >
> > [18] Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs.’
>
> 35. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146, Snowden LJ (then sitting in this court as Snowden J) amplified these criteria. He first said that there is no general rule that a case needs to be ‘exceptional’ before a new point will be allowed to be taken on appeal. He pointed out that there was a spectrum of cases, at one end of which is a case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to

> raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

56. In my judgment what the Defendant is seeking to do is a classic example of an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In fact, I would go further, and say that the new point *would* - not might - have changed the course of the evidence given at trial. The trial would have had a different shape.

57. The Claimant's vehicle was provided on credit hire terms by Accident Exchange Ltd. They provided Mr Latif (who, like Mr John, works for APU Ltd) with their case management notes. He made a statement on behalf of the Claimant dated 23 September 2020, in which he quoted from the notes. It does not appear Mr Latif had any first hand involvement with the repair. For the most part, the notes appear to consist of messages and communications about the progress of the repairs to the Claimant's vehicle. I will quote just a selection of those referred to Mr Latif.

58. There is an entry for 17 December 2019: 'No ECD at the moment as a big job. ECD set to monitor'. I assume 'ECD' means 'Expected Completion Date'. Moving forward, there is then an entry for 23 December 2019, 'Please await confirmation before collecting your vehicle. At present the estimated completion date for your repairs is 06/01/2020.' I note that already this was beyond the two weeks which Mr Roberts now says the repair should have taken. There is a further entry on the same day: 'Delayed repairs'. There is no explanation what the cause of the delay was.

59. Christmas and New Year then intervened, and there are no records until 28 January 2020: 'Off-hire our vehicle: deferred until 29/01/2020 07:00 (Call b/s [I assume bodyshop] for update.)' On 29 January 2020 there was this: 'Call made to bodyshop: Landrover now confirmed steering rack now arriving Friday if it arrives ECD 05/02.' In fact, the repair was not completed until later that month.

60. If the Defendant had raised the issue of period at trial, then all of these matters would undoubtedly have been explored in evidence through Mr Latif, and perhaps others. Reasons for the delay in the repair would have required exploration. For example, if the Defendant had maintained that the repair

should have been completed in two weeks, the Claimant may have wanted to call someone directly involved with the repair to rebut that suggestion, eg, because of the size of the job; the need for a new steering rack; and the time it took to obtain that from Land Rover. In short, the evidence on the question of *quantum* would have been different, and would have been much more extensive.

61. Mr Roberts complained that Mr Latif statement was 'unhelpful' through lack of clarity, and that he had not been cross-examined. As to the first point, as I have said, Mr Latif was simply the vehicle for putting the repair notes into evidence. I think the notes are relatively clear. As to the second point, it hardly lies in the Defendant's (or Mr Robert's) mouth to complain that Mr Latif was not cross-examined, when there does not appear to have been any application by the Defendant for him to attend for cross-examination – because period was conceded by the Defendant, and this was a fast track trial. If matters were not explored in cross-examination, as Mr Roberts argued they should have been, then that was because of tactical decisions taken by the Defendant. No application was made by the Defendant to remove it to the multi-track.

62. I do not accept Mr Roberts' assertion that the Claimant is not (or would not be) prejudiced by this new basis for the Defendant's case. The Claimant won at trial after playing the game on a pitch selected by the Defendant (ie, by her not putting period in issue). The Defendant is now seeking to make the Claimant play the game all over again on a different pitch. That is obviously prejudicial.

63. The Defendant faces the further difficulty that there is absolutely no evidence to support Mr Roberts' suggestion that the repair could have been done 'in a couple of weeks'. As Mr Weir said, the repair, 'took as long as it took.' I commented in argument that garages work to their own schedule; parts have to be got; and in this case Christmas and New Year intervened. Mr Roberts' figure seemed to me to have been simply plucked from the air. He advanced no coherent basis for his suggestion that if the Claimant had gone to a 'mainstream garage' (his words) the repair would have been done more quickly than it was. Mr Roberts did not explain what the difference was between a 'mainstream garage' and Custom Coachworks of Burgess Hill, which actually carried out the repair.

64. I therefore dismiss this ground of appeal on a straightforward application of *Singh v Dass* and *Hudson v Hathaway*. Mr Weir reminded me of Lewison LJ's well-known *dictum* in *FAGE UK Limited v Chobani UK Limited* [2014] EWCA Civ 5, [114(ii)]:

> "The trial is not a dress rehearsal. It is the first and last night of the show."

65. It follows that the time to raise the issue of period was at the trial; a deliberate decision was taken by the Defendant to concede the issue, so that no live evidence was called, which would have been necessary had the matter been in issue; and it is now too late to raise it.

Was the Recorder wrong to conclude that the Claimant was impecunious despite having had c. £12,000 in a cash ISA available on the date of accident and her own

witness' assessment that the spot hire charge would have been c. £9,000, thus leaving c.£3,000 ?

66. As I have explained, this argument was raised in the Defendant's Grounds of Appeal, but was absent from Mr Roberts' Skeleton Argument.

67. In his Reply Mr Roberts said (contrary to Mr Weir's submission) that there had been no 'disavowal' of the Grounds of Appeal, but that there had merely been a change in emphasis between the Grounds and the Skeleton Argument. That, I think, underplays matters somewhat. That said, I am prepared to accept Mr Roberts' assertion that the Grounds of Appeal had not been abandoned.

68. That said, it seems to me that the first question is whether I should now allow the argument to be pursued.

69. Paragraph 5.1 of PD52A provides that:

> "The purpose of a skeleton argument is to assist the court by setting out as concisely as practicable the arguments upon which a party intends to rely."

70. A skeleton argument which differs, without explanation, from the grounds of appeal will not readily fulfil this objective because the court may be left in a state of uncertainty as to what exactly the appellant intends to argue.

71. In the exercise of my case management powers, in particular under CPR r 3.1(2)(k) and (m), I decline to entertain this ground of appeal. In his opening remarks Mr Weir referred to the High Court not being 'the Wild West'. Leaving aside the slightly emotive language, I take Mr Weir's point. Proceedings in this Court are governed by detailed and carefully drafted rules. Those rules must be followed unless there is a reason not to do so, and the Court's permission obtained. They require a party to present their case with clarity and precision. As Mr Weir said, and again I agree, 'the rules are here for a reason, and they need to be respected.'

72. It therefore seems to me that it is not open to a litigant to 'chop and change' how they advance their case, certainly without good reason or explanation. Here, there is neither. A party is entitled to know how their opponent's case is to going to be put, as is the court, otherwise the process of litigation and adjudication becomes very difficult. I regret to say that the way this appeal was presented did not always aid my ready comprehension of the issues arising in it.

73. But if I am wrong, and I should consider the argument, then I reject it on its merits in any event. The conclusion the Recorder reached was reasonably open to him. The application of the appellate test of 'wrongness' under CPR r 52.21 must take account of the nature of the decision being challenged. Here, the Recorder was making an exercise of judgment on the question (as I shall explain) of what it would have been reasonable for the Claimant to have done following the accident, rather than making a hard-edged determination on an issue of law. That means that in order to allow the appeal, I must be satisfied that the Recorder reached a conclusion which was not reasonably open to him

on the evidence. In *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, [67], Lord Reed said:

> "67 It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

74. That is not an easy test to satisfy, at least in the present context. As Turner J observed in *Irving v Morgan Sindall plc* [2018] EWHC 1147 (QB), [37]:

> "It will only be in rare cases in which an appellate court will interfere with a judgment on the issue of impecuniosity reached at first instance."

75. The test of impecuniosity is derived from *Lagden v O'Connor* [2004] 1 AC 1067, in which Lord Nicholls observed (emphasis added):

> "9 There remains the difficult point of what is meant by 'impecunious' in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. *In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make.* I am fully conscious of the open-ended nature of this test. But fears that this will lead to increased litigation in small claims courts seem to me exaggerated. It is in the interests of all concerned to avoid litigation with its attendant costs and delay. Motor insurers and credit hire companies should be able to agree on standard enquiries, or some other means, which in practice can most readily give effect to this test of impecuniosity."

76. Lord Hope said at [34] (again, emphasis added):

> "34. … *The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages.* He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected."

77. Hence, an assessment of impecuniosity requires an assessment of what was reasonable for a claimant to do. It is for this reason that I said the Recorder was engaged in an exercise of judgment.

78. In *Irving*, Turner J said at [36]:

> "I cannot ignore the fact that by reducing her capital to the bare minimum and increasing her debt, the claimant would have been exposing herself to the risk of a serious financial challenge in the event that even a modest but unexpected financial reverse might have afflicted her before her claim was satisfied. Impecuniosity need not amount to penury."

79. It follows that the Recorder's task was to determine whether it would have been unreasonable in December 2019, in the circumstances in which the Claimant found herself, to have required her to use her ISA money (which the judge accepted had been ear-marked for mortgage payments and other bills) to pay for a hire car for an uncertain period whilst her own car was undergoing major repairs.

80. I see the force in the Defendant's submission that, as events turned out, the Claimant would have had a c.£3,000 cushion out of her c.£12,000 ISA having paid c.£9,000 in spot charges, and was thus not impecunious. However, I think the flaw in this argument is that it focusses on what actually happened (with the benefit of hindsight), and not on what the Claimant had to decide immediately following the accident, and what it was reasonable then for her to have done. That is the point of time where I consider the focus should be. At that point, no-one, I think, could have known how long her car would be off the road, and what the hire charge for a replacement might be (either at the spot rate or credit hire rate). Mr Weir said, with the benefit of his experience, that it is not uncommon in credit hire cases for the period to stretch to hundreds of days (no doubt to the chagrin of the paying insurance company).

81. There is no doubt the Recorder properly understood who bore the burden of proof on this issue. He was referred to *Morgan Sindall* (see his judgment at [17]) and in any event where the burden lies is well-established.

82. I do not think the Recorder's decision can be said to have been one which no reasonable judge could have reached. I do not doubt that other judges may have reached a different conclusion, but that is not the test.

83. The Recorder did not ignore that this was, in its own way, an emergency. He explained at [18] that if the Claimant had used her ISA here, she would have had nothing left 'if any other' emergency arose. As I have said, he accepted that the ISA was ear-marked to pay for the mortgage and other bills, and given the inherent uncertainty of the necessary length of hire (an uncertainty which came to pass, given the delay repairs to which I have referred) it was reasonable and not to expect her to spend the lion's share but very uncertain proportion of the totality of her savings on car hire. For most people, their mortgage is the biggest financial obligation which they have, and it is in that context in which the Claimant's decision falls to be assessed.

84. It therefore seems to me that the Claimant is right when she submits that the Recorder provided a rational and proper basis for his assessment that the Claimant was impecunious in [18]-[19] of his judgment. As he put it at [19]:

> "To give up almost all her savings, leaving herself nothing to cover further issues, would be making a sacrifice the Claimant could not reasonably be expected to make."

85. The Recorder accordingly asked himself the right question, and gave an answer that was properly open to him. In short, in December 2019, it would have been unreasonable to have asked the Claimant to commit to the risk of using up all of her savings on car hire, when they might well have been needed to pay her mortgage and bills, which was the purpose for which they had been ear-marked prior to the accident.

86. I reject this ground of appeal.

Conclusion

87. It follows that this appeal is dismissed.