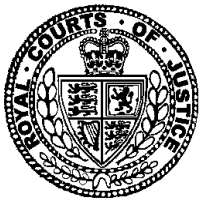

Neutral Citation Number: [2020] EWHC 117 (QB)

Case No: QA-2019-000253

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM DARTFORD COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2020

Before:

MR JUSTICE STEWART

- -

Between :

MR VAMSI PUTTA	**Appellant**
- and -	
ROYAL SUN ALLIANCE INSURANCE PLC	**Respondent**

- -
- -

Angela Georgiou (instructed by **Quantum Legal LLP**) for the **The Appellant**
Aidan O'Brien (instructed by **DWF LLP**) for the **The Respondent**

Hearing dates: 21 January 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A 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.

.....

MR JUSTICE STEWART

Mr Justice Stewart:

Introduction

1. This is an appeal by the Claimant against an order of Her Honour Judge Venn sitting in the Dartford County Court on 12 August 2019. In her order she gave judgment for the Claimant in the sum of £9,158.46. The Defendants had made a Part 36 Offer of £10,000 on 8 February 2018.

2. I gave permission to appeal by order dated 21 November 2019.

Outline

3. This appeal concerns credit hire charges which were claimed in the sum of £26,290.27 and repair costs in the sum of £2,424.95.

4. The Claimant was at all material times a self-employed Transport for London PCO-licensed taxi driver. His Mercedes E220 was damaged in the accident on 27 May 2016 and was temporarily unroadworthy. On 30 May 2016 the Claimant entered into a Credit Hire Agreement for a replacement vehicle. The daily rate was £408 (inclusive of collision damage waiver and VAT).

5. On 2 June 2016, the Claimant instructed engineers (Laird Assessors) to inspect the Mercedes. Their report is dated 3 June 2016. They valued the Mercedes at £18,000. The estimated cost of repairs was £2,335.14. The repair costs included 6.7 hours labour. The engineers' report was disclosed to the Defendant on 6 June 2016.

6. On 21 June 2016, the Defendant admitted liability via the Portal. On 28 June 2016 they sent a letter referring to the Claimant's claim for personal injury.

7. On 7 July 2016 the Claimant received an interim payment from the Defendant in the sum £1,962.62 in part payment of repairs. The Claimant then initiated the commencement of repairs. His vehicle was fully repaired by 20 July 2016 at a cost of £2,424.95. The vehicle then had to undergo a Transport for London safety test, which it passed on 1 August 2016.

8. The credit hire claim was therefore for 64 days between 30 May 2016 and 1 August 2016.

Summary of the Judge's Findings

9. The Judge accepted that the Claimant's memory was not the best but added "…I do not believe that the Claimant was giving answers to the best of his recollection or doing his best to assist the court; I formed the strong impression that he was doing his best to give answers he felt were favourable to his case. At one point I had to remind him to think about the answers he was giving because he had given me six or seven different answers to one question; this was not only confusing, but also suggested that the Claimant was not being a careful witness." [29]

10. As stated above, the engineers' report was sent to the Defendant on 6 June 2016. The Judge found that it was not reasonable for the Claimant to allow storage and hire charges to accrue until he received a response from the Defendant's insurers. She

said that a reasonable time for a response would be the time allowed under the pre-action protocol, namely 15 days. In any event, where the vehicle was repairable at modest cost, 15 days was a reasonable period of time for the Claimant to allow the Defendant's insurer to indicate whether they wished to arrange their own inspection. Therefore, as at 21 June 2016 it was reasonable for the Claimant to make some progress with returning his vehicle to a roadworthy condition so far as his finances allowed him to do that [31]-[35].

11. The Judge found that throughout the repair period the Claimant had over £5,500 available to him on his credit cards and the Claimant could and should have effected repairs by using his credit card facilities. In the 15 days after 6 June 2016, the Claimant should have started investigating when his vehicle could have been repaired. He should have had in mind before 21 June 2016 that he might need to find a repairing garage [35]-[37].

12. Allowing the actual 13 day repair period and eleven days thereafter to obtain the Transport for London certificate, the repairs should have been completed and the vehicle back on the road as a taxi by no later than 16 July 2016. [38]-[39].

13. Thus, the period of hire was reduced to 49 days. In relation to this, the third ground of appeal states:

> "The learned trial judge was wrong in law and in fact to find that a period over which the Claimant hired a replacement vehicle was too long."

14. The Judge then considered the question of (1) the rate of hire and (2) whether or not the Claimant was impecunious.

15. The Defendant's case was that, having spent £2,424.95 on repairs out of a sum of £5,585.68 available funds on the credit card, the Claimant had £3,160.73 funds remaining on his credit card. The submission was that those funds should have been used by the Claimant to hire at the basic hire rate (BHR).

16. The Judge found that on 3 June 2016 the Claimant knew that his vehicle was repairable and the estimate of repairs in terms of cost and time (2 garage days approximately). Had the Claimant been mitigating his losses, then at the end of the hire period he would have been driving his own vehicle again. The only evidence as to the BHR was from the Defendant. It was provided by a Mr Skellam. The Judge was not provided with a copy of the case of *Stevens v Equity Syndicate Management Ltd* [2016] EWCA Civ 93. She said that so far as she was aware she was not required to identify that a particular vehicle was available at the time the Claimant hired [41]-[46]. In refusing permission to appeal the Judge gave further details about the chronology of what was available to the Claimant in the period 27 May 2016 to 9 July 2016. That chronology was amplified from the evidence in Mr O'Brien's skeleton argument. It was not disputed. I shall refer to it later.

17. Relying on Mr Skellam's report, the Judge found that a company called Drover could have provided an equivalent vehicle at £335 per week [47]. After judgment Ms Georgiou said that Drover was not a hire company but an advertising platform which did not own its own fleet. There was further argument about this point and the Judge

then asked about another company in Mr Skellam's report, namely Wendex. Ms Georgiou said that the evidence was that Wendex was essentially a garage offering hire as a secondary service and they would not be a mainstream reputable hire company so as to satisfy the ***Stevens v Equity*** test. She added that there were no quoted rates for Wendex attached to Mr Skellam's witness statement. There was a further discussion which culminated in the Judge saying that it had been brought to her attention that Drover appeared to be an advertising company, or at least an intermediary between drivers and hirers and not an appropriate company on which to base an assessment of the basic hire rates pursuant to ***Stevens v Equity***. She concluded as follows:

> "Another company is identified in the statement of Mr Mark Skellam…Mr Skellam explains in his statement that he knew that he had been dealing with finding the basic hire rate for a replacement for an ABI category PT9 vehicle. When new, the Claimant's vehicle would have been ABI category PT9. Mr Skellam states that he also knew that he was looking for a plated vehicle. He states that he had made telephone enquiries to prospective vehicle providers from whom the relevant basic hire rate details were recorded. He said that some published a tariff on their website, but for others he had to make telephone enquiries.
>
> One of the companies Mr Skellam contacted is known as Wendex and offered 7 day hire for £350. Wendex is clearly a company that hires vehicles. It was suggested on behalf of the Claimant that hiring was only part of Wendex's garage business, but I have seen an advert from Wendex, which states that they are Wendex Vehicle Rental Ltd, PCO registered hire vehicles; they offer daily rental for contract hire. I have seen another advert that says that Wendex has in excess of 20 years in the vehicle rental industry and are well placed to serve.
>
> It is unsurprising that the rates Mr Skellam put forward are not from places like Hertz or Easy Car because the Claimant's vehicle was a plated vehicle; I have yet to see rates offered from these sorts of companies for a plated vehicle.
>
> I am satisfied that Wendex is a company of some 20 years standing; it is a reputable PCO plated vehicle provider and whether or not it is a mainstream supplier, it is certainly a local reputable supplier. No issue has been taken with the locality of the company.
>
> I am also satisfied that Mr Skellam made the telephone calls he says he made and that he was told by Wendex that a Mercedes Benz E Class was available for £350 for a 7 day hire.
>
> I therefore revise what I think the basic hire rate is likely to have been to £350 for a 7 day period. I find as a fact and I am satisfied on the basis of Mr Skellam's evidence, that there was

> likely to have been a Mercedes Benz E Class, or similar class of vehicle to that the Claimant had been driving, available to hire for the duration of the period in which had been reasonable for the Claimant to hire for at that amount."

To the above hire figure the Judge added collision damage waiver at £18 per day for 49 days, a total of £882, making the figure for car hire £3,332.

18. Ground 4 of the Grounds of Appeal is as follows:

> "The Learned Judge was wrong in law and in fact to accept the Basic Hire Rates evidence adduced by the Defendant when assessing whether and at what rate the Claimant could have obtained a comparable vehicle on the open "spot" market."

19. As to the Claimant's impecuniosity, the Judge found that the Claimant had £3,160 remaining on his credit cards and, after paying for repairs he would have applied this to funding a replacement vehicle at the BHR if he had been mitigating his losses. She said that the repairs and hire could have been funded solely by using the funds available on the credit cards, without the Claimant having to spend money in his current account which he used for day-to-day living and family expenses [48]-[50].

20. As regards the arithmetic, prior to recalculating the BHR and adding in the collision damage waiver charges, the Judge said that £5,585.65 funds on the credit card minus hire and repairs of £4,675 left £910.65 on credit cards for unexpected emergencies. The Claimant also had an overdraft facility available to him. He used this only on 1 day to the extent of £131.12. He also had some £2,500 tax savings which were not due to be paid until 31 July 2016. The Judge said this was after the vehicle would have been repaired and usable as a private hire vehicle and the payment for the vehicle damage had been paid in full. The Claimant therefore had at all material times, save for 1 day, some £3,500 he could access for unexpected payments. On that 1 day, he had only £3,386.88. [51]-[52]. This finding was later modified to take account of the Collision Damage Waiver and higher BHR charges. Here the Judge said that the Claimant's current account had a balance "within more than £171.27 of the overdraft limit, and any overdraft would have been extremely short." She added:

> "I do not therefore come to the conclusion that in the circumstances it would have been reasonable for him to go and hire at, I think the figure was £410 a day, to avoid dipping very briefly into an agreed and established overdraft."

21. In relation to impecuniosity, there are 2 grounds of appeal namely:

> "1. The Learned Trial Judge was wrong in law and in fact to find that the Claimant was pecunious, at the beginning of and throughout the period of hire.
>
> 2. The Learned Judge was wrong in law and in fact to find that had the Claimant paid for the repairs to his vehicle and paid for hire of an alternative vehicle by utilising his credit card(s), the Defendant would have been liable to pay less damages and thus

> would have made payment to the Claimant shortly after the collision."

The Approach of the Appellate Court

22. In *Price v Cwm Taf University Health Board* [2019] EWHC 938 (QB) Birss J referred to a decision of Coulson LJ refusing permission to appeal. That case was *Wheeldon Brothers Waste Ltd v Millenium Insurance Company Ltd* [2018] EWCA Civ 2403. Coulson LJ reviewed a number of authorities and concluded:

> "10. In short, to be overturned on appeal, a finding of fact must be one that no reasonable judge could have reached. In practice, that will usually occur only where there was no evidence at all to support the finding that was made, or the judge plainly misunderstood the evidence in order to arrive at the disputed finding"

23. For completeness it is worth making brief reference to the authorities upon which Coulson LJ relied.

24. In *Fage UK Ltd v Chobani Ltd* [2014] EWCA Civ 5 at [114] Lewison LJ said:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…"

25. In *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 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."

Impecuniosity – Case Law

26. Impecuniosity was considered in the leading case of *Lagden v O'Conner* [2004] 1 AC 1067. At [9] Lord Nicholls said that in context of credit hire impecuniosity signifies an "inability to pay car hire charges without making sacrifices the Plaintiff could not reasonably be expected to make.…It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. 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."

At [35] Lord Hope "…The criterion that must be applied is whether he had a choice – whether it would have been open to him to go into the market and hire a car at the ordinary rates from an ordinary car hire company."

27. It is clear from the case of *Umerji v Khan* [2014] EWCA Civ 357 at [37] that the burden is on the Claimant to prove that his expenditure was reasonably incurred. There is a grey area about how much needs to be pleaded and proved to establish reasonableness before the evidential burden shifts to the Defendant to show that the expenditure was unreasonable. Nevertheless, in this type of case a Claimant needs to rely on his impecuniosity in order to justify the amount his claim should prove it.

Grounds 1 and 2

28. In *Opoku v Tintas* [2013] EWCA Civ 1299 at [30], the Court of Appeal held that a judge is entitled to take into account a Claimant's credit card facility when deciding the issue of how a Claimant can reasonably be expected to find funds.

29. In *Irving v Morgan Sindall plc* [2018] EWHC 1147 (QB) Turner J dealt with the situation where the judge concluded that the Claimant could have raised the money to buy a replacement car of the value of the one written off by the depleting those of her accounts which were in credit and spending up to her credit card limit. This court held that the judge failed to appreciate that his calculations were based on the assumption that the Claimant could be expected to have bought a replacement car immediately after the accident. That assumption was untenable because a fortnight elapsed before the car had been written off and a further fortnight would have been needed to buy a replacement. Over that 4 weeks, even if pecunious, the Claimant would have been entitled to hire a car at the basic hire rate. That hire rate would have been some £700 over a 4 week period. Therefore, the sum which the Claimant would have needed raise was far in excess of that upon which the judge based his calculations. Turner J took into account the fact that the judge suggested that further sums could have been raised by the Claimant applying to extend the limit on her credit card or approaching her family for loans. He concluded that neither option was sufficient to bring the Claimant outside the parameters of impecuniosity. He concluded, at [36]:

> "Furthermore, 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."

30. I shall approach the issue of impecuniosity assuming at this stage that the Judge's findings for period of hire and BHR remain intact.

31. The nub of the Claimant's case is that the Judge should not have required him to have to use every penny of the available credit on his credit cards in mitigation of his loss. It is said that this would require him to bear the burden of expensive credit card debt for an open-ended period, without any real consideration as to how he was to repay the sums spent on his credit cards. Further, there was no consideration as to how he

would fund everyday expenditure or deal with unexpected events if he had no available credit to him on his credit cards. The average interest rates across the 3 credit cards was 27.37%. He would have been immediately liable for interest charges. He did not wish to use his credit cards to pay for repairs, as this would have put a lot of burden upon him and he would not have been able to pay back the credit card debt for a long period of time. He knew from an early stage that he would have to fund, at least in the short term, the repair costs. It is said that it was unreasonable for him to have to embark upon funding BHR charges from the funds he had available to him. Further, the Claimant gave evidence that anything more than 30% of total credit available on the credit cards over a long period of time could affect his credit rating.

32. In those circumstances, it is said that the Claimant did not have a real choice as to whether or not he entered into credit hire since he was incurring a loss, or bearing a burden, or making unreasonable sacrifices in mitigation of his damages.

33. I have summarised above the Judge's findings as to the Claimant's finances. The evidence before her was quite detailed and the Judge gave an ex tempore judgment. In effect, her findings telescoped the evidence but also, because of the hire rates allowed after the initial judgment had been given, together with the collision damage waiver fees, her findings became somewhat piecemeal. The question is whether she was right to find that the Claimant was not impecunious on the evidence before her. In order to deal with this, the evidence needs to be looked at in some more detail, as helpfully summarised in Mr O'Brien's skeleton.

34. As at 30 May 2016, the Claimant did not know what the prospective length of hire would be. Nor did he know how long his vehicle would be off the road. At that point the evidence is as follows:

    (i) On the Judge's finding the BHR was £476 per week.

    (ii) The Claimant entered into a credit hire agreement at a daily rate of £408.

    (iii) The Claimant earned a daily pre-tax profit of approximately £131. Therefore, as he accepted in evidence, he would have been out of pocket every day he had to work. He said that he understood that but he had to get back to work. He said he had not thought it through. He was liable for the credit hire charges.

    (iv) There was at that stage £581 in his current account, £6,064 available credit on credit cards and £1,000 arranged overdraft, a total of £7,645.

    (v) In the first week therefore, the Judge was entitled to find that the Claimant was not impecunious. It should be emphasised that the BHR rate was a weekly rate which was renewable weekly.

35. As at 4 June 2016, on the Judge's finding the Claimant knew the cost of repair (£2,424.95) and the repair time (2 garage days approximately). Funds available as a minimum during the week 4-11 June 2016 were £72 on the current account, £6,158 available credit on the credit cards and £1,000 available overdraft. This is a total of £7,230. Had the Claimant paid the first week's hire, this would be reduced to £7,230

minus £476 = £6,754. Again, the Judge was entitled to find that the Claimant was not impecunious during this period.

36. In the week commencing 11 June 2016, the Claimant had, as at 11 June 2016, the following funds: £556 on his current account, £5,887 available credit on credit cards and £1,000 arranged overdraft facility, a total of £6,015. For one day, on 15 June 2016 the available funds dropped to £5,328. They recovered to £6,123 the following day. Even at the lowest point, and allowing for the payment of 3 weeks hire (£1,428) the Claimant would have had a minimum fund of £3,900 in this week.

37. In the 4th week of hire, commencing 18 June 2016, the Claimant had funds available, namely £509 current account, credit card facility £5,887, overdraft facility £1,000, a total of £7,396. If one deducts 4 weeks hire (£1,904) the available funds remaining to the Claimant would have been £5,492. The Judge found that repairs should have begun on 21 June 2016 and they would have been completed by 5 July 2016. Even if these were funded at the outset, the Claimant would have had available funds of £3,067.

38. In week 5, commencing 28 June 2016, the Claimant had available funds namely current account £1,252, credit cards £5,887, overdraft facility £1,000, a total of £8,139. Deducting from this figure, 5 weeks car hire (£2,308) and repair costs, the Claimant would still have had £3,334 available funds.

39. Week 6 commenced on 2 July 2016. The Claimant's funds then were: current account £1,011, credit cards £5,730, overdraft facility £1,000, a total of £7,741. After paying 6 weeks hire charge (£2,856) and repair costs, the Claimant would have had £2,425 available to him.

40. Week 7 commenced on 9 July 2016. By this stage the Claimant had received part payment from the Defendant for the repair costs in the sum of £1,962.62. this was on 7 July 2016. In addition, he would have had the following available funds: current account £1,075, credit cards £5,730, overdraft facility £1,000. Adding in the part payment of repair costs gives a total of £9,768. Deducting 7 weeks hire (£3,332) and repair costs, would have left the Claimant with £4,011.

41. Therefore, at the beginning of each week, had the Claimant not entered into a credit hire agreement, he would have had substantial funds available to him. The Judge's telescoping of the evidence was in fact not unfavourable to him taking, as she did, a general view of the facts. The lowest amount available to the Claimant would have been at commencement of week 6 when what would have remained was £2,425, out of which £1,000 was the overdraft facility, thus leaving £1,425 available on credit cards. This does not take account of the possible short-term use of the £2,500 put aside for tax.

42. If the Claimant had considered the position at the beginning of each week, and taken into account the sums reasonably available and the changing situation, it was open to the Judge to find that he was not, at any stage, impecunious. He was not, and would not have been had he paid BHR and repair charges, in the situation referred to by Turner J in ***Irving***, namely a situation amounting to penury. Further, on the basis that the Claimant would have to pay the credit hire charges if not recoverable in full,

incurring such charges rather than using his assets as set out above was not a reasonable decision for a risk-averse person. I would add the following:

(i) There was no evidence to the effect that the Claimant could not have entered into a credit hire agreement part way through the hire had his circumstances changed for the worse, given his fluctuating income and outgoings.

(ii) The Judge rejected the Claimant's evidence that he had done a search to find out what the BHR would have been. Therefore, this was not a case of someone who had properly weighed up the alternatives before deciding to incur credit hire costs many times higher than the BHR.

43. It follows that if the Judge was correct as to the period of hire and the BHR, her decision must stand in relation to the finding that the Claimant was not impecunious.

44. I now turn to Ground 2. The Judge's finding that is challenged arose after judgment and during argument as to interest. The Judge accepted that the average interest rate on the credit cards was 27.42%. The Claimant's counsel said that interest on £2,500 at 27.42% was £685.50 per year which over 3 years would have been £2,056, without taking account of the compounding effects of interest. The Judge said this:

> "…The Claimant received part of the payment to the vehicle repairs relatively quickly and this dispute appears to have escalated because of the claim for credit hire charges which were significantly more than the Claimant could ever hope to earn on any given day. I have to do my best to put the Claimant in the position that he should have been but for the accident so long as he had acted reasonably, and I have come to the conclusion that, had he acted reasonably, it is likely that he would have been paid for the hire charges and the balance of the repairs very much sooner than he in fact was. Bearing in mind that it took, I think, a period of about 2 months for the part payment on the repairs to come through, I would expect that upon completion of the repairs it would have taken perhaps another 2 months for the balance that he spent on hire charges and on repairs to come through. On about £255 for 2 months, on a broad-brush basis, doing the best I can, I am going to allow £500 in respect of interest."

45. The Claimant says that there was no evidence to support this finding. Further, the Appellant paid for his repairs and the shortfall of £462.33 in relation to the disputed exhaust was never forthcoming from the Defendants. Therefore there was objective evidence before the Court that the Defendant would not have reimbursed the Claimant for repair and hire charges within 2 months of completion even if he had funded the expenditure from sums available on his credit cards.

46. I do not accept this submission for the following reasons:

(i) As the Judge found, the Claimant received part of the payment for his vehicle repairs relatively quickly and the dispute appeared to have escalated because of the claim for credit hire charges.

(ii) The Defendants having expeditiously made payment of the majority of the repair charges, the Judge was entitled to find that the dispute of a few hundred pounds repair costs and a claim for reasonable hire charges would have been settled relatively quickly and in the time frame she suggested. Indeed, 18 months prior to trial the Defendants made a Part 36 Offer which the Claimant did not succeed in beating.

47. Therefore, I rule against the Claimant in relation to Ground 2.

Ground 3: The Period of Hire

48. The Claimant submits that because he was impecunious it was wrong for the Judge to reduce the period of hire given that he had no real option other than to wait for the Defendant to issue a cheque for the costs of the repairs before commencing repairs. The Claimant says that the Defendant should have raised a payment for repairs to the vehicle as quickly as possible and that there was no explanation as to why it had taken until 7 July 2016 to raise a cheque in the amount they did, given that they had been put on notice of the claim by the Claims Notification Form dated 1 June 2016.

49. I have already found in relation to Ground 1 that, assuming the Judge was correct about the BHR, the Claimant was not impecunious. Therefore Ground 3, as a separate ground, falls away.

Ground 4 – Basic Hire Rates

50. It was said in the Claimant's Skeleton [20] that it is common ground that BHR only falls to be considered in the event that a Claimant is deemed pecunious. In one sense this is correct. However, if the Judge erred about the BHR this would:

(i) Even if the Claimant was not impecunious, give rise to a greater award.

(ii) Potentially have a real impact on the issue of pecuniosity. The figures earlier in this judgment are based upon the BHR findings by the Judge.

51. In *Stevens v Equity Syndicate Management Ltd* [2015] EWCA Civ 93 Kitchen LJ said:

> "It follows that a judge faced with a range of hire rates should try to identify the rate or rates for the hire, in the Claimant's geographical area, of the type of car actually hired by the Claimant on credit hire terms. If that exercise yields a single rate then that rate is likely to be a reasonable approximation for the BHR. If, on the other hand, it yields a range of rates then a reasonable estimate of the BHR may be obtained by identifying the lowest reasonable rate quoted by a mainstream supplier or, if there is no mainstream supplier, by a local reputable supplier..."

52. The Judge in the present case raised with the parties the case of *Stevens* in her judgment at [45]. She said she had not been provided with a copy but from her

recollection paraphrased the passage which I set out above. There is no criticism of the way she paraphrased the principle.

53. There had been a directions order of 14 June 2018 in which the Defendant was permitted to rely upon a "basic hire report in relation to the rate of hire claimed by the Claimant." There was also the following order:

> "6. In the event that the Defendant does seek to obtain a basic hire report, the Claimant is permitted to file and serve a rebuttal basic hire report…"

54. The Claimant did not obtain such evidence. He purported to rely upon a statement from Stephen Perry dated 18 September 2018. The Judge pointed out that that report should not have been evidence, not being about the basic hire rate. It was a critique of Mr Skellam's report. Mr Skellam had not been asked to attend for cross-examination. Further, Mr Perry's statement did not have a compliant statement of truth.

55. Against that background I consider the Claimant's criticisms of the Judge's findings.

56. First it is said that exhibits were missing from Mr Skellam's statement. The particular exhibit which seems to be relevant to Wendex is WR/3. In paragraph 4.5 of his report Mr Skellam said:

> "From the gathered information, telephone enquiries are then made to the prospective vehicle provider from whom the relevant BHR details are recorded (see exhibit WR/3)."

In table 1 at paragraph 7.2 it is clear that telephone enquiries were made for rates at the time of hire in respect of Wendex. Therefore, there was sufficient evidence for the Judge to make the finding she did, table 1 setting out a figure of £350 for 7 day hire. If the Claimant had sought to make any point about the lack of exhibit WR3, then that should have been flagged up before trial and/or Mr Skellam asked to attend the trial. The Claimant did not apply for Mr Skellam to attend trial for cross-examination pursuant to CPR Rule 33.4. It is also said that there were apparent errors in the figures given for the other possible BHR providers when comparing paragraph 7.2 and the exhibits for those hirers. Those alleged errors may have been capable of explanation had Mr Skellam been cross-examined. For example the figure for Drover was £330 per week. The exhibit suggests £324. These could have been (a) error by Mr Skellam, (b) accurate in that the preceding figure on the exhibited document was £330 and it is possible that this is the figure for the BMW listed, (c) another explanation. It is simply not permissible to say that the Judge had to reject Mr Skellam's evidence about Wendex's rates because there may have been other errors in his statement.

57. The second point is that the finding, based on table 1 of Mr Skellam's report, that a Mercedes would have been available at £350 for a 7 day hire is inconsistent with paragraph 5.4 of the statement. Mr Skellam said this in paragraph 5:

> "5.1 On 23 August 2018, I searched company historical records. I found details of hire companies that have previously been captured who supplied suitable hire vehicles near to the

> Claimant's locality at the time of the Claimant's original hire in this case.
>
> 5.2 The rates I provide are those that were captured for those companies for hire of that class of vehicle in the months of February, May and November 2016.
>
> 5.3 All companies were trading as hire companies at the time of the Claimant's hire.
>
> 5.4 There is no guarantee of an "equivocal replacement plated vehicle" being available, however, hire companies attempt to satisfy customer requirements by offering comparable/superior vehicles or "cross hiring" at no other cost, rather than lose business."

58. A distinction must be drawn between a "guarantee" and a probability. The Judge was fully aware of this distinction having discussed this matter with counsel before she gave judgment in relation to Wendex. She was entitled to make the findings she did based on Mr Skellam's evidence.

59. Thirdly, it is said that Wendex appeared to be a repairing garage that offers hire as an add-on service and is not therefore a mainstream supplier. The Judge gave reasons as to why she did not expect comparators from companies like Hertz or Easy Car, the Claimant requiring a plated vehicle. She was satisfied for the reasons she gave that Wendex was a reputable PCO-plated vehicle provider. An exhibited Wendex advert described the company as "Wendex Vehicle Rental Limited". The Judge was entitled to make the findings she did on the evidence before her.

60. Fourthly, it is said, that there was no evidence before the Court that Wendex could in fact supply to the Claimant an equivalent replacement vehicle. It was submitted in the Claimant's Skeleton Argument that the only evidence about Wendex before the Court was a single generic advert in a trade magazine, which provided no costings or availability details, and one larger advert suggesting that a VW Passat could be hired for £110 per week or £25 per day. However, the advertisement also made it clear that Wendex supplied PCO-registered hire vehicles and a Mercedes E300 hybrid was specified. On the basis of that information and the telephone calls referred to by Mr Skellam, the Judge accepted Wendex as an appropriate BHR hirer. She was entitled so to do this. The fact that the magazine was a trade magazine does not assist the Claimant, particularly given that Mr Skellam said that the trade magazines are available to the public and the Judge did not accept the Claimant's evidence that he had performed a search to find out what the BHR would have been. [49].

61. The fifth point is that Wendex are located some 21 miles from the Appellant's geographical area. The Judge made it clear that she was aware of the geographical area requirement as referred to in the ***Stevens*** case. Wendex was located 21 miles from the Claimant's home address. The point had not been argued before the Judge that Wendex was outwith the Claimant's geographical area. Mr Skellam's evidence was that Wendex was 21.1 miles away from the Claimant's address. The question of whether a vehicle is within the Claimant's geographical is one of fact for the Judge.

This finding was within the power of the Judge for her to make on the evidence available.

62. Finally, the Claimant says that the insurance provision/excess liability was not detailed by Mr Skellam. The insurance excess was listed as £500 in table 1 to his report. What is submitted is that for one BHR company, Chauffeur Rentals it is specifically stated that the rate included insurance. It cannot be inferred, however, that the Wendex rate did not include insurance, especially given that at paragraph 6.2 Mr Skellam said: "Rates include insurance as indicated and VAT at 20%". Any ambiguity could have been clarified by correspondence, Part 18 questions or cross-examination.

63. It is of note that in the early paragraphs of his statement Mr Skellam sets out in some detail the basis upon which he was providing his figures. There is no criticism of the basis upon which he worked.

64. In summary Ground 4 must fail. Having regard to the authorities listed earlier in this judgment under the heading "The Approach of the Appellate Court" it would be wholly wrong for this Court to be interfere with the findings of fact made by the Judge in the circumstances I have briefly set out.

Summary

65. For the above reasons this appeal is dismissed.