England and Wales Court of Appeal (Civil Division) Decisions

Clark v Tull (t/a Ardington Electrical Services) [2002] EWCA Civ 510 (1st May, 2002)

Neutral Citation Number: [2002] EWCA Civ 510

Case No: B2/2001/2112, B2/2001/2113
B2/2001/2108, B2/2001/2102, B2/2001/1254

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
AND OXFORD COUNTY COURT
MR JUSTICE GRAY
HHJ CHARLES HARRIS QC

Royal Courts of Justice
Strand,
London, WC2A 2LL
1st May 2002

B e f o r e :

LORD JUSTICE ALDOUS
LORD JUSTICE TUCKEY
and
LORD JUSTICE JONATHAN PARKER

Between:
VALIGN=BOTTOM WIDTH=19%>Claimant/
Appellant
VALIGN=BOTTOM WIDTH=19%>Defendant/Respondent

Between:

Amanda Clark

- and -

Mr Kenneth Tull t/a Ardington Electrical

Services

And Between :

Julian Dennard	**Claimant/ Appellant**
- and -	
Robert Plant	**Defendant/Respondent**

And Between :

Arjune Sen	**Claimant/ Appellant**
- and -	
Steelform Engineering Company Limited	**Defendant/Respondent**

And Between :

Victor Lagden	**Claimant/ Appellant**
- and -	
Philippa O'Connor	**Defendant/Respondent**

And Between :

Wendy Burdis	**Claimant/ Appellant**
- and -	
Eric Livsey	**Defendant/ Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr I. Milligan QC, Mr B. Williams and Mr N. Hext (instructed by Herbert Smith as London agents for Stephens & Scown) for the Claimants/Appellants Clark, Dennard, Sen and Lagden.
Mr C. Symons QC, Mr M. Grant and Mr J. Hough (instructed by Morgan Cole and Hugh James Ford Simey) for Ardington, O'Connor and Steelform.
Mr I. McLaren QC and Mr S. Turner (instructed by Corries) for Plant.
Mr I. Milligan QC, Mr B. Williams and Mr P. McGrath (instructed by Betesh Partnership) for Burdis.
Mr J. Stuart-Smith QC and Mr M. Grant (instructed by Royal &Sun Alliance) for Livsey
Mr M. Brindle QC and Mr P. Goodall (instructed by Freshfields Bruckhaus Deringer) for Centrus (Intervener) by way of written submissions only.

HTML VERSION OF JUDGMENT
AS APPROVED BY THE COURT

This is the judgment of the Court to which all the members have contributed.

Introduction

1. This is the third round of a contest between the motor insurance market and credit hire companies which provide the innocent victims of motor accidents with car repair and hire services at little or no cost to them. The commercial success of such schemes has substantially increased the cost of motor claims borne by insurers. This has no doubt motivated their sustained legal attack on the schemes. Their first line of attack was that the car hire agreements were champertous. This failed in Giles v Thompson [1994] AC 142. Next, it was contended that the hire agreements were regulated consumer credit agreements which did not meet the statutory requirements laid down by the Consumer Credit Act 1974 so were unenforceable. This succeeded in Dimond v Lovell [2000] 2 WLR 1121, although Lord Hoffman described it as "a technical defect which more sophisticated drafting can easily correct". At both these earlier stages of the contest the House of Lords accepted that the credit hire companies fulfilled a real need and bridged a gap in the market and noted that there were many county court cases awaiting their decisions which they obviously hoped would put an end to further controversy. This was not to be.

2. In four of the cases before us the challenge is now to the whole scheme to provide credit for repairs and car hire which is said to be a pretence designed to avoid the restrictions imposed by the 1974 Act. Alternatively it is contended that the agreements are still unenforceable under specific provisions of the Act. Substantial issues relating to the measure of damages are also raised. Again thousands of cases in county courts up and down the country await the decisions of the higher courts on these issues.

3. Four sample cases were tried by His Honour Judge Charles Harris QC in the Oxford County Court last year with a view to appeal. His judgment is now reported at [2002] Lloyds Rep IR 138. A similar exercise the previous year failed when the sample cases he tried (Seddon v Tekin and others [2001] GCCR 2865) settled shortly before the appeals were due to be heard by this court. In each of our four cases the credit hire company standing behind the claimants is one or more of the subsidiaries in the Helphire group of companies. Various insurers stand behind the defendants. In the fifth case, Burdis v Livsey, the credit hire company involved is Accident Assistance. This is an appeal from a decision of Gray J ([2001] 1 WLR 1751) on one of the issues of damages which potentially arises in the other cases as well.

Some facts

4. In order to illustrate and understand the many issues we have to resolve it is convenient to set out the facts of one of the cases. For this purpose we have taken Sen v Steelform Engineering Ltd. We gratefully adopt Judge Harris's account of the facts in that case which were not in dispute.

> "Dr. Sen, a very precise witness, was involved in an accident on 31st May 1999 when his Ford Fiesta was hit from behind by the defendant's BMW while he paused at a roundabout near Bicester. He took his car to a garage he knew, Midland Link Motors. Someone there told him about Helphire and how it would provide a hire car and deal with the repairs for him. He said he was told at the garage that if he took out an Angel policy then if the repair hire and engineers fees were not recovered from the other driver Angel would indemnify him for his losses. He confirmed that he would like to do this on the telephone from the garage to Helphire. He did not wish to prejudice his seven year no-claims bonus. He completed an accident report form on 2nd. June 1999 and the following day a Helphire vehicle hire agreement, credit hire agreement (51 weeks) and a credit repair agreement were also filled in. He sent Angel a cheque for £10 dated 4th June 1999 by way of premium for the insurance.

He was provided with a **Vauxhall** Astra which he had for only three days, 3rd to 5th June 1999, whilst he **visited** his mother in Birmingham. The hire charges in his case were £190.35p and an invoice was addressed but not sent to Dr. Sen on 9th June 1999. Also on 9th June Angel wrote to Dr. Sen confirming receipt of his £10 and stating that he was covered by its Cost Cover policy commencing on 3rd June 1999 ... Midland Link Motors prepared but did not send Dr. Sen an invoice for the sum of £326.30p plus **VAT.** These repairs were of the simplest kind, all that was needed was one bumper and some rear lights. There was no engineers claim.

On 3rd April 2000 Helphire wrote to McMurray [solicitors] reminding them that Dr. Sen's charges would shortly be due under the terms of the agreement and asking them to get him to sign the claim on the Angel policy if he wished to claim. McMurray's wrote to Dr. Sen on 20th April and Dr. Sen signed this on 17th May 2000. On 11th June 2000 Angel wrote to McMurray "as requested by our mutual client we have now paid all the money that they (sic) owed to the Helphire group..... We act for the underwriter who now has subrogated rights in respect of the sum paid to Helphire please accept this letter as our instructions to act."

The Agreements

5. The **Vehicle** Hire agreement signed by Dr Sen provided that the period of hire was not to exceed 12 weeks. Unless the hirer entered into a credit hire agreement the hire was payable at its commencement or otherwise upon demand. The hire charges were not shown on the agreement when it was signed.

6. The relevant terms of Dr Sen's credit hire agreement are as follows:

"1. Provided that you are not found to have caused or contributed to the accident, you are entitled to a replacement **vehicle,** whilst yours is unroadworthy or being repaired, at the expense of the driver at fault or his insurers ("the Third Party").

2. Helphire's credit hire scheme enables you to hire a **vehicle** from Helphire on credit. The credit is provided whilst Helphire pursues a claim on your behalf against the Third Party. This is done through Helphire's own legal department or by solicitors nominated by Helphire ("the solicitors"). The solicitors will be instructed by you and will act for you.

3. Subject to Conditions 10 and 14 the Credit period expires when the claim has been concluded either by completing negotiations with the Third Party or by a decision of the Court. At that point you will be liable to pay Helphire's hire charges, but if it has been established that you were not at fault, the hire charges will be recovered by Helphire, or the solicitors, from the Third Party. ....

9. Helphire's provision of credit for the Hire **Vehicle** is on the condition that:

(i) Helphire may bring a claim for the hire charges against the Third

Party in your name or nominate the solicitors for you to instruct in bringing the claim in accordance with Condition 2. ....

(iii) You will co-operate fully in the bringing of the claim to include coming to court to give evidence in the unlikely event that this is necessary...

(**v**) Any cheques made out in your name which include an amount for hire charges may be paid into Helphire's bank account even if they include any other money due to you. If this happens Helphire will immediately send the other money to you.

(**vi**) If the hire charges are paid to you for any reason then you will pay them to Helphire immediately .....

> 10. You will pay the whole of the hire charges immediately if demanded by Helphire ... should any of the following occur ....
>
> 13. This agreement will not apply to any **Vehicle** Hire Agreement
>
> where the Hire **Vehicle** has been hired for a period exceeding 12
>
> weeks.
>
> 14. The credit period extended by this Agreement shall expire in any event fifty-one weeks from the date of this Agreement. At the expiry of the credit period you shall then become liable to pay the hire charges in full. If the charges are subsequently recovered from the Third Party, Helphire will refund them to you."

The other Helphire claimants entered into the same agreement except that for Dennard and Lagden the credit period was only twenty-six weeks.

7. The credit repair agreement contains similar terms to those of the credit hire agreement but assumes a prior conventional agreement between the customer and the garage to carry out the repairs. It made payment for the repairs the customer's responsibility and said that "Helphire's 5 Star Repair **Service** exists to provide you with credit so that the repairing garage can be paid prior to a claim being concluded against the Third Party". Again the credit period was either fifty-one or twenty six weeks from the date of the agreement.

8. Each of the three Helphire agreements to which we have referred was with their subsidiary, Helphire (UK) Ltd (HUK). Angel Assistance Ltd. is another Helphire subsidiary. On the 19th June 1998 it entered into an underwriting agreement with Albion Insurance Co. Ltd. which authorised it to bind insurances for Albion's account and issue policies including Angel's Cost Plus Cover policy to Helphire's credit hire and credit repair customers for risks attaching for the 12 months on or after 1st July 1998. Angel was entitled to rate such policies as it wished provided Albion received a net premium of 5p per policy up to a maximum of £13,500 per annum. Angel was authorised to settle the claims in accordance with the policy cover and was obliged to "indemnify [Albion] in respect of the first £10,000 of each claim" made under each policy. Angel was required to monitor the incurred loss ratio of the business and a formal review meeting was to take place immediately if that ratio reached 65%. The agreement contains an acknowledgement by Albion that insureds issued with Angel policies were Angel's clients and operating guidelines dealing with administrative, claims and accounting procedures. The underwriting agreement for the following year was with Europ Assistance. Although there are differences in the wording between the two agreements they are not significant except that in the Europ agreement the £10,000 was described as an additional premium.

9. Dr Sen was issued with an Albion policy schedule by Angel but by a mistake it sent him the Europ policy wording. It is common ground that he should have been sent the Albion wording. There are some differences between the two wordings but for present purposes they are not significant. The Albion wording under the heading "What is insured" says:

> "Following an Insured Incident ... If You use Helphire's credit hire or credit repair **services** We will pay Helphire's Costs and Interest on conclusion of Your claim in respect of them (whether by judgement or settlement) in the event that they cannot be recovered from Another Party that You and Helphire consider to be at fault.
>
> As Helphire's Costs have to be paid within fifty one weeks in any event We will pay them if Your claim has not been concluded by then, even if the claim is continuing."

The policy defined "We" as "Angel Assistance acting on behalf of Albion" and "You" as "The person who has paid the premium". "Helphire" was defined as "Helphire UK Ltd." and "Helphire's Costs" as

> "Any liabilities incurred by You under Helphire's credit hire and/or repair schemes including amounts paid out on Your behalf"

The "Period of Insurance" was defined as:

> "The period for which We have agreed to cover You and for which You have paid the premium."

"Insured Incident" was to include

> "For a claim for Helphire's Costs and/or interest an accident that Helphire believes can be proved to be completely the fault of Another Party [which]... must have occurred during ... the period of insurance"

However in the policy schedule sent to Dr Sen and the other claimants the period of insurance was said to start after the date of the accident.

10. The Judge found that Angel had paid HUK the amount owing by Dr Sen under the credit hire agreement and another Helphire subsidiary, Helphire Finance Ltd. (HFL), the amount owing under the credit repair agreement on 13th July 2000. The payments were made by cheque as part of a large batch of similar payments.

11. The payment to HFL is explained by a repairer agreement between that company, HUK and the garage which repaired Dr Sen's car under which HFL agreed to purchase the garage's invoices for 90% of their **value.** HFL paid the garage 90% of its invoice for repairing Dr Sen's car on 29th June 1999. This agreement also laid down the procedure by which the garage would operate Helphire's 5 star repair **service** culminating, on completion of the repairs, in the garage submitting an invoice to Helphire UK for submission to HFL. Other documents showed that the garage's invoice was to be made out to the customer but was not to be sent to him or to show the discount. Similar repairer agreements were made with the garages which repaired the other three Helphire claimants' cars.

12. But Mrs **Clark** and Mr Dennard did not purchase an Angel policy in the way that Dr Sen (and Mr Lagden) did. Their cars were insured through brokers, A Plan, who offered the Helphire scheme to their clients free of charge. The arrangements between A Plan and Helphire were concluded in an exchange of correspondence in which A Plan said they wanted to clarify their understanding:

> "... of the Angel product in relation to us. We have purchased a Group policy for the benefit of all our clients to indemnify them for the residual liability they have for any credit hire or repair costs should you be unable to recover in part or whole from the Third Party or their insurers.... perhaps you could confirm".

to which Helphire replied saying

> ".... the block policy afforded to clients of A Plan by Angel will indemnify those clients for any credit hire or repair costs in accordance with the policy wording"

A Plan paid £1 per annum in consideration for this arrangement. Mrs **Clark** was sent an Albion and Mr Dennard an Europ policy schedule but not the policy wording and each signed the subsequent solicitors' letters saying they wished to claim under these policies before payments were made by Angel to HUK and HFL in the same way as the payments made for Dr Sen. We were told that about 20% of Helphire's customers come through A Plan.

13. In Burdis Gray J was only concerned with a credit repair agreement which the county court judge had held to be unenforceable because it did not comply with the Act. The claimant (Accident Assistance) did not appeal that finding.

The 1974 Act

14. By section 8 of the Act an agreement by which the creditor provides the debtor with credit not exceeding £25,000 is a regulated agreement if it is not an exempt agreement under section 16. Regulated agreements must be in the form and contain the information set out in the Consumer Credit (Agreements) Regulations 1983, Schedule 1 of which requires a term stating the amount of the credit. Section 61(1)(a) of the Act says that a regulated agreement is not properly executed unless "a document in the prescribed form itself containing all the prescribed terms" is signed by both parties. Schedule 6 says that the amount of the credit is one of the prescribed terms. Although the court has power to enforce an improperly executed regulated agreement (section 65) it cannot do so unless the parties have signed a document containing all the prescribed terms (section 127(3)). Neither the credit hire or credit repair agreements in any of the Helphire cases stated the amount of the credit although there is an argument that the credit hire agreement in the case of Lagden was in the prescribed form because he was given a copy of Helphire's tariff of hire charges.

15. Section 15 of the Act makes a consumer hire agreement a regulated agreement if it is not an exempt agreement. A consumer hire agreement is an agreement for the bailment of goods to the hirer which -

> "(1) (a) is not a hire purchase agreement, and
>
> (b) is capable of subsisting for more than three months, and
>
> (c) does not require the hirer to make payments exceeding £25,000."

16. The Consumer Credit (Exempt Agreements) Order 1989 was made under section 16 of the Act. By paragraph 3(1)(a)(i) of this Order the Act does not regulate

> "an agreement for fixed sum credit under which the total number of payments to be made by the debtor does not exceed four, and those payments are required to be made within the period not exceeding 12 months beginning with the date of the agreement;"

Helphire's case is that their credit hire and repair agreements were exempt agreements.

17. It is not possible to contract out of the Act (section 173). Helphire contend that they were unable to enter into regulated agreements with their customers because it was impractical to comply with the cooling-off provisions (section 67) or for garages to register as credit brokers (section 145) as well as the difficulty in specifying the amount of the credit at the time the agreements were made. We will also have to examine the provisions of section 18 of the Act later in this judgment.

The issues and the way in which the judges resolved them

18. The Insurers contended that the Helphire scheme as a whole was a pretence. By using apparently exempt agreements and insurance Helphire's customers were in effect being provided with long term credit contrary to the Act. The judge rejected this contention saying:

> ".... [this was] not a masquerade or impermissible pretence to camouflage what was in reality a non-exempt agreement but a complex, artificial and sloppily executed and enforced scheme which was nonetheless based upon prime facie exempt agreements and not a mere pretence. The documentation did impose a real requirement to pay, though Helphire did not enforce it, and the insurance arrangement (artificial though it was) provided the claimants with the wherewithal to pay."

The insurers say that the judge approached the question in the wrong way and reached the wrong conclusion.

19. Next the insurers contended that in any event the credit hire agreements were consumer hire agreements within section 15 of the Act and so they were not exempt. The judge rejected this argument as a matter of construction of the Act following the **views** of the **Vice-Chancellor** in *Dimond* in the Court of Appeal [2000] 1 QB 216 and Professor Goode. The insurers say he was wrong to do so.

20. The third regulation issue arises out of the insurers' contentions that neither the credit repair or credit hire agreements were exempt agreements because they did not require a total of no more than four payments and/or (in the case of the agreements containing the fifty-one week credit period) payment within twelve months. The judge rejected both these arguments as a matter of construction of the agreements.

21. Before the judge Helphire contended that their entire scheme was irrelevant to the claimant's right of recovery because it was collateral to the defendants' torts. It was to be regarded as speculation by the claimants for their own account. (See The Elena d'Amico [1980] 1 Lloyds Rep. 75). The judge did not accept this submission because it was inconsistent with the decision in *Dimond* where the House rejected a number of alternative ways in which the claimant said she could recover despite the fact that the agreement was unenforceable. This point was not pursued by Helphire before us but Mr Milligan QC for Helphire wished to keep it open. He did however submit that the claimants could recover even if the agreements were unenforceable because they were still contractually obliged to pay Helphire and Angel in fact discharged that debt. The judge rejected this submission also. Mr Milligan pursued it before us and two new submissions: the first based on section 18 of the Act and the second on the claimants' undertaking to hand over the proceeds of their claims to Helphire.

22. In any event Helphire submitted that the repair costs were recoverable. In the earlier cases which he tried Judge Harris accepted this following Jones **v** Stroud D.C. [1986] 1 WLR 1141, but by the time he tried our cases Gray J. had reached the opposite conclusion in Burdis and Judge Harris felt that he ought to follow that decision although he did not agree with it. Helphire and Accident Assistance for whom Mr Milligan also appears say that Gray J was wrong.

23. As he found in favour of Helphire on the three regulation issues Dr Sen and Mr Lagden succeeded before the judge on the basis that subrogated rights had been acquired to their claims. However no such rights had been acquired to Mrs **Clark** and Mr Dennard's claims because the judge found that they were not insured. Helphire say the judge was wrong about this.

24. There follow a number of issues about damages. The first of these is whether the claimants can recover 100% of the repair costs or only the 90% paid by HFL to the garage. Judge Harris did not deal specifically with this issue, but it is obviously one upon which a lot of money turns. We have been asked to decide it.

25. Then the question arises as to how delay by the garage in carrying out the repairs should be treated. In **Clark** and Dennard the judge found the repairs had taken too long and so the defendants were only liable for the cost of a repair of reasonable length appropriate to the damage and for consequential hire of similar duration. Helphire say that this approach was wrong.

26. The next set of issues arises from the decision in *Dimond* that only the spot rate of hiring an alternative **vehicle** is recoverable and not the higher rates charged by credit hire companies. The first of these is whether this applies to an impecunious claimant who has no alternative but to use Helphire. Mr Lagden was such a claimant. The judge held that he was entitled to recover the full amount. The insurers say he was not.

27. Then the question arises as to whether the cost of hiring an equivalent car is recoverable if the claimant hires a car from Helphire which is inferior to his own damaged car. This is what Mr Dennard did and the judge found that he could only recover the spot rate for the car he actually hired.

28. Next the question arises as to how the spot rate should be calculated. **Various** options were canvassed before Judge Harris who in the end accepted the approach of the insurers' expert, Mr Mainz. He produced a countrywide report giving spot rates for different regions in January 2001. His rates were calculated by averaging rates quoted by a sample of national and local car hire companies. In an attempt to provide guidance for other cases the Judge advocated use of the figures in this report plus 10%. Helphire challenge the judge's approach and his acceptance of Mr Mainz's figures.

29. Helphire made a separate charge for delivery and collection of the hire car. The judge held that this charge was not generally recoverable because it was part of the inconvenience caused by the accident for which damages were not available. For the same reason the judge said that he would have rejected any claim for engineers or assessors fees, although in the cases before him such claims were abandoned. Helphire say that both delivery and collection charges and engineers' or assessors' fees are recoverable.

30. Finally the judge awarded interest on the discounted amounts paid by HFL to the garages from the time they were paid. The insurers say that no interest should have been awarded at all or at least it should only have been awarded from the time Angel paid HFL which was what the judge decided in respect of the payment of the hire charges by Angel to HUK. Helphire say that he should have awarded interest on the full cost of the repairs from the date they were completed and interest on the hire from the end of the hiring.

Pretence – see paragraph 18

31. It is not contended that the Helphire scheme was a sham in the sense described by Lord Justice Diplock in Snook v London and West Riding Investments Ltd. [1967] 2 QB 786, 802 because it obviously did not involve any deceit or improper motive by the claimants. The judge put it this way:

> "There was no suggestion in last year's cases and there is none in the instant ones, that any of the claimants who entered into their credit or insurance agreements had any improper motive whatsoever. They merely and perfectly legitimately wanted their cars mending and a substitute providing without significant expense to themselves. There is no evidence that they had any intention to avoid, legitimately or illegitimately, the application of the consumer credit legislation."

32. Complicity by all those involved is not however a pre-requisite to rejection of agreements which are a sham in the wider sense. Thus in Antoniades v Villiers [1990] 1 AC 417 the House of Lords refused to give effect to provisions in an agreement designed to evade the Rent Acts which called itself a licence and reserved a right of occupation to the landlord, because they were pretences (mere "dressing up"). The landlord did not genuinely intend to exercise his right of occupation. The insurers also relied on Gisborne v Burton [1989] 1 QB 390, to similar effect where the landlord had tried to evade the Agricultural Holdings Act 1948 by granting a tenancy to the farmer's wife who then sub-let it to her husband. In this type of case the courts have made it clear that they will look at the scheme as a whole if there is more than one transaction and subsequent conduct in order to determine its effect and validity.

33. In the instant case the court is concerned with consumer protection legislation. It is not possible to contract out of the provisions which regulate some transactions but the Act says that other transactions are exempt. There is therefore nothing wrong with entering or attempting to enter into such a transaction. Either it is exempt or it is regulated and the courts must decide which. Lord Hoffman gave valuable advice about the court's approach to such a question in Norglen Ltd. v Reeds Rains Prudential Ltd [1999] 2 AC 1, 13 when he said:

> "If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work ... or they do not.... If they do not work, the reason .... is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes."

34. Adopting this approach one should not come at the Helphire scheme with any preconceived ideas. This was the judge's approach. The insurers criticise him for saying that:

> "I do not regard it as obvious that pubic policy necessarily requires courts to scrutinise the agreements here with the rigour, suspicion or hostility that is being urged by the defendants. They are not concerned at all with the protection of the consumer/claimants, but rather with finding a means of reducing the liability of tortfeasors and their insurers for the consequences of their negligence."

But this is no more than the approach advocated by Lord Hoffman and the point the judge makes about the insurers is obvious. As Lord Mustill put it in *Giles* at page 165:

> "The solicitude of the defendants and their insurers for the interests of their potential opponents may fairly merit a measured, if not sceptical, regard."

35. Helphire obviously designed the scheme with the intention that its agreements would not be regulated by the Act for reasons which we can understand. What do their agreements say? Credit is provided by credit hire and credit repair agreements which limit the credit period to twenty-six or fifty-one weeks after which time the customer becomes liable to pay for the hire or repairs. Subject to the specific points about section 15 of the Act and the exemption order which we consider below, these agreements were self evidently exempt.

36. The insurers do not contend that the agreements themselves bear some other meaning or are anything other than what they appear to be. What they say is that the court should infer that there was no limit to the credit period because the insurance was a pretence and the evidence showed that if the customer did not claim on the insurance he was not pursued by Helphire. But the effect of this is that either way the customer does not pay for hire or repairs and it was not suggested that he retained any continuing liability to do so. On this analysis he was not provided with any credit at all.

37. But this may be too simplistic a **view** and so we need to look in a little more detail at the insurers' contentions. Helphire's case is that the reason their customers do not pay is because the payments by Angel extinguish their liability. The insurers accepted that there would have been nothing objectionable about this if it had been achieved by genuine insurance. Their attack was therefore on the particular insurance arrangements and the way the claims on the policy were paid.

38. In support of this attack the insurers rely on the terms of the underwriting agreement which show that in practice no claims would ever be made on Albion or Europ. The evidence was that although some claims had exceeded £10,000 Angel had made no claim. Underwriters were excluded from every aspect of the insurance. The policy wording was a nonsense because the insured incident was defined as the accident whereas the period of insurance in each case started after the accident.

39. These points were obviously considered by the judge who, as we have said, referred to the scheme as a whole as being sloppily executed and to the insurance arrangement as being artificial. But the documents do show an intention to create genuine insurance arrangements. The underwriting agreement contains many of the terms one would expect to find in such an agreement and there was an assumption of risk by underwriters. Subject to the point about the policy wording, which was obviously a mistake, a claimant would have a **valid** claim under the policy for the cost of hire and repairs if no payment was made by Angel. In effect the risk assumed by underwriters was of the solvency of the Helphire Group. There is nothing wrong or unusual with insurance arrangements which have this effect.

40. Much of the trial was taken up with investigating the payments made by Angel to HUK and HFL to which we have referred and the source of the funds which enabled such payments to be made. Helphire's statutory accounts for the year ending 31st March 2000 were before the court but the judge refused the insurers application for disclosure of the internal accounts of the companies within the group. Nevertheless he allowed the insurers in Dennard, separately represented then, as now, by Mr McLaren QC, to amend their defence to allege that the payments were circular intra-group transactions and of no effect. Helphire say that having refused the application for disclosure the judge should not have allowed this amendment. In the course of his judgment the judge referred to the submissions made on the statutory accounts and commented that it was not obviously clear

why the large payments which Angel was making to HUK and HFL were not reflected in their respective accounts.

41. The insurers' submission to the judge was that the payments made by Angel were "merely transfers with no discharge of a debt, the snap-shot of a moment in a meaningless and incestuous circulation of internal group funds". But he found that Angel did make the payments to HUK and HFL saying "Cheques, **valid** instruments, were drawn and met. There must have been payments out from Angel's bank account and into HUK or HFL's accounts". He accepted the submission that the source of the money to enable the payments to be made was irrelevant. Just as importantly he accepted that the payments by Angel effectively discharged the claimants debts.

42. We think the judge's conclusions about this aspect of the case are unassailable. Mr McLaren clung tenaciously to the submission that no payment was made by Angel. That was a hopeless submission in the light of the judge's findings of fact. Mr Symons QC simply relied on the fact that the money to pay was obviously generated internally by a circular movement of funds as a further indication of pretence. But again there is nothing unusual about a circular flow of funds around a group of companies. Here, however, what we are concerned with is whether Angel made payments which had the effect of discharging the claimants' debts to HUK. If that happened the means by which Angel did so does not alter the nature of the transactions and is therefore irrelevant.

43. These conclusions make it unnecessary to consider further the judge's ruling about the amendment and an application by Helphire to put in their statutory accounts for the year ending 31st March 2001.

44. We have so far considered the insurers' main attack on the scheme. The fact that customers who did not claim on the insurance were not pursued was not considered in any detail by the judge. But just because the scheme was, as he said, "sloppily enforced" does not lead to the conclusion that the credit hire and repair agreements were intended to have some meaning contrary to their express terms. Commercial parties may, and often do, choose not to enforce their strict legal rights without intending to create or demonstrate some different state of affairs. Other matters relied on by the insurers about the way in which the Helphire scheme was run do not in our judgment advance their case. Looked at from the claimants' point of **view** there was no pretence. They got exactly what they bargained for: car repair and hire at little or no cost. It might be said that it is only the insurers' attack on these schemes which has raised the spectre of long term credit because in the ordinary way claims of this kind are settled within weeks of the accident.

45. For the these reasons we think that the judge reached the right conclusion on the issue of pretence.

Section 15 of the Act – paragraph 19

46. We have set out section 15 in paragraph 15. The insurers' argument is simple. Although the **vehicle** and credit hire agreements restrict the hiring to a period not exceeding twelve weeks, the liability to pay under the credit hire agreement subsists for more than three months so these are consumer hire agreements. Helphire say the twelve week limit only applies to the contract of bailment and not to the obligation to make payments to which the insurers respond by saying that this is not what sub-section (1)(b) says and sub-section (1)(c) shows that the section is concerned with payments.

47. This point was not taken by insurers in *Dimond* but in the Court of Appeal the **Vice-Chancellor** obviously thought that an agreement would not be a consumer hire agreement unless the bailment was for more than three months (see paras. 34 and 65 at pages 227 and 232). Goode *Consumer Credit Law and Practice* at paragraph 456.3 says:

> "Section 15(1)(b) is plainly referring to the duration of the agreement as it applies to the bailment of the goods".

The judge followed these **views.**

48. Although sub-section (1)(b) could have been more clearly drafted we agree with the judge's construction. Section 15 is directed at the long-term bailment of goods which are not the subject of hire purchase agreements. Sub-section (1)(b) is intended to refer to the period of such bailment and not to any other obligations which might be assumed under the agreement. Sub-section (1)(c) is merely intended to limit the application of the section to agreements of a certain size. It does not extend the type of agreement to which the section is intended to refer.

49. Some support for this construction can be derived from the surrounding sections of the Act. Section 15 appears as one of six sections which closely define different categories of regulated agreements. Section 18 to which we will return contemplates that one must look at any agreement to see whether any part of it falls within one of these defined categories, in which case that part must be treated separately. This suggests that the intention was to confine the different categories of agreement. The construction contended for by the insurers gives a much wider definition of a consumer hire agreement than we think Parliament intended.

Exempt agreement – paragraph 20

Four payments

50. An exempt agreement is one under which "the total payments to be made by the debtor does not exceed four". The insurers argue that this means that the agreement must require repayment of the credit by no more than four payments. Neither the credit hire or repair agreements contain such a requirement so they are not exempt. Furthermore, they say, conditions 9(**v**) and (**vi**) of the credit hire agreement actually contemplate more than one payment.

51. The judge rejected these submissions by reference to the terms of the agreement which he said envisaged repayment in "one go". Conditions 9(**v**) and (**vi**) were not to the point.

52. This issue is simply one of construction of the agreements concerned. Looking at the credit hire agreement the principal obligation is contained in condition 3, the first sentence of which says when the credit period is to expire and continues "at that point you will be liable to pay". This is a one payment requirement. Condition 3 is "subject to conditions 10 and 14". Condition 10 is a default provision which requires payment of all the hire charges immediately on demand and condition 14 simply reinforces condition 3 by saying that the hire charges are to be paid in full at the end of the credit period. Conditions 9(**v**) and (**vi**) make provision for what is to happen if Helphire receives cheques made payable to the hirer or the hirer receives the hire charges directly. These provisions do not affect the obligation to make payment. The same applies to the credit repair agreement. We therefore agree with the judge on this point.

Twelve Months

53. An exempt agreement must also be one in which the "payments are required to be made within the period not exceeding 12 months beginning with the date of the agreement". Here the insurers' argument is that conditions 3 and 14 only talk about the hirer becoming "liable" to make the payment. Other conditions in the agreement distinguish between liability to pay and "required to pay". There is a difference between the two: once a hirer becomes "liable to pay" he will have a reasonable time before he is "required to pay" which in the case of the fifty-one week agreements takes the credit period over the limit.

54. The judge repeated the conclusions he had reached on this point in the earlier cases. He concluded that, looked at in its context "in a straightforward way by a reasonable eye and not that of a lawyer sedulously seeking out possible ambiguities" condition 14 was to be read as meaning "you must pay" at the end of the credit period and not "at that time we can ask you to pay and you must do so later".

55. We think the judge was right about this. As he pointed out "liable" may mean "bound or obliged by law" in which sense condition 14 would obviously require payment at the end of the credit period or "obliged if asked." The word "liable" is used in the latter sense in some parts of the agreement. Thus, if Helphire triggers the default provision in condition 10(**v**) which requires the hirer to pay

the hire charges if Helphire think he will not recover 100% of his claim, he has the right to postpone their demand for payment by asking for a barrister's opinion for which he "would be liable" and "be required to pay the estimated costs in advance". No such distinction is drawn in Conditions 3 and 14 where, we think, it is clear that the words "liable to pay" are used in the first sense referred to by the judge.

Recovery even if agreements are unenforceable – paragraph 21

56. As we have said Mr Milligan reserved what he called his "over-arching" point for another place. As we have found in his favour and upheld the judge's decision on each of the three regulation issues it is not necessary for us to decide whether any of his other alternative submissions are right. These submissions are distinct from the Burdis point which is that the repair costs are recoverable even if the hire charges are not which we do have to decide. Nevertheless, as they have been argued, we will consider Mr Milligan's alternative submissions and express our **views** on them shortly.

57. The first is based on the decision of this court in Wilson **v** First County Trust (No. 2) [2001] 3 WLR 42 in which the **Vice-Chancellor** (at paragraphs 24 – 27) said that an improperly executed regulated agreement still gives rise to contractual obligations. The effect of the Act is simply to prevent the lender enforcing his rights. Thus, the argument goes, there is no reason in principle why the claimants should not recover damages in respect of the costs of discharging their obligations under their agreements with Helphire because they would not act unreasonably in doing so. If double recovery was a bar to this analysis, it could be overcome by the claimants undertaking to pay over to Angel or Helphire (as appropriate) any damages which they recover. To test the position Mr Milligan said that he had instructions to offer such undertakings on behalf of two of the claimants for whom he appeared.

58. We think the short answer to these submissions is that double recovery is a bar to the analysis and it is not overcome by the undertaking. Even though the contractual obligations of the claimant to pay Helphire for hire and repairs subsist if the credit agreements are unenforceable Helphire have no enforceable right to recover these amounts. The claimant has not paid and cannot be required to pay them so that if he recovers from the defendant there will be double recovery. The undertaking given to the court is truly collateral and could not be said to be the consequence of the defendants tort. It is to be noted that the Court of Appeal was not tempted by a similar undertaking offered in *Dimond* (see paragraph 74).

59. Mr Milligan's other submission was based on section 18 of the Act. This section says:

> "(1) This section applies to an agreement (a "multiple agreement") if its terms are such as –
>
> > (a) to place a part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreement so mentioned, or within a category of agreement not so mentioned, or
> >
> > (b) to place it, or a part of it, within two or more categories of agreement so mentioned.
>
> (2) Where a part of an agreement falls within sub-section (1), that part shall be treated for the purposes of this Act as a separate agreement.
>
> (3) Where an agreement falls within sub-section (1)(b), it shall be treated as an agreement in each of the categories in question, and this Act shall apply to it accordingly."

Put shortly what Mr Milligan says is that the court is required to analyse the agreements in this case carefully and separate out those parts of them which contain obligations which are regulated by the Act and those which are not. Here the obligations in conditions 9(**v**) and (**vi**) in the Helphire credit hire agreement and the corresponding provisions in their and Accident Assistance's credit repair agreement are free-standing and enforceable even though the credit provisions are not. So,

the argument goes, the risk of double recovery disappears because if the claimants sue and recover from the defendants they will be obliged to pay over what they recover under these free-standing and enforceable provisions.

60. As a late starter in Mr Milligan's array of arguments this one has some superficial attraction, but on closer analysis we cannot accept it. Condition 9 and its equivalent in the Helphire credit repair agreement is expressed to contain conditions for "Helphire's provision of credit". In the Accident Assistance agreement credit is provided "in accordance with this agreement" which contains the condition in question. We do not think it is possible to regard these terms as having a free-standing life of their own. They are simply part of the terms on which credit is granted.

Lagden – the tariff – paragraph 14

61. Helphire's argument in this case is that even if the credit hire agreement was regulated it was enforceable because this hirer received a copy of their tariff of hire charges before he signed the **vehicle** and credit hire agreements. The judge, who obviously did not find Mr Lagden's evidence **very** satisfactory, made no special finding that he had received the tariff.

62. However, on the basis that he did, Mr Milligan submits that it is enough for the hirer to know how much per day he will have to pay for the hire because this will enable him to calculate his liability exactly once he knows the length of the hiring. He derives support for this **view** from the recent decision of the Northern Ireland Court of Appeal in O'Hagan **v** Wright NIECA 20 (unreported). It does not matter, he submits, that the information is contained in more than one document.

63. Mr Symons, on the other hand, submits that section 61(1)(a) of the Act makes it clear that the amount of the credit which is one of the terms prescribed by Schedule 6 of the 1983 Regulations has to be included in the prescribed form itself.

64. We think Mr Symons is right about this. Incorporation by reference is not good enough. The Act says in terms that the prescribed form "itself" must contain all the prescribed terms. Here the agreement said nothing about the amount of the credit.

Repair Costs – paragraph 22

65. As noted earlier, Helphire submit in the alternative that even if the credit agreements are unenforceable, nevertheless the repair costs are recoverable. In the light of our conclusion that the credit agreements in the Helphire cases are enforceable, this issue does not strictly arise for decision in those cases. However, it is a live issue in Burdis, and accordingly we address it in the context of the appeal in that case (for which we granted permission).

66. The facts in Burdis were, in summary, as follows. Following the accident, Miss Burdis contacted the garage from which she had purchased the car to arrange for it to be repaired. The garage suggested that she finance the repairs on a credit basis. Miss Burdis accordingly contacted Accident Assistance Ltd, and entered into a standard form of credit repair agreement with that company. The Agreement was a regulated consumer credit agreement for the purposes of the 1974 Act.

67. The standard form contains a section headed "Explanation", in the following terms:

> "1. If your **vehicle** is damaged in a collision with another **vehicle** and you are not found to have caused or contributed to the collision, you are entitled to have your **vehicle** repaired at the expense of the driver of the other **vehicle** (or his insurer).
>
> 2. However your claim against the third party will take time to conclude and in the meantime you will need to have your **vehicle** repaired.
>
> 3. Practically, you will need to arrange and pay for the repair and recover the costs from the third party.

> 4. The repairing garage will only be prepared to carry out the work if it is guaranteed payment.
>
> 5. ACCIDENT ASSISTANCE **Repairplan** exists to provide you with credit so that the repairs can be paid for prior to the conclusion of your claim against the third party. Payment of the repair costs will remain your responsibility but we will pay them in the first instance. To participate in **Repairplan** your claim must be handled by us, by our own legal department, or by solicitors nominated by us ("the Solicitors"). The Solicitors will act for you and you will be responsible for their fees and expenses."

68. There then follows a section headed "Conditions for Provision of Credit for **Vehicle** Repair", which contains the terms of the Agreement. For present purposes we need refer only to conditions 1.2, 1.9 and 4, which are in the following terms (so far as material):

> "1.2. Payment of the repair costs and associated expenses (including consulting engineers fees) is your responsibility but we will pay the repairer's bill in full on your behalf allowing you credit in accordance with this Agreement.
>
> ....
>
> 1.9. If you receive any monies in respect of the repair costs and/or associated expenses you must pay them to us immediately. ....
>
> 4. The period of credit will expire on the day before the anniversary of the date of this Agreement. We can then ask you to repay the repair costs and associated expenses plus interest."

69. In contrast to the Helphire cases, there was no insurance element in the transaction, nor was there any issue as to hire charges.

70. The repair costs, which came to £2,981.19, were duly paid by Accident Assistance, thus extinguishing Miss Burdis' liability to the garage. It was common ground that as a result of the repairs Miss Burdis' car was restored to its pre-accident **value.** Miss Burdis included the repair costs in her claim for damages against the defendant, Mr Livsey.

71. At first instance, Judge Hewitt found that the Agreement was unenforceable since it did not comply with the requirements of the 1974 Act. There was no appeal against that finding. However, Judge Hewitt went on to hold that the repair costs were recoverable by Miss Burdis from Mr Livsey notwithstanding that in the event (because the Agreement was unenforceable) the entire cost of the repairs had been borne by Accident Assistance. Mr Livsey appealed.

72. Gray J allowed Mr Livsey's appeal, concluding that the case did not come within the established exceptions to the rule against double recovery and that there was no **valid** reason of public policy why Miss Burdis should have the double benefit of having her car repaired free of cost to her and of recovering damages in the amount of the repair costs which she would not have to meet.

73. Before Gray J, it was submitted by Mr Harvey McGregor QC (appearing on that occasion for Miss Burdis) that the damage caused by the accident was represented by the diminution in **value** of the car; which in turn was generally measured by reference to the cost of restoring the car to its former condition; that the damage was suffered immediately the accident happened; and that in determining the amount of the damage it was irrelevant whether the owner had to pay for the repairs out of his own pocket or whether the necessary funds had come from elsewhere. In support of that submission, Mr McGregor relied on a number of authorities, including *Jones v Stroud*.

74. In *Jones v Stroud* the plaintiffs claimed damages against the local authority for its negligent failure to inspect the foundations of their house, which had started to subside. They included in their claim for damages the cost of repairing the house, but at the trial they produced no evidence that they had paid for the repairs. At first instance the official referee held that the claim was statute-barred, but indicated that had it not been statute-barred he would have given judgment for

the plaintiffs for the cost of the repairs. The Court of Appeal allowed the plaintiffs' appeal on the limitation issue, and went on to hold that the plaintiffs were entitled to recover the cost of the repairs, whether or not they had paid for them. At page 1150F Neill LJ said:

> "The second point I have found more difficult. The plaintiffs failed to provide any documents relating to the work carried out by Marlothian Ltd. and there is no evidence that the plaintiffs have paid or are liable to pay any sum to Marlothian in respect of that work. It was submitted on behalf of the plaintiffs, however, that if the repairs were necessary and were carried out it was not to the point that the plaintiffs had not proved that they had paid for the repairs themselves. Our attention was drawn to *The Endeavour* (1890) 6 Asp.M.C. 511, where repairs to a **vessel** were carried out but before paying for them the plaintiff had gone bankrupt. It was there argued that the plaintiff could not claim the cost of the repairs because the sums recovered would only go to swell the creditors' funds. This argument was rejected and it was said, at p. 512:
>
> > "If somebody out of kindness were to repair the injury and make no charge for it, the wrongdoer would not be entitled to refuse to pay as part of the damages the cost of the repairs to the owner."
>
> In my judgment, on the facts of this case this submission is correct.
>
> It is true that as a general principle a plaintiff who seeks to recover damages must prove that he has suffered a loss, but if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property has been or will be repaired I do not consider that the court is further concerned with the question whether the owner has to pay for the repairs out of his own pocket or whether the funds have come from some other source."

75. However, Gray J concluded (at paragraph 46 of his judgment) that the combined effect of the House of Lords' decisions in Hunt **v** Severs [1994] 2 AC 350 and in *Dimond* is that the passage in Neill LJ's judgment in *Jones* ***v*** *Stroud* quoted above can no longer be regarded as good law. In paragraph 48 of his judgment, Gray J said:

> "Miss Burdis entered into the credit agreement with [Accident Assistance] within days of the accident. Her purpose was to finance the cost of making good the consequences of Mr Livsey's negligence without having herself having to put up the money for the repair costs .... before recovering from Mr Livsey's insurers. For purely adventitious reasons she cannot be treated as constructive trustee of the damages which represent the cost of repairs. In these circumstances I see no reason why she should be entitled to damages, any more than Mr Dimond was entitled in Dimond **v** Lovell to recover damages representing the cost of hiring a replacement car."

76. As we have said in *Seddon* Judge Harris had reached the opposite conclusion. He concluded that *Hunt* ***v*** *Severs* had not overruled *Jones* ***v*** *Stroud*, either expressly or by necessary implication, since it was dealing with a different type of damage (damages for personal injuries). As to *Dimond*, Judge Harris commented that the only speech in which the damage to the car itself was considered was that of Lord Hobhouse. Judge Harris concluded that far from indicating that *Jones* ***v*** *Stroud* was bad law, Lord Hobhouse explicitly indicated that the line of authority of which it was an up-to-date example was well established. Judge Harris continued:

> "The distinction between this head of damage and that considered in *Dimond* ***v*** *Lovell* is that in the case of the unenforceable car hire cost a contract with a third party is of the essence of the damage which is consequential loss or special damage. In *Dimond* the plaintiff had not suffered a loss because he had his mobility provided for and he is not liable to expend money as special damage. Thus there is nothing to claim, like the injured plaintiff who receives medical treatment on the National Health **Service** and does not have to pay for private treatment. On the other hand, the car repair figure is merely a method of **valuing** the loss which the plaintiff has

undoubtedly suffered, namely the diminution in **value** in his car. It has nothing to do with liability to a third party.

It is, of course, possible that on some future occasion when it turns its mind to it the House of Lords, or, indeed, the Court of Appeal, may decide that *Jones* ***v*** *Stroud District Council* needs reconsideration, but it has not done so yet.

Accordingly, in my **view** it remains for the moment appropriate to follow *Jones* ***v*** *Stroud District Council*."

77. However, as we have said, in our cases, Judge Harris felt constrained to follow Gray J's decision in Burdis, although he did not agree with it. At page 43F of his judgment he said:

> "In *Seddon* –***v-*** *Tekin* and in *Taylor-****v-Cooke*** [1999] I found that a century of authority from The Endeavour [1896] 62 LT 840, **via** *Derbyshire-****v-Warren*** [1963] 1 WLR 1069 CA and culminating in *James* [sic] -***v-Stroud*** [1986] 1 WLR 1141 showed that the measure of damages in cases of damage to property was the diminution in **value** of the chattel, which was normally measured by, but which was not the same thing as, the cost of repair. Thus the recoverability of the repair charges was irrelevant. The contrary argument was that *James-****v-Stroud*** was "impliedly overruled" by *Hunt-****v-Severs*** [1994] 2 AC 350 and *Dimond-****v-Lovell*****,** though it was not mentioned in any of the judgments in those cases which were not dealing with diminution in **valuation** claims.
>
> However in *Burdis-****v-Livsey*** 21st May 2001 Leeds Crown Court Gray J rejected submissions made by Harvey McGregor QC and held that *James-****v-Stroud*** [sic] could no longer be regarded as good law. All three leading Counsel in the instant case felt that *Burdis-****v-Livsey*** was authority binding upon me (there is a different **view** articulated informally to DCJ's by a senior member of the Court of Appeal that it would be persuasive only). In the circumstances, though I retain the **view** of the law I have expressed, I think that Burdis probably is binding upon this Court and so though I do not agree with it I shall follow it. I understand that it is subject to appeal which might be usefully be listed with the appeals in this case if that is possible."

78. Before us, Mr Milligan (for Accident Assistance), adopting a written skeleton argument prepared by Mr McGregor, advances essentially the same submissions as were advanced below by Mr McGregor. He submits that a distinction falls to be made between repair costs and hire charges, in that whereas repair costs represent the measure of the diminution in the **value** of the car resulting from the accident (i.e. an immediate and direct loss which is suffered when the accident occurs), hire charges are of an entirely different character, in that they represent a consequential and prospective loss which is suffered if and when the charges are incurred. He submits, relying on British Westinghouse **Electric** and Manufacturing Co Ltd **v** Underground **Electric** Railways Co of London Ltd [1912] AC 673 at 688-692 and other authorities, that where (as in Burdis) the claimant has suffered an immediate and direct loss, the proper question for the court is not whether that loss has been subsequently avoided in circumstances which fall within one of the exceptions to the rule against double recovery, but rather whether it has been reduced or extinguished by a transaction which is collateral to the tort – in other words, which is (to use the traditional expression) *res inter alios acta*. This, he submits, is a principle which is clearly established by the authorities, of which *Jones* ***v*** *Stroud* is merely a recent example. He submits that Gray J was wrong to hold that *Jones* ***v*** *Stroud* has been overruled, pointing out that it has been referred to in a number of later authorities (including one, Alfred McAlpine Construction Ltd **v** Panatown Ltd [2000] 3 WLR 946, which was decided after the House of Lords' decision in *Dimond*) without any criticism or suggestion that it is no longer good law.

79. Turning to the facts of Burdis, Mr Milligan submits that the agreement between Miss Burdis and Accident Assistance is clearly a collateral transaction which does not flow from Mr Livsey's tort, and that accordingly the fact that it is unenforceable is irrelevant and should not be brought into account in assessing the damages which Miss Burdis is entitled to recover from Mr Livsey.

80. Mr Stuart-Smith QC (for Mr Livsey's insurers) relies on *Hunt* **v** *Severs* as authority for the proposition that unless the unenforceability of the agreement is brought into account Miss Burdis will be over-compensated in damages. He submits that since damages in the law of tort are purely compensatory, the crucial question is whether the **victim** of the tort has suffered a loss. If he has not, then there is nothing for which he need be compensated. This applies, he submits, whether the reason for the absence of any loss is that no circumstances arose which could give rise to a loss, or that despite the fact that circumstances arose which might have given rise to a loss, they did not do so, for whatever reason.

81. Mr Stuart-Smith seeks to illustrate the application of this principle by reference to personal injury cases, and in particular the well-known House of Lords decisions in Parry **v** Cleaver [1970] AC 1 and Hussain **v** New Taplow Paper Mills Ltd [1988] AC 514. These latter cases establish that, in assessing damages for personal injuries, benefits derived from insurance taken out by the claimant or (in certain circumstances) from the benevolence of a third party are to be left out of account, as being exceptions to the rule against double recovery. Mr Stuart-Smith submits that there is a direct analogy between damages for personal injury and the repair costs claimed in Burdis, and that since neither of the two recognised exceptions to the double recovery rule applies in Burdis, there is no basis for allowing recovery of costs which the claimant has not, in the event, had to bear. He also seeks to equate repair costs with hire charges, submitting that in both cases if the claimant does not in fact suffer a loss (for whatever reason) there is no loss to be compensated, and that in Burdis the claimant did not in fact suffer a loss since she was not required to pay for the repairs. He submits that Gray J was right to conclude that the unenforceability of the agreement with Accident Assistance should be brought into account in assessing Miss Burdis' loss.

82. As to the authorities on which Mr Milligan relies, and in particular *Jones* **v** *Stroud*, Mr Stuart-Smith submits that Gray J's analysis was correct and that the passage from Neill LJ's judgment quoted earlier is no longer to be regarded as good law. In support of this submission Mr Stuart-Smith undertook a detailed examination of the subsequent authorities in which reference is made to *Jones* **v** *Stroud* in an attempt to demonstrate that, notwithstanding that *Jones* **v** *Stroud* has never expressly been overruled, the subsequent authorities do not support Neill LJ's **view.**

83. Mr Stuart-Smith submits that both the reasoning and the decision of the Court of Appeal and of the House of Lords in *Dimond* were based on the premise that the First Automotive credit hire agreement was a constituent element of the package offered to the claimant, and that the same applies to the Agreement with Accident Assistance in Burdis. He submits that if a potential loss is reduced or avoided by the incurring of a substituted expense, that expense is recoverable, and that *Dimond* has decided that an unenforceable credit hire agreement is a relevant factor to be taken into account in assessing the damage which the claimant has suffered. There is, he submits, no justification for asserting that a similar transaction entered into in relation to repair costs should be treated any differently.

84. In our judgment a fundamental distinction must be drawn, for present purposes, between repair costs and hire charges. When a **vehicle** is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in **value** of the **vehicle.** As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the **vehicle** to its pre-accident condition (see *Dimond* at page 1139G per Lord Hobhouse).

85. In Burdis the general rule applied, and it was common ground that the repairs restored Miss Burdis' car to its pre-accident **value.** Nor was there any issue as to the reasonableness of the garage's charges. Thus at the moment when the accident occurred Miss Burdis suffered a direct and immediate loss, the measure of which was the cost of the repairs which were in fact carried out (£2,981.19). But it was not a condition precedent to the recovery of compensation for that loss that the car be repaired: Miss Burdis' cause of action for the recovery of damages representing the diminution in the **value** of her car caused by Mr Livsey's negligence was complete when the accident occurred (see: The Glenfinlas [1918] P 363 and The London Corporation [1935] P 70 CA). Similarly, a claimant's damages will not be affected by the fact that, in the event, the repairs are carried out at no cost to him (see The Endeavour (1890) 6 Asp MC 511, where the **vessel** was repaired but, due to the bankruptcy of the owner, the repairer was never paid).

86. By contrast, the hire charges which were sought to be recovered in *Dimond* represented a potential future loss, consequent upon the defendant's tort, which was recoverable as damages only if and when it was in fact suffered. In the language of pleading, the hire charges constituted special damage. As Judge Harris put it in *Seddon* (at page 2890), in the passage quoted earlier, the hire charges are "of the essence of the damage which is consequential loss or special damage". Hence in *Dimond*, because the credit hire agreement was unenforceable and the hire charges were accordingly irrecoverable from the claimant, the hire charges never formed part of the claimant's loss.

87. The distinction between an immediate and direct loss on the one hand and a potential future loss on the other is of importance for present purposes because it leads to different treatment of benefits derived from a third party after the commission of the tort. In every case a claimant's recoverable loss is limited to the loss which he has actually suffered - damages in the tort of negligence are, after all, "purely compensatory" (see per Lord Bridge in *Hunt* **v** *Severs* at page 357H) - but the process of determining, in the light of subsequent events, what loss the claimant has actually suffered differs according to whether the loss was suffered when the tort was committed (direct loss) or whether it was suffered subsequently (consequential loss).

88. In a case of direct loss, subsequent events will operate to reduce or extinguish the loss only in so far as such events are referable to the claimant's duty to mitigate his loss, and hence referable in a causative sense to the commission of the tort (see *British Westinghouse* and *The Elena D'Amico*. In *The Elena D'Amico*, Robert Goff J said (at page 88, right hand column):

> "[W]hat is alleged to constitute mitigation in law can only have that effect if there is a causative link between the wrong in respect of which damages are claimed and the action or inaction of the plaintiff."

89. Robert Goff J went on to cite **Viscount** Haldane LC's speech in *British Westinghouse*, describing it as a "classic statement of the principle of mitigation".

90. The operation of this principle can also be seen in cases concerning breach of a covenant to repair contained in a lease (see, for example, Joyner **v** Weeks [1891] 2 QB 31 CA and Haviland **v** Long [1952] 2 QB 80 CA).

91. In our judgment, the authorities to which we have so far referred establish that subsequent events which are not referable in a causative sense to the commission of the tort, that is to say events which, on a true analysis, are collateral to the commission of the tort, or res inter alios acta, or too remote - we regard these expressions as interchangeable - do not affect the measure of a direct loss suffered when the tort was committed.

92. In the case of potential future losses, on the other hand, the general rule is that to the extent that such a loss is in fact avoided (for whatever reason) it is a loss which is never suffered and which is accordingly irrecoverable for that reason. In *Hunt* **v** *Severs* Lord Bridge, at page 361F, gave the example of an injured claimant who requires hospital treatment. Lord Bridge said:

> "If an injured plaintiff is treated in hospital as a private patient he is entitled to recover the cost of that treatment. But if he receives free treatment under the National Health **Service,** his need has been met without cost to him and he cannot claim the cost of the treatment from the tortfeasor."

93. We see that as an example of potential future damage, consequent on the tort, which in the event was never suffered. In that respect, it is in our judgment on all fours with the hire charges in *Dimond*.

94. There are two well-established exceptions to the general rule that potential future losses are irrecoverable if and to the extent that they are in fact avoided: these exceptions are identified in *Parry* **v** *Cleaver* and *Hussain*. In the latter case Lord Bridge said (at page 527G):

> "But to the prima facie rule there are two well established exceptions. First, where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the tortfeasor: *Bradburn v Great Western Railway Co* (1864) LR 10 Ex 1. Secondly, when the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary from a disaster fund, the amount received is again to be disregarded: *Redpath v Belfast and County Down Railway* [1967] NI 147. In both these cases there is in one sense double recovery. If the award of damages adequately compensates the plaintiff, as it should, the additional amounts received from the insurer or from third party benevolence may be regarded as a net gain to the plaintiff resulting from his injury. But in both cases the common sense of the exceptions stares one in the face. It may be summed up in the rhetorical question: 'Why should the tortfeasor derive any benefit, in the one case, from the premiums which the plaintiff has paid to insure himself against some contingency, however caused, in the other case, from the money provided by the third party with the sole intention of benefiting the injured plaintiff?'"

95. However, since in our judgment repair costs are merely the measure of a direct loss, suffered when the tort was committed, and are not to be regarded as falling within the category of potential future losses claimable as special damage, the general rule identified in Lord Bridge's example in *Hunt v Severs*, and the exceptions to that general rule to which we have just referred, are of no materiality for present purposes.

96. In our judgment, therefore, Neill LJ's judgment in *Jones v Stroud* represents a modern restatement of a principle established by the earlier authorities.

97. We turn at this point to Gray J's conclusion in Burdis that *Jones v Stroud* is, in this respect, no longer good law, having been impliedly overruled by *Hunt v Severs* and *Dimond*.

98. So far as *Hunt v Severs* is concerned, we do not consider that that decision impacts at all on the principle established by *British Westinghouse* and the other authorities to which we have referred. As Judge Harris pointed out in *Seddon*, *Hunt v Severs* is concerned with a different type of damage. In concluding that the decision in *Hunt v Severs* is inconsistent with Neill LJ's judgment in *Jones v Stroud*, Gray J seems to us to have overlooked the important distinction between direct loss and consequential loss.

99. We turn, then, to *Dimond*. *Dimond* was concerned only with hire charges: no issue arose in relation to repair costs. However, Lord Hobhouse placed the issue as to the recoverability of hire charges in a wider context, and in so doing referred to the direct loss which the claimant had suffered when the accident occurred. At page 1139F Lord Hobhouse said this:

> "Mrs Dimond was at the time of the accident the owner and person in possession of the **vehicle.** It was damaged. Its **value** was reduced. This can be expressed as a capital account loss. This loss can be measured as being the cost of making good the damage plus the **value** of the loss of its use for a week. Since her car was not unrepairable and was not commercially not worth repairing, she was entitled to have her car repaired at the cost of the wrongdoer. Thus the measure of loss is the expenditure required to put it back into the same state as it was in before the accident. This loss is suffered as soon as the car is damaged. If it were destroyed by fire the next day by the negligence of another, the second tortfeasor would only have to pay damages equal to the reduced **value** of the car and the original tortfeasor would still have to pay damages corresponding to the cost of putting right the damage which he caused to the car. These questions are liable to arise in relation to any damaged chattel and have long ago received authoritative answers in cases concerning ships: *The Glenfinlas* (Note) [1918] P.363; *The Kingsway* [1918] P.344; *The London Corporation* [1935] P.70. These cases also distinguish between the cost of the damage to the chattel and consequential losses to the owner of the chattel such as loss of revenue. However even where the chattel is non profit earning (as was Mrs Dimond's car) there may still

> be scope for awarding general damages for loss of use: *The Mediana* [1900] AC 113; *Admiralty Commissioners v S.S. Chekiang* [1926] AC 637; *Admiralty Commissioners v S.S. Susquehanna* [1926] AC 655.
>
> I mention these cases and the principles they illustrate to demonstrate that persons such as Mrs Dimond do not have to survive in an environment where the law does not recognise the losses which they may have suffered and that the law is not without principles covering the provision of compensation and its assessment. Each case depends upon its own facts but loss of use of the chattel in question is, in principle, a loss for which compensation should be paid. However one of the relevant principles is that compensation is not paid for an avoided loss. So, if the plaintiff has been able to avoid suffering a particular head of loss by a process which is not too remote (as is insurance), the plaintiff will not be entitled to recover in respect of that avoided loss. If the loss has only been avoided by incurring a substituted expense, it is that substituted expense which becomes the measure of that head of loss. Under the doctrine of mitigation, it may be the duty of the injured party to take reasonable steps to avoid his loss by incurring that expense."

100. In respectful disagreement with Gray J, we do not find in that passage anything inconsistent with the principle derived from the earlier authorities, culminating in *Jones v Stroud*. On the contrary, we agree with Judge Harris when he said in *Seddon* that in the passage from his speech quoted above Lord Hobhouse "explicitly indicated that the line of authority of which [*Jones v Stroud*] is an up-to-date example is well established".

101. Nor can we accept Mr Stuart-Smith's submission that the other authorities in which reference has been made to *Jones v Stroud* (**viz.** Linden Gardens Trust Ltd **v** Lenesta Sludge Disposals Ltd [1994] 1 AC 85, Darlington Borough Council **v** Wiltshier Northern Ltd [1995] 1 WLR 68 and *Panatown*) impliedly disapproved of *Jones v Stroud*. In our judgment those authorities contain nothing to suggest that *Jones v Stroud* is no longer good law.

102. We accordingly conclude that *Jones v Stroud* remains good law, and that the principle which it restated has not been in any way eroded by subsequent authority.

103. We turn, therefore, to the question whether that principle applies on the facts of Burdis.

104. In our judgment the agreement between Miss Burdis and Accident Assistance was plainly collateral to the tort, and must accordingly be left out of account in assessing Miss Burdis' damages. We do not see how it could be said that the agreement flowed from any act of mitigation by Miss Burdis - rather, it flowed from the fact that Mr Livsey's insurers had not settled the claim. The true analysis, in our judgment, is that Miss Burdis has discharged her contractual obligation to the garage to pay for the repairs. The fact that she has done so by arranging for the payment to be made by a third party (Accident Assistance) seems to us to be irrelevant in the context of assessment of damages.

105. Accordingly, for the reasons which we have given (which are essentially the same as those of Judge Harris in *Seddon*), we conclude that the decision of Gray J was wrong, and that the appeal in Burdis must be allowed.

Clark and Dennard – no insurance – paragraph 23

106. Although the judge accepted that Angel had discharged Mrs **Clark's** and Mr Dennard's liability to HUK by making payments as it did in the other cases, he held that no subrogated rights had been acquired to their claims because they were not insured. These two claims therefore fell foul of the rule against double recovery. The judge's conclusion was based principally upon his **view** that neither claimant had provided consideration for the Angel policy, although in Mrs **Clark's** case he had doubts as to whether she intended to create legal relations and also relied on the policy wording.

107. Mrs **Clark** and Mr Dennard were clients of A Plan. We have set out the arrangement between A Plan and Helphire in paragraph 12. What was the nature of this arrangement? Mr Milligan's

primary submission is that Angel gave authority to A Plan to issue policies (Albion or Europ) to their customers if they opted for the Helphire scheme. We think this analysis is largely correct, although looking at the exchange of correspondence and what actually happened we think the authority conferred on A Plan by Angel simply permitted A Plan to agree on Angel's behalf that Angel would issue policies to A Plan's eligible clients. As the arrangement with A Plan only involved giving them this authority, no question of consideration arises, although as between A Plan and Angel, quite apart from the one pound, the scheme was obviously to their mutual advantage so each would have provided consideration to the other.

108. But the critical question is whether A Plan clients themselves gave consideration for the insurance which they received as part of the scheme. Mr Milligan says quite simply that by signing up to the Helphire scheme, which brought advantages to all concerned, A Plan's clients were providing consideration. The fact that such consideration was not provided directly to Angel or the underwriters is not to the point. Consideration may be provided to a third party for the ultimate benefit of the other party to the contract. (See Shanklin Pier Ltd. v Detel Products Ltd. [1951] 2 KB 854).

109. We broadly accept these submissions but do not think it is enough simply to say that the Helphire scheme brought advantages to all concerned. However it is accepted that A Plan's clients gave consideration for the credit hire and repair parts of the scheme, no doubt because of the obligations they assumed under the agreements dealing with these aspects of the scheme. The scheme as a whole, including the Angel policy, was one of the benefits which A Plan offered to its clients. By placing their insurance business with A Plan these clients obviously gave consideration to A Plan and this entitled them to the benefit of the Helphire scheme including the insurance part of it for which they did not have to pay. So a part of the consideration given by A Plan's clients to A Plan was for the benefit of Helphire and their scheme which, through Angel, included insurance. Once one accepts that this is a genuine scheme of which insurance is an integral part, it is unrealistic to think that no consideration is given for that particular part of the scheme. You do not get something for nothing.

110. As A Plan clients did provide consideration for the insurance their legal position is the same as those, like Dr Sen, who actually paid for it. Points about the policy wording do not therefore affect the position. The judge relied on the definition of "you" in the Albion wording as the person who has paid the premium. Mrs **Clark** paid no premium, but if one looks at the wording as a whole "you" is obviously intended to mean the person who has incurred liability under Helphire's credit hire and/or repair scheme. No such difficulty arises with the Europ wording where "you" is defined as "the person who has taken out this policy". The judge also relied on the fact that the wording defined the insured incident as the accident whereas the period of insurance shown in the policy schedules issued to the claimants started after the accident. As we have already said this was an obvious mistake. If underwriters had relied on it to resist a claim we have no doubt that they would have been unsuccessful.

111. These conclusions make it unnecessary to consider **various** alternative ways in which Mr Milligan put this part of Helphire's case. They mean also that we allow the appeal in Dennard. In **Clark** however there is the further point about intention to create legal relations. Although she signed the Helphire agreements and received the policy schedule Mrs **Clark** was unaware of what she had signed, believing that the hire car had been provided as a courtesy car by her motor insurers. She made the claim on the policy by signing the letter from the solicitors "so as to have nothing further to worry about". We think these facts demonstrate that Mrs **Clark** did sign up to the scheme. The fact that she did not understand that this is what she had done because she did not read the documents she signed is not to the point. Looking at the matter objectively we think there can be no doubt that there was a mutual intention to create legal relations in Mrs **Clark's** case. It follows that we allow the appeal in her case as well.

Payments to the garage – paragraph 24

112. We have already explained how by the credit repair agreement HUK was to provide credit so that the repairing garage could be paid (paragraph 7) and how the garage was paid 90% of its invoice by

HFL but the 10% discount was kept secret from the claimants (paragraph 11).

113. The judge described the agreement between HFL and the garage as a factoring agreement but did not deal with the insurers' submission that the claimants are only entitled to recover the amount paid by HFL. Mr Symons contends that this was not a factoring agreement. The proper analysis of the credit repair agreement was that HUK agreed to act as the claimant's agent to pay the repairing garage. That being so, HUK, as agent, was obliged to pay the secret profit to the claimant. It follows that the claimant's loss was the cost of the repair paid by HFL for the agent, not that cost plus 10%. Alternatively, Mr Symons submits that the agreement shows that the garage was prepared to accept 90% of its invoiced cost of the repairs and so that is the measure of the claimants loss.

114. We do not accept these submissions. The credit repair agreement exists, as it says, to provide credit so that the repairing garage can be paid. It presupposes a prior conventional contract between the garage and the claimant to carry out the repairs. Unlike the provision of hire cars Helphire assumed no responsibility to carry out the repairs themselves and the credit repair agreement made payment for repairs the claimant's responsibility. So HUK never became the claimant's agent to pay the repairing garage. The agreement with HFL was a separate agreement under which HFL purchased the claimant's debt to the garage at a discount of 10%. This did not extinguish the claimant's debt to the garage. Rather HFL contracted for the right to recover the debt from the claimant and at least part of the risk and expense of recovery were compensated by the discount. In purchasing the claimant's debt HFL was not acting as his agent. So this is a classic factoring arrangement which is not affected by the fact that HFL's fellow subsidiary, HUK, provided credit to the claimant. When Angel paid HFL it paid 100% of the cost of repair. This corresponded to the loss incurred by the claimant which equated to the proper cost of repair. This analysis of course assumes that the invoiced cost of the repairs was a proper cost. If it was not, that is a separate question. But the mere fact that the garage was prepared to factor the debt for 90% of its **value** does not mean that the claim should also be limited to 90%. For these reasons we conclude that the claimants are entitled to recover 100% of the proper costs of the repairs to their cars.

Delay in repair – see paragraph 25

115. The repair to Mrs **Clark's** car should have been completed within 5 days, but due to factors beyond her control it took about 10 days. There were also delays in the repair of Mr Dennard's car. He was told that it would take 5 days and despite chivvying the garage on the telephone, it was not ready for collection for 12 days. In both cases the hire period was extended through no fault of the claimant.

116. The judge held that the sensible and proper approach was to make the defendant responsible for the cost flowing from a repair of reasonable length appropriate to the damage. If the repairs should reasonably have been completed in, say 5 days, but were not, the defendant should not have to pay for the hire cost during the extended period. Thus in Mr Dennard's case the car hire should be 5/12 of the actual car hire cost. The insurers supported the conclusion and the reasoning of the judge.

117. Helphire submitted that the approach of the judge was wrong in law. The damage to Mr Dennard's car had caused him loss amounting to 12 days hire charges. He was entitled to recover that loss unless the chain of causation had been broken by some supervening act or he had failed to mitigate his loss. On the findings of the judge the delay did not arise from a supervening act and both Mrs **Clark** and Mr Dennard had acted reasonably. It followed that they were entitled to recover in full. In support they referred us to Mattocks **v** Mann [1973] RTR 13. In that case Mrs Mattocks took her car to reputable repairers. It was estimated that it would take 6 weeks to repair, but the repairs took 12 weeks to complete. Thereafter the repairers held the car pending payment which was not made by the defendants until nearly 7 months after the repairs had been started. Thus the Court of Appeal had to decide whether Mrs Mattocks could recover the cost of hiring the car that she needed during the full time taken to repair the car and during the time when the repaired car was held pending payment.

118. Beldam LJ giving the leading judgment with which the others agreed held that Mrs Mattocks was entitled to recover the cost of hiring a replacement car for the full period. He rejected the approach

of the Master that the period involved included a period which could not be held against the defendant. He said at page 18:

> "For a supervening cause or a failure to mitigate to relieve a defendant of a period of hire there must, in my judgment, be a finding of some conduct on her [Mrs Mattocks] part or on the part of someone for whom she is in law responsible, or indeed of a third party, which can truly be said to be an independent cause of loss of her car for that period."

119. Beldam LJ went on to point out that there was no finding to that effect. Mrs Mattocks had put her car with reputable and well-known repairers. She could not be criticised because they had taken on too much work and therefore the repairs had taken much longer than at first sight seemed reasonable. Further there was no supervening event despite the 7 month delay.

120. Mr Milligan also referred us to Candlewood Navigation Corporation Ltd **v** Mitsui O.S.K. Lines Ltd [1986] 1 AC 1. In that case the Privy Council considered whether the plaintiff could recover in respect of an extended period of repair caused by industrial action at the repairers. Their Lordships held that the plaintiff could recover because the industrial action was foreseeable.

121. We believe that the approach of the Court of Appeal in *Mattocks* applies to this case. The defendants' actions damaged the cars of Mrs **Clark** and Mr Dennard. They should pay the loss caused by their actions. The actual loss incurred involved hire of replacement cars for 10 days in the case of Mrs **Clark** and 12 days in the case of Mr Dennard. They both appear to have acted reasonably in placing the cars in the hands of respectable repairers and there were no supervening events. Further delays of that order were foreseeable. The extra loss caused by the delay in the repair must fall on the tortfeasor as there was no failure to mitigate. On the findings of fact in those cases the cost of hire should not have been reduced. The insurers of the defendants should seek a contribution from the repairers for any unjustified length of repair.

Impecuniosity – see paragraph 26

122. Mr Lagden's 10 year old car was parked unoccupied. It was damaged by the defendant in his Mitsubishi Shogun. Therefore Mr Lagden would have been deprived of the use of a car for the 10 day period during which the car took to repair unless he hired a replacement car.

123. Mr Lagden had **very** little money and therefore could not afford to hire a car and it is reasonable to assume that he could not have obtained a loan to enable him to pay hire charges. He therefore could not obtain a replacement car without using Helphire or a similar company. Can he recover the cost of the Helphire Scheme, including as it did certain sums which would not normally be recoverable?

124. The judge held that if "an impecunious claimant can only get himself a replacement car as part of a credit hire package then he reasonably needs … to expend the sum which that package costs." That being so, Mr Lagden who had no other cheaper way of getting himself a replacement car was entitled to recover the reasonable costs of such a scheme. That was subject to the defendant showing that there were rival credit hire schemes which charged less. If so, the amount recovered would be likely to be the lesser charge.

125. The insurers submitted that the judge's conclusion was wrong and was contrary to *Dimond*. They relied on the statement of Lord Hoffman at page 1135 D – "If Mrs Dimond had borrowed the hire money, paid someone else to conduct the claim on her behalf and insured herself against the risk of losing and any irrecoverable costs, her expenses would not have been recoverable." If Mrs Dimond could not recover the cost of borrowing the hire money, then Mr Lagden could not do so by either going to the bank or obtaining credit from Helphire. The insurers accepted that Mr Lagden had need of a car and had lost the use of his car, but submitted that he could not recover as a head of damage that which was irrecoverable by a "wealthy" person. As held in *Dimond*, that part of the Helphire costs that did not equate to the cost of repair and hire of a replacement car had to be stripped out. The result was that Mr Lagden's loss was, at most, the cost of hiring a replacement car not the full costs of the Helphire Scheme.

126. Helphire submitted that the issue of impecuniosity was not considered in *Dimond* and the speeches must be read with that in mind. They supported the conclusion reached by the judge. They submitted that the capital loss in these cases was the loss measured as the cost of repair plus "the **value** of the loss of its use …" (see Lord Hobhouse in *Dimond* at page 1139 F-G). That being so, the effect of impecuniosity had to be considered as part of the law of mitigation. A claimant who is under a duty to mitigate is not obliged to do that which he cannot afford to do (see Dodd Properties Ltd **v** Canterbury City Council [1980] 1 WLR 433 at 435). Mr Lagden had no choice but to purchase the additional benefits of the Helphire Scheme. As in Alcoa Minerals of Jamica Ltd **v** Broderick [2000] 3 WLR 23, Mr Lagden suffered one head of damage. His impecuniosity did not give rise to a head of damage and was something which was reasonably foreseeable. Thus his measure of loss included a sum for loss of use of his car. He was under a duty to mitigate his loss, but did not have to do that which he could not afford to do (see *Dodd Properties* at 453 D). He could afford to use the **services** of Helphire and their costs were recoverable provided Mr Lagden acted with commercial prudence.

127. The judge came to the right result. A defendant who damages another's car should not be surprised to find that he will have to pay for a replacement car if it is needed by the claimant. A wrongdoer must take his **victim** as he finds him. The loss is measured as the cost of repair plus the **value** of the loss of its use to the **victim.** Of course, additional benefits obtained as a result of taking reasonable steps to mitigate loss need to be brought into account in the calculation of damages (see Lord Hobhouse in *Dimond* at page 1135 F). But nobody suggests that there were any steps that were reasonable which would have mitigated Mr Lagden's loss which did not involve paying the full cost of the scheme. It was not suggested he could have obtained a loan or that there was any cheaper way of obtaining a replacement car. It seems that the Helphire charge was, to him, the cheapest way to remedy the loss. He was therefore entitled to recover the full cost of the scheme.

128. We realise that in some cases it will be necessary to consider the financial ability of a claimant to pay car hire charges. However we do not anticipate that District and County Court Judges will not be able to arrive at a just result without putting the parties to great expense.

Different Car – see paragraph 27

129. Mr Dennard drove a sports car. He was supplied with a 1.8 **Vauxhall** **Vectra** as a replacement car. Its cost of hire was substantially less than that which he would have been charged if he had insisted on the supply of a sports car.

130. The judge held that Mr Dennard would have been entitled to a replacement sports car, but, since he accepted a **Vectra,** he was only entitled to the appropriate cost of the type of car which he decided to accept.

131. Helphire submitted that the judge was correct to conclude that Mr Dennard was entitled to a replacement sports car. They also submitted that the cost of hiring such a sports car represented Mr Dennard's loss. The fact that he accepted a less prestigious car was irrelevant. It was not open to the defendants to question the way that Mr Dennard spent his damages. The insurers submitted that Mr Dennard was not entitled to a replacement sports car. His loss was equivalent to the cost of a suitable car.

132. The law enables a claimant to recover his loss. Prima facie that loss is equivalent to the cost of a replacement **vehicle,** but that is subject to the duty to mitigate. Mitigation requires reasonable steps to be taken. Whether that has been done is a question of fact which depends on the circumstances.

133. In the present case the loss suffered by Mr Dennard was the cost he had to pay for hire of the **Vectra,** not the amount which he might have paid for the hire of another car. A person who has no need for a replacement car because, for instance, he is abroad during the repair cannot recover the cost of hiring a replacement which he never incurs (see *Giles* ***v*** *Thompson* at 167D). Similarly, a person who does not incur the cost of hiring a sports car cannot recover more than the cost actually incurred. Mr Dennard expressed his satisfaction with the **Vectra** and upon the facts it would not

have been reasonable for him to insist upon a replacement sports car. However if a need for a particular replacement car is established, then the cost incurred of hiring that car is recoverable.

Calculation of the rate of hire – see paragraph 28

134. In *Dimond* the claim for loss of use failed as the car hire agreement was unenforceable; but the Appellate Committee expressed their opinions as to the principles upon which damages for repair and loss of use should be calculated. Lord Hoffman drew attention to the additional benefits that Mrs Dimond had achieved by **virtue** of her contract with 1st Automotive which was the accident hire company involved. He held that such additional benefits had to be brought into account and therefore had to be stripped out. He said at page 1136 D that "prima facie their **value** is represented by the difference between what she [Mrs Dimond] was willing to pay 1st Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car". That he referred to as the "spot rate".

135. Lord Hobhouse having referred to The Mediana [1900] AC 113, said that each case turned on its own facts, but loss of use of a chattel was, in principle, a loss for which compensation should be paid. He held that Mrs Dimond would, but for the fact that her contract with 1st Automotive was unenforceable, have been entitled to recover for the loss of use of her car. She could not recover the whole sum claimed as it included benefits which could not be included in the cost of mitigation. Thus although the sum she was to pay was reasonable to obtain the benefits enjoyed by the scheme of 1st Automotive, her recovery should be limited to the cost of hiring a replacement car.

136. Although the House of Lords gave guidance as to the principles to be applied in arriving at the correct measure of damage for loss of use, their application has proved difficult. As the judge said, hire rates are in constant flux and different companies' hire charges **vary** considerably. For example Mr Mainz, the expert called by the insurers, found that the daily rate applicable to the period when Dr Sen required a hire car **varied** from about £25 to £40. Thus there was no spot rate as such.

137. Met with this problem, the judge considered three ways of arriving at the correct measure of loss. First to break down the charge made by the accident hire car providers so as to enable the unrecoverable element to be stripped out. This was in theory an acceptable solution, but the judge rejected it as being too cumbersome and expensive in hostile litigation as it would entail detailed disclosure and analysis in thousands of small cases. The cost involved would not be proportionate and for that reason he did not favour it as a practical solution. We agree.

138. The judge's second approach was to apply a "reasonable discount" to the rate charged which would by its nature be somewhat arbitrary. We understand that this approach has been adopted in a number of cases. Even so, we do not believe it appropriate in the absence of agreement between the parties or without cogent evidence as to what the discount should be. Further, as the judge pointed out, once the courts start applying a particular discount the total charge may be increased. For those reasons we do not favour this approach.

139. The third solution was to look at actual locally available figures. That, the judge said, leads to the difficulty of deciding what figures should be taken and from where. Should the highest figure be taken or the lowest or an average? We will return to these difficulties later, but first will consider the approach adopted by the judge.

140. The judge had the advantage of expert evidence about car hire rates given by Mr McLean for Helphire and Mr Mainz for the insurers in 3 of the 4 cases. The judge described Mr Mainz as an impressive witness and relied on his evidence, revised by him in the light of the evidence of Mr McLean.

141. Mr Mainz carried out a survey of car hire rates. His survey included the best-known national companies and a random selection of smaller local concerns. It produced a snap-shot of hire rates in January 2001. He did not attempt to identify any distinct pattern in the rates charged nor to determine any trend; but found that the rates charged by the national companies in general exceeded those of smaller local concerns by a substantial amount.

142. The Mainz report produced a band of rates which, for Dr Sen, **varied** from £25 to £40. The average of those with excess of less than £100 was £35.05.

143. The judge concluded that a "band" was not of much use. A single figure was needed. He decided that to arrive at that figure, it was acceptable in the circumstances to take the average and that the best figure would be the average of the averages derived from the two experts' reports. He also concluded that the January figures were a little low for peak seasons, e.g. May, and if it was desired to have "one set of figures applicable in a somewhat rough and ready basis all the year round, then some increase would be appropriate". He concluded that "Mr Mainz's figures plus 10% might reasonably be accepted as a guide for general all round use."

144. Mr Symons submitted that the approach of the judge was, having regard to the circumstances correct and this Court should not interfere. The judge was right to realise that the task of the court was to strip out the unrecoverable element of Helphire charges so as to obtain a sensible spot rate. The judge heard the evidence and had considered in detail the Mainz report which gave information which, at most, had a 5% possibility of error. The average figures represented a fair spot rate and were a fair representation of the Helphire rate stripped of the unrecoverable element.

145. Mr Milligan submitted that the approach of the judge was flawed for a number of reasons. We need only refer to three. First, the average of averages taken by the judge was not the cost to a claimant of hiring the car. At best it was the average of the cost of hire. In times of hire-car shortage the claimant should be entitled to recover the true cost not some lower cost estimated as an average. Second, the uplift of 10% was completely arbitrary. Third, the adoption of Mainz plus 10% did not, in hostile litigation, achieve a relatively cheap and workable resolution of the issue which was the purpose of the judge. The Mainz report would not be admissible in other litigation without other litigants being able to produce evidence to the contrary and to question Mr Mainz on its **validity.** In any case it was potentially out of date in 2001.

146. We believe that Mr Milligan's criticisms of the judge's adoption of Mainz plus 10% are justified as were his criticisms of the suggestion that it provides a working solution. If Mainz plus 10% is justified to arrive at the reasonable charges incurred in hiring a replacement car, then it must be capable of application whether or not an accident hire company is involved. That cannot be right. A person who needs to hire a car because of the negligence of another must, subject to mitigating his loss, be entitled to recover the actual cost of hire not an average derived from the Mainz report. If the principle adopted by the judge is correct then it would seem appropriate also to apply that principle to the cost of car repair, namely a claimant may only recover the average of the charges of garages. But a person whose car is damaged should in appropriate circumstances recover the cost to him of repair and loss of use. His recovery should not be restricted to an average of car repair or hire rates nor should he be able to recover that average cost if the actual cost is less. We believe that the solution is to apply normal legal principles.

147. The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use and he establishes a need for a replacement, he is entitled to the cost of hiring a replacement car. He can go round to the nearest car hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances.

148. We do not anticipate that the application of the correct legal principles will lead to disproportionate costs in small cases. The claim will be based on evidence as to the rate charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates. Thereafter the evidential burden passes to the insurers to show that it would not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate. What is reasonable and whether a loss is avoidable are questions of fact, not law, which District and County Court judges regularly decide. It can arise in many different types of cases, ranging from damage to chattels to a failure to take action. We do

not believe that a decision on such issues in respect of car hire charges will be any more difficult than in respect of car repair charges.

149. Mr Symons submitted that the amount charged by a car hire firm did not necessarily equate to the car hire element of Helphire charges. He may be right, but such a charge is a real indication of the loss as the speeches in *Dimond* pointed out.

150. We had the assistance of written submissions from Michael Brindle QC, who appeared for Centrus Limited, which was given leave to intervene. He provided us with information on the ABI scheme and suggested that the appropriate measure of damage for loss of use should be that set out in the scheme or based upon it. No doubt the scheme is, and will be, of benefit to insurers, the accident hire companies and the public; but the ABI figures cannot be taken in hostile litigation as being the appropriate figures of loss. They reflect a compromise agreed between the parties rather than an assessment of loss.

Delivery and Collection Charges – see paragraph 29

151. Helphire deliver the replacement car to the car owner and collect it and make a charge. The judge held that:

> "… in the light of the *Dimond* decision I do not think that delivery charges can be generally recoverable in ordinary cases … However, for some people it may be reasonably necessary to have a delivery if, for example, the **victim** was handicapped or had no practical or cheaper way of getting to the car himself. A long taxi ride might cost more than a delivery charge, in which case the latter should be recoverable."

152. The parties accepted that in appropriate circumstances the cost of delivery and collection or the cost of taxi rides was recoverable. We agree. The real issue between the parties concerned the principle to be applied to decide when such costs are recoverable. The insurers submitted that delivery costs were not recoverable unless there were special circumstances such as a special need or there was no other form of transport from the owner's abode to the place where the car to be hired was kept. Helphire submitted that delivery was in general an appropriate cost and the consequent charge should be paid unless it was shown that it was unreasonable.

153. If injury causes damage then the injured party can recover the loss caused by the injury. But the need for a replacement car is not self-proving (see *Giles* ***v*** *Thompson* at 167 D); neither is the need for delivery self-proving. If the injured person lives next door to the car hire company, he can walk round and collect the replacement car and a delivery and collection charge is not part of the loss. However, the cost of obtaining the replacement car can be recovered subject to the duty to take reasonable steps to mitigate the loss. What is reasonable is a question of fact, which can usually be deduced from the surrounding circumstances. If there is suitable public transport, it would be reasonable to expect the car to be collected. If part of the loss is the cost of delivery and collection, that must be proved.

Engineers' Charges – see paragraph 29

154. The factual background can be derived from Mr Lagden's and Mrs **Clark's** claims. He took his damaged car to Essex Coachworks for repair. He signed up with Helphire. An engineer was sent to inspect the car and he agreed with the garage a provisional figure for repairs of £1020 including **VAT.** The charges for the engineer were invoiced at £70.50 inclusive of **VAT.** Mrs **Clark** suffered minor damage to a nearside panel. Repairs of £560 were authorised by Helphire's engineer. He charged £35 plus **VAT,** but her claim was based upon a second invoice of £60 plus **VAT.**

155. The judge concluded that the cost of the engineer was not a recoverable head of damage as it was one of the additional benefits of the Helphire scheme. It enabled the claimant to avoid the trouble of getting competitive tenders. That conclusion was strictly obiter as the claims to recover engineers' fees were abandoned in these test cases.

156. We do not believe that a claimant is under a duty to get competitive tenders. He can recover the cost of the repair unless it be shown that he has not taken reasonable steps to mitigate his loss. Of course a number of quotations or one engineer's report can be good evidence to rebut an allegation of a failure to mitigate and may be useful in settlement negotiations; but the costs are not part of the loss. The fact that insurers use engineers to report on damaged cars and agree the costs of repair is irrelevant to the assessment of the amount of loss. Helphire use an engineer to negotiate the repair charges with the repairer with no doubt the **view** that the engineer's report will lead to a quick and satisfactory settlement of the claim and protect Helphire. As such they would not be recoverable. The judge was right.

Interest – paragraph 30

157. After reminding himself that the power to award interest is discretionary, of the need to look for reality and of the principle that on a subrogated claim insurers may recover interest for the period they have been kept out of their money, the judge said:

> "It seems to me that in reality from the time Helphire's arrangements paid out to the repairers, Helphire has been standing out of its money".

So he awarded interest from the time HFL paid the garages but only on the actual amount (90%) which it paid. The position was slightly less clear as far as car hire was concerned but he said:

> "Despite the artificiality of what was being done nonetheless these payments were being made by Angel".

So he awarded interest on the payments made by Angel from the time they made those payments to HUK.

158. Based on *Giles* Mr McLaren submits that the judge should not have awarded any interest. There the House of Lords declined to award interest on the hire charges in one case because the claimant had not been kept out of any money of her own whilst her claim was being litigated and the credit hire company did not have an interest in the claim of the kind which a subrogated insurer has. Mr McLaren says that the claimants in this case were not kept out of money of their own either so no interest should have been awarded. But this argument overlooks the fact that the claims are subrogated claims. The claimants have no further liability to Helphire because Helphire have been paid under the Angel policies. We therefore reject Mr McLaren's submission.

159. On the basis that these are subrogated claims the claimants are entitled to interest on the amounts paid by Angel to HUK and HFL from the dates when such payments were made. That is Mr Symons' position. It is what the judge did for the hire charges and, Mr Symons says, should have done for the repairs.

160. Mr Milligan submitted that as the recoverable amount of the hire charges had the interest element stripped out of it, interest was recoverable on the amount of the spot rate from the notional date upon which the hirer would have to pay it at the end of the period of hire. We do not accept this submission simply because this is a notional exercise. The claimant has not in fact had to pay anything at this stage and no subrogated rights have yet accrued.

161. At first sight the same reasoning should apply to the repair costs, but it can be argued that here the position is different since we have decided that those costs are recoverable irrespective of the claimants' arrangements with the credit hire companies. But the fact remains that the claimant has not been kept out of any money, whatever the analysis of his right to recover may be. That is the reality and the basis upon which we think the discretion should be exercised. In the Helphire cases this leads to the conclusion that Mr Symons' solution is correct. As no question of subrogation arises in Burdis we think that no interest is recoverable in that case for the reasons given in *Giles*.

162. It follows that we uphold Judge Harris's decision about interest on hire charges but not on repair charges. Interest on 100% of those charges should run from the date of the payments made to HFL. No interest will be awarded in Burdis.

Tributes and apologies

163. We should like to pay tribute to Judge Harris for the quick and efficient way in which he dealt with these cases and for producing a most comprehensive and readable judgment. We should also like to pay tribute to counsel who appeared before us for their clear and helpful arguments which they were able to compress into the limited time available. We know that we have not dealt with a number of those arguments in this judgment but have not done so in the interests of brevity.

Order: Appeal allowed in part; counsel to lodge a draft minute order.
(Order does not form part of the approved judgment)
