England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2014] EWCA Civ 357
Case No: B2/2013/1884

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Manchester County Court
Mr Recorder Alldis
1IR10252

Royal Courts of Justice
Strand, London, WC2A 2LL
25/03/2014

B e f o r e :

LORD JUSTICE MOSES
LORD JUSTICE UNDERHILL
and
SIR ROBIN JACOB

Between:

ZURICH INSURANCE PLC	**Appellants**
- and -	
SAMEER UMERJI	**Respondent**

STEVEN TURNER (instructed by DAC Beachcroft Claims Ltd) for the Appellants
LEE NOWLAND (instructed by Brimelows Solicitors) for the Respondent
Hearing dates: 30 January 2014

HTML VERSION OF JUDGMENT

Lord Justice Underhill :

INTRODUCTION

1. The Claimant, who is the Respondent to this appeal, is a train guard. He lives in Bolton. He was the owner of a Mercedes car, first registered in February 2007. It was worth about £8,000. On 19 October 2010 he was involved in an accident and his car was damaged. It was in due course assessed as a write-off. The other driver was the First Defendant, who is not a party to this appeal. The Second Defendants, who are the Appellants, are the First Defendant's insurers.

2. The car was apparently undrivable following the accident. The Claimant contacted a company called Elite Rentals (Bolton) Ltd. He entered into a credit hire agreement with them of the familiar kind, under which they rented him, from the following day, a replacement car for a maximum period of 89 days. Over the next year and a half he entered into a series of further agreements in substantially the same terms (though not always for the same **vehicle**) until 2 June 2012 – a total period of 591 days. The rental for that period was £95,130.14 (representing a rate of about £161 per day) – a remarkable sum given the **value** of the damaged car. The Claimant says that he was unable to afford to buy a replacement **vehicle** until the Appellants paid him the pre-accident **value** of his old car. That did not in fact happen until 16 November 2012. It does not matter for present purposes why the Claimant ceased to hire a replacement **vehicle** some five months before that date: probably Elite became nervous about extending any further credit.

3. Elite also arranged for the recovery of the damaged car and its storage. It remained in store for over four months, until 22 February 2011. The recovery and storage charges came to £3,420.75.

4. It was a term of the credit hire agreement that the Claimant agreed to Elite appointing solicitors to pursue a claim in his name against the First Defendant and that he would co-operate in that claim. A firm called M&S Legal were duly instructed, apparently on the day of the accident itself. They notified the Second Defendants of the Claimant's claim in accordance with the pre-action protocol.

5. After some correspondence, of which I need not give the details here, proceedings were initiated in the Claimant's name in the Manchester County Court on 24 August 2011. The First Defendant did not file a defence and a liability judgment was entered in default on 6 October. It appears that he had not notified the Appellants of the proceedings, and on 11 January 2012 they applied to be joined as defendants (relying on *Gurtner* **v** *Circuit* [1968] 2 QB 587). An order was eventually made joining them on 25 April. It was directed on that occasion that any application to set aside the judgment should be made by 30 May. The Appellants missed that deadline but made a late application on 6 June. That was refused by District Judge Smith on 16 October: other orders were made on the same occasion to which I shall return in due course. The action proceeded accordingly on a quantum only basis.

6. The issue of quantum came on for trial before Mr Recorder Alldis on 14 June 2013. He gave judgment for the Claimant against the Appellants in the sum of £101,559.36. The elements in that award with which we are concerned are:

   (a) the sum of £92,386.54 in respect of the hire charges from Elite (save in respect of a period of some two-and-a-half weeks when the Claimant was on holiday and had no need of a car); and

   (b) the sum of £2,540 (plus **VAT**) in respect of the storage charges.

7. This is an appeal against that judgment, and specifically against the two elements which I have identified. The Notice of Appeal originally pleaded four grounds. Only three are now pursued. The first two are concerned with the award in relation to the rental charges; the third relates to the storage charges. I will consider them in turn.

8. Before us the Appellant was represented by Mr Steven Turner and the Claimant by Mr Lee Nowland. The submissions of both counsel, both in writing and orally, were of **very** high quality.

THE HIRE CHARGES

THE BACKGROUND LAW

9. There is now a plethora of cases, both reported and unreported, about the recoverability of credit hire charges in circumstances such as these. I need not review them in any detail. For the purpose of the

issues in the present appeal I need only note the following points:

(1) A claimant whose car has been damaged as a result of the defendant's negligence is entitled to recover for the cost of hiring a replacement **vehicle** to the extent, but only to the extent, that it was reasonable for him to incur that expenditure. If authority is needed for so basic a proposition, it can be found in the speech of Lord Hope in *Lagden* ***v*** *O'Connor* [2004] 1 AC 1067, at para. 27 (pp. 1077-8).

(2) The issue of reasonableness is conventionally assessed by reference to three elements labelled "need", "rate" and "duration". At the risk of spelling out the obvious, the first question is concerned with whether the claimant needed a replacement **vehicle** for all or any part of the period claimed for: he might, for example, have been ill or abroad. "Rate" is concerned with whether the claimant has paid an excessive hire rate. In practice an issue about rate will generally arise in a credit hire case, and the question will be whether the claimant can recover the cost of credit hire rates – which are substantially higher, to reflect the credit element and the other services provided by the hirer – rather than straightforwardly hiring a replacement **vehicle** at "basic hire rates"[1]: see (3) below. The third question is concerned with whether the period of hire was longer than necessary. In practice that means whether the claimant should reasonably have had his or her original **vehicle** repaired sooner or, if it was a write-off, should have bought a replacement sooner. (There could in principle also be a question whether the claimant has hired an unnecessarily expensive type of car: that could be treated as an aspect of need or rate or as a separate question.)

(3) In *Lagden* ***v*** *O'Connor* the House of Lords (by a majority) held that where a claimant is not in a financial position to pay hire charges on an ordinary upfront basis – in the jargon, where he is "impecunious" – he should be entitled to recover credit hire rates. Both Lord Nicholls and Lord Hope gave some guidance about how to decide whether a claimant was indeed impecunious, but I can ignore that aspect for present purposes.

(4) Although *Lagden* ***v*** *O'Connor* was concerned with the issue of rate, the decision was avowedly based on the general principles of the law of damages. In principle, therefore, impecuniosity might also justify a higher level of award with regard to the element of duration – that is, where a claimant hires a replacement car for longer than he otherwise might because of his inability to pay promptly for repairs or to buy a replacement **vehicle.**

THE INTERLOCUTORY HISTORY

10. It is, regrettably, necessary to set out the history of the interlocutory proceedings in some detail. I do so as follows.

11. The Particulars of Claim, drafted by Ms Milnes of M&S Legal, are largely formal. In relation to the items of loss with which we are concerned, namely storage and hire charges, they state merely "£ __ to be confirmed". The net **value** of the written off car was quantified at £7,100.

12. Our attention was drawn to the Practice Direction accompanying Part 16 of the CPR. Para. 8 identifies certain "matters which must be specifically set out in the particulars of claim if relied on". Para. 8.2 lists a number of matters which "the Claimant must specifically set out … where he wishes to rely on them", including, at (8), "any facts relating to mitigation of loss or damage". No "facts relating to mitigation" are pleaded in the Particulars of Claim, beyond the fact that it is intimated that a claim for hire charges will be made. I mention this because the Appellants took the point later that the Claimant should have pleaded his impecuniosity in the Particulars of Claim. But that is academic since, as will appear, the issue was addressed squarely at a later stage. [2]

13. On 6 January 2012 M&S Legal served on the First Defendant a witness statement from the Claimant. It was presumably drafted before the judgment on liability since it covered both liability and quantum. So far as the hire agreement with Elite was concerned, it said, at para. 14:

> "I required a replacement **vehicle** for a number of reasons. I have a family and require a **vehicle** for transporting them around and to **visit** friends and family. I also require a **vehicle** for domestic duties such as shopping. I have to have a **vehicle** in order to travel to work as well in order that I can continue to earn a living for me and my family. The terms and conditions of hiring were explained to me. I agreed to it as I fully expected the matter to be resolved within a few weeks and for the Defendant's insurer to pay for the repairs to my **vehicle** or the **value** of the **vehicle** if it was written off. I was unable to afford to replace my **vehicle** when it became apparent that the **vehicle** was written off and when the Defendant's insurer denied liability."

14. On 16 May 2012 the Claimant served a Schedule of Special Damages. This claimed, *inter alia*, hire charges to date, which at that point totalled £84,801.30, and stated that the loss was ongoing. It also claimed the recovery and storage charges.

15. No further progress was made until the Appellants were joined as Second Defendants and their belated application to set aside the default judgment was dismissed (see para. 5 above). On that date, being 16 October 2012, District Judge Smith made the usual directions for disclosure, exchange of witness statements, and the service of a schedule of loss and counter-schedule. Paragraph 3 of the order reads:

> "The claimant shall confirm by 4 pm on 30 October 2012 whether he intends to allege that he was impecunious at the time of the hire."

16. Paragraph 3 of the order of 16 October 2012 is of central importance to this appeal. We were shown a transcript of the discussion before the District Judge which led to it being made. The issue came up after the Judge had delivered his judgment refusing permission to set aside the default judgment and when directions for the trial of the quantum issue were discussed. Mr McMaster of counsel, who was then appearing for the Appellants, said:

> "I will be asking for standard credit hire type directions in terms of confirmations of impecuniosity, disclosure of financial documents and the like."

Mr Nowland then said that:

> "… [M]y position on this is as follows: that, first of all, it is for the claimant to raise his impecuniosity. Thereafter, it is for the claimant to prove it. If the claimant is going to raise it, they would do so by way of a reply to the defence. Thereafter, there is going to be a direction in any event for standard disclosure and the claimant would then have to provide those documents in order to prove impecuniosity. If he fails to do so, then he does not establish impecuniosity and he is going to be stuck with the spot rates."

He went on to say that if the Appellants were dissatisfied with the Claimant's disclosure "either in relation to his impecuniosity or anything else" they could always make an application for specific disclosure. In those circumstances, he submitted, all that was necessary was for matters to proceed according to the rules, with provision for standard disclosure and a Reply. The Judge said that it was his usual practice to order the Claimant "to specifically state by a given date whether he or she is going to be relying upon impecuniosity or not". There was then some discussion about whether that should be done in a separate document or in the Reply, but the Judge in the end adopted the former alternative. Two points should be made about that discussion:

(1) It is clear from Mr Nowland's comments that he saw the question of impecuniosity as going to the issue of whether any recovery in respect of hire charges should be at the basic hire rate or the enhanced credit hire rate. Neither Mr McMaster nor the Judge said anything different.

(2) Both parties and the Judge saw the immediate practical consequences of any "impecuniosity" claim as being whether the Claimant would have to give disclosure about his means.

17. The Claimant did not make any statement in accordance with paragraph 3 of the order of 16 October 2012. It was said at the trial that this was a deliberate decision on the part of his advisers. Mr Turner suggested that that is contradicted by the contemporary evidence; but we need not resolve the point.

18. On 5 November 2012 the Appellants issued an application seeking various orders. The first was that "having failed to comply with paragraph [3] of the [Order of 16.10.12], the Claimant is debarred from relying upon any arguments in relation to impecuniosity": it is phrased slightly differently in the draft order attached but the differences are not significant. The supporting witness statement referred to para. 16.8.2 (8) of the Practice Direction to Part 16. The Appellants apparently believed – I would have thought rightly (see para. 23 below) – that since DJ Smith's order was not framed as an unless order, a further order was formally necessary in order to prevent impecuniosity being relied on. The remainder of the application concerned disclosure.

19. The Defence, which was lodged on 6 November 2012, pleaded "Particulars of Failure to Mitigate" at paras. 9 and 10. Para. 9 reads as follows:

> "Second Defendant will aver that the Claimant has failed to plead in his Particulars of Claim pursuant to Practice Direction 16.8 (2) (8) such facts which he intends to rely on in relation to duration, need, impecuniosity. The Second Defendant will aver that the Claimant should be debarred from relying on such as arguments as it does not form part of his statement of case."

20. The Defence attached a Counter-Schedule responding to the Claimant's Schedule of 16 May. This was very full and carefully structured. Part 1 was headed "General": it contains nothing material for present purposes. Part 2 was headed "Credit Hire". It had a number of headings raising a variety of issues about the claim for rental charges: these include, though they are not limited to, the trinity of "need, rate and duration". I need not go through them all, but the following points must be noted:

(1) Para. 2.1, also headed "General", puts the Claimant to proof of the factual basis of his claim as regards the hires from Elite. The concluding passage reads as follows:

> "Further the Second Defendant will aver that the Pre-Accident Value of the Claimant's vehicle was assessed at £7,100 (exclusive of salvage at £1,000). The Second Defendant will aver that the hire charges for the replacement vehicle were disproportionate to the value of the Claimant's vehicle. The Second Defendant puts the Claimant to strict proof that it was not more economical for him to have borrowed the price of a replacement car than to keep hiring from Elite Rentals (Bolton) Ltd. The Claimant is put to strict proof that he was the true beneficiary of the hire claim.
>
> The Claimant is put to strict proof that he mitigated his losses in hiring."

(2) Sub-para. 2.3, headed "Rate", pleads that the rate charged was excessive and that the Claimant was only entitled to basic hire rates. It puts the Claimant to proof of such rates, though it also says that the Appellants themselves "will rely upon local basic hire rate evidence".

(3) Para. 2.4, headed "Duration", puts the Claimant to proof generally of the reasonableness of the period of hire. Various specific points are made about an alleged delay in organising inspection. It is not here averred that he should have bought a replacement vehicle sooner, though of course such a point had been pleaded at para. 2.1.

(4) Para. 2.5 is headed "Impecuniosity". It reads as follows:

> "2.5.1 It is not admitted that the Claimant is entitled to claim the full credit hire rate.
>
> 2.5.2 The Second Defendant will aver that the Claimant is debarred from relying on impecuniosity.
>
> 2.5.3 Without prejudice to the Second Defendant's arguments, the Claimant is required to confirm if he is impecunious and if so to show why he needed to hire his vehicle on a credit basis in accordance with the case of *Lagden v O'Connor* [2003] UKHL 64. The Second Defendant requires confirmation

> (and disclosure of the material documentation set out below) from the Claimant of his financial status for a period 3 months prior to the commencement of hire and 3 months following cessation of hire, if the Claimant is alleging that he was impecunious and therefore needed to hire on a credit basis.
>
> 2.5.4 The Claimant is required to show why he did not negotiate a weekly rate for hire when he knew or ought to have known that the period of hire would extend beyond 7 days."

(5) Under para. 2.6, headed "Disclosure", the Appellants identify, expressly "without prejudice to [their] arguments" (sc. the averment in the previous paragraph that the Claimant is debarred from relying on impecuniosity), the disclosure which the Claimant should give "if it is [his] case that he was impecunious and therefore needed to hire on a credit basis".

21. Mr Nowland draws attention to the fact that although the Counter-Schedule asserts that the Claimant cannot rely on his impecuniosity it does so only in the context of the claim for credit hire rates: see points (4) and (5) above. Although a point is taken, obliquely, on the duration of the hire, in para. 2.1, that is not expressly related to the impecuniosity issue.

22. The hearing of the application of 5 November 2012 (see para. 18 above) came on before Deputy District Judge Higgins on 7 January 2013. Ms Milnes appeared for the Claimant and Mr Poole of counsel for the Appellants. In opening Mr Poole explained the background to the application for the debarring order in relation to impecuniosity. He said that the Appellants had sought the original order because they had wanted to establish whether it would "be part of the Claimant's case that he was in fact impecunious and thus would be claiming the full **value** of the credit hire claim"; and that no communication had been received by the prescribed deadline. He again referred to para. 8.2 (8) of the Practice Direction to Part 16. Judge Higgins said that in his **view** that failure meant that the Claimant could not "raise that defence or the pleading of impecuniosity unless [he] now makes an application … for relief from sanction". When it came to Ms Milnes' response, he said "I presume that you are not going to seek to rely upon impecuniosity". She replied:

> "Sir, I have been trying to obtain instructions from my client. I have taken **various** documentation from him to enable me to advise him properly as to how he should plead his claim. He has been obtaining copies of bank statements, credit card statements. I only received these last week after the Christmas period. They are quite extensive.
>
> The only thing I would say is that in the claimant's witness statement which was dated 6th January 2012 in relation to the initial disposal hearing he does confirm in that witness statement that he was unable to afford to replace his **vehicle** and had no other **vehicle** available etc. Whilst I accept that does not specifically plead impecuniosity, it is an indication."

The exchange continued:

> "JUDGE HIGGINS: If you want to raise impecuniosity you are going to have to make another application for relief from sanction.
>
> MS. MILNES: I hear what you say, sir.
>
> JUDGE HIGGINS: Because my **view** is it is dealt with by District Judge Smith's order, paragraph 3. The time has gone. I do not know whether it needs to be in a recital because I think it stands by itself. My **view** is paragraph 3 bites unless you seek relief from sanctions.
>
> MS. MILNES: Yes, sir."

At the end of the hearing there was some discussion as to how the question of the impecuniosity issue should be dealt with in the order. Judge Higgins' position meant that, logically, no order was required;

but it was agreed that there should be a recital, which in the form actually issued reads "IT BEING RECORDED THAT the Claimant is debarred from pleading impecuniosity". ("Pleading" in this context plainly means "relying on".)

23. It is debatable whether the analysis by the Deputy District Judge of the effect of DJ Smith's order was correct. That order did not explicitly say that the Claimant would automatically be debarred from relying on impecuniosity if he failed to give the confirmation in question (though it might not have been a bad thing if it had); and accordingly it might be thought that an order to that effect, and not simply a recital, was required. But, quite rightly, no point was taken on this before us. Both parties and the Court understood and intended that the Claimant should not be entitled – at least without a further application, which was never made – to rely at the trial on his impecuniosity. In practice, therefore, DDJ Higgins can be treated as having made a debarring order, and I will for convenience refer to it as such.

24. The substantive order of DDJ Higgins required the Claimant to produce further documents by way of disclosure and the Appellants to serve an updated Counter-Schedule. The Counter-Schedule, which was dated 3 April 2013, was duly served. It follows the same broad format as its predecessor (para. 20 above) but differs in the detailed drafting. I should note the following points:

    (1) Under the heading "Need" it is pleaded, at para. 4.2.3, that:

> "Further, following the Second Defendant's Application Hearing on 07 January 2013, the Claimant is debarred from relying on impecuniosity. The Second Defendant will aver that the Claimant did have funds to replace his **vehicle** and did not need to hire for the total period he intends to claim."

    (2) Under the heading "Rate" it is pleaded that:

> "Following the Second Defendant's Application Hearing on 07 January 2013, the Claimant is debarred from relying on impecuniosity."

    (3) Under the heading "Duration", it is pleaded:

> "4.4.2 As explained above the Claimant is debarred from relying on impecuniosity.
>
> 4.4.3 The Second Defendant will aver that the Claimant had funds to have reasonably off hired a lot sooner than he did."

    (4) Under the heading "Impecuniosity" the Schedule pleads:

> "4.5.1 Following the Second Defendant's Application Hearing on 07 January 2013 and Court Order arising from the same, the Claimant is debarred from relying on impecuniosity.
>
> 4.5.2. The Second Defendant will aver that the Claimant is only entitled to claim basic hire rates for the **vehicles** he hired."

25. If those **various** passages are carefully analysed, some criticisms could be made of their coherence. In particular, if the Appellants' case was that it was for the Claimant to assert his impecuniosity and that he was debarred from doing so, it seems inconsistent to make the positive averments pleaded under each head. And it was not strictly logical to include a separate heading for "Impecuniosity", when it had been raised already in relation to each of the issues to which it could apply. But one should not be over-critical. The County Court is not the Commercial Court, and the Counter-Schedule, like its predecessor, made a commendable effort to be full and thorough. The Claimant was on any **view** put clearly on notice that the Appellants regarded the order of DDJ Higgins as precluding him from relying on impecuniosity for any purpose including, at paras. 4.2.3 and 4.4.2, in relation to the duration of the hire.

THE RECORDER'S DECISION

26. At the trial the Claimant was represented by Mr Nowland and the Appellants by Ms Pascale Hicks of counsel. We have a full transcript.

27. In the course of her cross-examination of the Claimant Ms Hicks asked him why he had not bought a replacement **vehicle** as soon as he knew that the damaged car was a write-off. He replied that he did not have the means to do so. Ms Hicks said that the effect of the order of DDJ Higgins was that he could not rely on his impecuniosity as justifying his failure to replace the damaged **vehicle** sooner than he did. Mr Nowand objected that that order went only to the issue of rate and not to the issue of duration. Their disagreement on that point was **ventilated** in a series of exchanges between them and with the Recorder. The Recorder's attitude was apparent from his first observation to Ms Hicks, which was:

> "Oh come now, impecuniosity goes – you know perfectly well – to the question of credit hire."

Although Ms Hicks replied that it went also to the duration of the hire, the Recorder made it clear that he was unpersuaded.

28. The same debate was rehearsed in closing submissions, but the Recorder remained of the same **view.** In his *ex tempore* judgment, he said, at paras. 17-18:

> "17. [The] main plank of Miss Hicks' argument on behalf of the second defendants … is … that because of the debar order in relation to any allegation of impecuniosity by the claimant, he cannot defend an allegation by the defendants of failure to mitigate his loss by, first of all, replacing the car in February 2011 and, secondly, in continuing to hire a **vehicle.** It is said that the order means that he is deemed to have had sufficient funds to do both those things: namely, replace his car and avoid the hire charges or the need to hire.
>
> 18. I regard that, and I indicated as much to Miss Hicks, as involving a confusion between an issue upon which the claimant bears the burden of proof and in relation to which the debar order was made and an allegation of failure to mitigate on which the defendants bear the onus of proof and upon which they have called no evidence, nailing their colours wholly to the debar order. As I say, I think there is a fundamental confusion between the two concepts and I do not regard the debar order as disentitling the claimant to say, "I had no money to replace my car until I was paid by the insurers, but I needed a car and I had to hire one in the interim". It is the difference between a sword and a shield. The claimant, because of the order, could not use an argument of impecuniosity as a sword, but that does not debar him from saying that he was not sufficiently pecunious to avoid the need to hire or to replace his car."

He had previously made it clear that in his **view** it was for the Appellants to advance a positive case that the Claimant could have afforded to replace his car sooner than he did, and to have sought disclosure and raised Part 18 questions about his means so as to be able to do so. He said that they had failed to make any such applications and that he "detected an element of ambush in the approach adopted".

29. Accordingly the Recorder awarded damages in respect of the entirety of the period of hire. Although it was common ground that DDJ Higgins' order prevented the Claimant from advancing impecuniosity as a justification for the payment of credit hire rates, the Appellants had by an oversight failed to adduce evidence of basic hire rates; and in those circumstances it was accepted that the Recorder could and should assess damages by reference to the rates actually paid.

THE APPEAL

30. The Amended Notice of Appeal (for which Patten LJ gave leave at the time of granting permission to appeal) pleaded three grounds in relation to the hire charges claim but, as I have noted, one is not now pursued. I take the other two in turn.

(1) The Effect of the Debarring Order

31. The Appellants' case is that the effect of the order of DDJ Higgins, reflecting the original terms of the order of DJ Smith, is that the Claimant was debarred from relying on his own impecuniosity for any purpose, including justifying the duration of the hire – and thus, specifically, that the orders are entirely general in their reference to impecuniosity and that it was wrong of the Recorder to read in a limitation which is not apparent from their terms. Even if that were potentially permissible, Mr Turner submitted that there was no justification for doing so: the distinction drawn by the Recorder between relying on impecuniosity as a shield (as regards duration) and as a sword (as regards rate) was misconceived, since the burden of proof was the same as regards both elements. There was no question of any "ambush": quite apart from the fact that the terms of the orders were unequivocal, the Claimant had been put squarely on notice of the Appellants' stance in the revised Counter-Schedule. It was in fact the Appellants who had been unfairly wrong-footed: if impecuniosity remained in play the Claimant was obliged to give disclosure about his means, which he had not done, and but for the debarring order they could and would have insisted that he do so.

32. Mr Nowland for the Claimant supported the Recorder's reasoning. But the principal thrust of his submissions was that it was clear that at the time that the orders of DJ Smith and DDJ Higgins were made both parties understood them to be concerned only with the question whether the Claimant could recover credit hire rates. The use of the term "impecuniosity" in this field derives entirely from the decision in *Lagden* **v** *O'Connor*, which was concerned only with the recoverability of credit hire rates, and it was well understood by practitioners and courts as, in effect, a term of art relating to that issue. That was reflected in the Recorder's initial response to Ms Hicks as recorded at para. 27 above. It was also apparent from the transcripts of the hearings before the two District Judges as summarised at paras. 16 and 22 above. As regards the first, I have already observed at para. 16 that no-one contradicted Mr Nowland's own clearly expressed statement as to the purpose of the order. As regards the second, Mr Poole had opened the application expressly on the basis that the Appellants wanted to know whether the Claimant "would be claiming the full **value** of the credit hire claim". The Appellants had not in their original Counter-Schedule referred to the order of DJ Smith when pleading their case on duration. They had first done so in the revised Counter-Schedule only a couple of months before trial; and even then they had not been wholly consistent. Their case represented an opportunistic attempt to give the debarring order an effect which nobody had intended at the time.

33. In my **view** the Recorder was wrong, and this appeal should be allowed. My reasons are essentially those advanced by Mr Turner, but I should amplify them a little.

34. The starting-point must be the language of the debarring order. It purports straightforwardly to prevent the Claimant from relying on his impecuniosity, without qualification. An averment by a claimant that he had to hire a replacement car for as long as he did because he did not have the money to buy one is a claim of impecuniosity just as much as a claim that he had to pay credit hire rates because he did not have the money to hire on the ordinary market, and it operates in the same way as a matter of law (see para. 9 (4) above). Thus when the Claimant is said to be debarred from relying on his impecuniosity that must mean, as a matter of ordinary language, that he is debarred from relying on it for either, or indeed any, purpose.

35. That reading of the order also reflects the realities of the matter. It would make little practical sense to debar the Claimant from relying on his impecuniosity for the purpose of claiming credit hire rates while allowing him to do so for the purpose of justifying the duration of the hire. If that were the case he would still have to give, and/or the Appellants would have to seek, full disclosure and other information about his means; yet the primary purpose of such an order is to establish whether the parties do in fact have to spend time and money going down that route. If impecuniosity is to be off the table it must be for all purposes.

36. I therefore believe that the terms of the order are clear. I can accept in principle that there may be cases where justice requires that the clear terms of an order be treated as having some different meaning in order to reflect the parties' common understanding, presumably (though this was not much explored in submissions) on the basis of an estoppel. I would, however, be cautious about going down that route except in a clear case. Orders will often have to be interpreted and enforced by parties (or advisers) or

judges who were not present when they were made, and they ought to be capable of being understood without recourse to any other materials. But even on the most liberal approach I do not see that what was said at the two DJ hearings, or the Appellants' failure clearly to take a point about impecuniosity and duration in the first Counter-Schedule, could justify reading into the debarring order a qualification which is not there on its face. It is true that both parties and the Court discussed the order in the context of its effect on the recoverability of credit hire rates. That is not particularly surprising. The importance of a plea of impecuniosity first emerged in cases concerning credit hire rates and it will be in that context that the possibility of such a plea most commonly arises; in many, I suspect most, cases the duration of the hire will be patently reasonable and there is no need for it to be explained by reference to the claimant's lack of means. But it does not follow from the fact that the order was discussed in the context of the claim for credit hire rates that there was a clear common understanding that that was the only intended impact of the order; and indeed that would have made little sense for the reason given in the previous paragraph. And in fact Ms Milnes' comments which I have quoted at para. 23 above do show a recognition that impecuniosity went to the issue of duration as well as rate. The same goes for the terms of the Counter-Schedule. The fact that – as, I agree, seems likely – the Appellants had themselves not appreciated the effect of the debarring order when they drafted the first Counter-Schedule is no reason why the order should not be interpreted according to its terms.

37. It also follows from foregoing that I cannot accept the Recorder's proposition that "impecuniosity-as-it-relates-to-rate" is to be distinguished from "impecuniosity-as-it-relates-to-duration"; and that the burden of proof as regards the latter is on a defendant. As I have already said, impecuniosity is the same concept in either case, depending on essentially the same evidence, and it makes no sense to treat it differently according to the particular head of claim in relation to which it is relied on. I am not sure that the burden of proof is in fact of central importance in this particular case, in **view** of the fact that an order was made for the Claimant to (in effect) state his case. But I should make it clear that, quite apart from that order, I would regard the burden as being on a claimant to plead and prove his case on this point. The correct analysis would appear to be as follows. A claim for the cost of hire of a replacement **vehicle** is, strictly, a claim for expenditure incurred in mitigation of the primary loss, namely the loss of use of the damaged **vehicle:** see the speech of Lord Hope in *Lagden* ***v*** *O'Connor* at para. 27 (p. 1077H). The burden is thus on the claimant to prove (and therefore plead) that such expenditure was reasonably incurred: see the authorities reviewed by Sir Mark Potter P in *Beechwood Birmingham Ltd* ***v*** *Hoyer Group UK Ltd* [2011] QB 357, at paras. 25-28 (pp. 367-8). There is no doubt a grey area about how much needs to be pleaded and proved to establish reasonableness before the evidential burden shifts to the defendant to show that the expenditure was unreasonable. But in this kind of case it is clearly right that a claimant who needs to rely on his impecuniousness in order to justify the amount of his claim should plead and prove it. I note in this connection that the Claimant's advisers plainly thought that it was incumbent on him to address the point in his witness statement, which was served at an early stage in the proceedings: see para. 13 above.

38. I would add that I agree with Mr Turner that the Claimant could not fairly complain of ambush. The revised Counter-Schedule made the Appellants' case adequately clear. I also agree that if the Claimant's advisers believed that they were entitled to plead impecuniosity by way of justification of the duration of hire they should have given the appropriate disclosure, whether pressed for it or not.

39. I would therefore hold that the Claimant was indeed debarred from asserting that he could not afford to buy a replacement **vehicle.** It follows that he should only have been entitled to recover hire charges up to the date when he should reasonably have done so. Mr Turner accepted that it was reasonable for the Claimant to wait until the Appellants had responded to the first notification of his claim, which was made through the online portal on 30 November 2010. Under the relevant protocol they had until 16 December to respond, and he said that the Claimant should have acted promptly at that point. He noted that the evidence had been that once the Appellants did eventually pay up the Claimant bought another car within a fortnight. He submitted that he should not be entitled to claim beyond mid-January at latest.

40. I would approach it rather differently. It was plainly reasonable for the Claimant to wait until an assessment had been made of whether it was economic to repair the damaged **vehicle.** But in my **view** it was also reasonable for him to wait until the Appellants had had the opportunity to inspect it

and say whether they agreed. The engineer's report that the car was a write-off was received by M&S Legal on 3 November 2010. For reasons which are unclear they did not send it to the Appellants until 11 January 2011[3]; but the Appellants were on notice of the claim from 30 November and themselves took no steps to seek inspection or to chase a report. Even when the report had been sent they did not respond, although they were written to by M&S Legal on 28 January and 15 February chasing the question of a without prejudice payment of the pre-accident **value.** The car was, as I have said, eventually disposed of, presumably for scrap, on 22 February. In my **view** it was reasonable for the Claimant to wait until that date before deciding to go ahead and buy a replacement. He could have bought a replacement **vehicle** within a fortnight thereafter – that is, by 8 March 2011. If my Lords agree, I would ask counsel to agree the correct figure for damages on that basis.

(2) The Effect of the Claimant's Comprehensive Insurance Policy

41. In the course of her cross-examination of the Claimant Ms Hicks put it to him that he could in the immediate aftermath of the accident have claimed the **value** of the damaged **vehicle** under his own comprehensive insurance policy and used the proceeds to buy a new car. The Recorder intervened to say that he believed there was authority that the innocent party in such a case was not obliged to take that course, and Mr Nowland confirmed that that was the case, referring to an authority which Ms Hicks herself had produced (which was apparently *Clarke* ***v*** *McCullough* [2012] NIQB 104). Ms Hicks did not pursue the point, either in cross-examination or subsequently in submissions.

42. The Appellants wish to pursue that point in this court – that is, that the Claimant's duty to mitigate meant that he should have claimed on his own comprehensive insurance policy and so remedied his own impecuniosity and been able to buy a replacement. Mr Turner submitted that this would involve no conflict with the well-established rule in *Bradburn* ***v*** *Great Western Railway* (1874) LR 10 Ex 1: the Appellants wished to rely on the policy in order to avoid their liability not for the loss of the **vehicle** itself but for a different (uninsured) loss which could have been avoided or reduced if the Claimant had acted reasonably.

43. The point is an interesting one and plainly of some general importance. But I do not believe that we should consider it on this appeal. It was not pleaded at any stage, nor indeed was it foreshadowed in any way until Ms Hicks sought to raise it as I have described. No doubt that is not necessarily an absolute bar to the point being taken. Both counsel came prepared to argue it, though in Mr Nowland's case only if his initial objection to it being taken were unsuccessful; and we were referred to several authorities, in particular *Parry* ***v*** *Cleaver* [1970] AC 1; *Martindale* ***v*** *Duncan* [1973] 1 WLR 574; *Mattocks* ***v*** *Mann* [1993] RTR 13; *McMullen* ***v*** *Gibney* [1999] NIQB 1; *Seddon* ***v*** *Tekin* (HH Judge Harris QC 25.8.00, unreported); *Bee* ***v*** *Jenson* [2007] EWCA Civ 923; and *Clarke* ***v*** *McCullough* (above). But I do not think that the issue can be treated as one of pure law which can be decided in a factual **vacuum.** Even if the Appellants' case that the Claimant should have claimed on his policy is not precluded as a matter of principle – as to which I express no **view** – it would be necessary to consider the full circumstances, including the terms of the policy as regards excess and/or no claims bonus, before we could reach a **view** as to whether he had acted reasonably in not doing so. None of this was explored in evidence. This battle will have to be fought, if insurers are so inclined, on another field.

THE STORAGE CHARGES

44. At the trial the Appellants argued that it was unreasonable for the Claimant to have his **vehicle** stored, as he did, for over four months before finally disposing of it (see para. 3 above): he could and should have disposed of it as soon as he was advised that it was a write-off, which, as I have said, was on 3 November 2010.

45. The Recorder held the Claimant had acted reasonably. If he had disposed of the car before the Appellants had had a chance to inspect it he would have been criticised: it was reasonable to retain it until they had either inspected it or made clear that they did not wish to do so. In fact they failed to respond to correspondence (see para. 39 above), and the Claimant eventually decided not to wait any longer and to get rid of the car anyway; but he could not be blamed for giving them the opportunity.

The Recorder noted that the Appellants did eventually, on 17 March 2011, ask for inspection facilities: that was obviously too late, but it illustrated the need to wait for at least some time.

46. Mr Turner submitted that that was altogether too lax an approach. What the Claimant's solicitors should have done was to give the Appellants a deadline of, say, 21 days to inspect, warning them that storage charges were being incurred, and the car should have been disposed of promptly thereafter whether it had been inspected or not.

47. I have some sympathy with Mr Turner's submission, and I would certainly encourage claimants' advisers in a similar situation to put the defendant's insurers on notice promptly that storage charges are being incurred and to impose a clear deadline after which the **vehicle** will be disposed of. But I am not prepared to say that it was wrong of the Recorder to hold that M&S Legal had done enough in this case. Although they had not imposed an explicit deadline, they had sent the engineer's report, which made it clear that storage charges were accruing at £20 per day, and had received no reply of any kind, despite sending two chasing letters. In those circumstances I can understand why the Recorder did not feel disposed to criticise them for waiting as long as they did.

DISPOSAL

48. If my Lords agree, the appeal as regards the hire charges will be allowed and an award of damages made only in respect of the period to 8 March 2011; but the storage charges appeal will be dismissed.

Sir Robin Jacob:

49. I agree.

Moses LJ:

50. I also agree.

Note 1 The use in the older cases of the term “spot rates” was deprecated by Aikens LJ in *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384: see para. 35. [Back]

Note 2 Para. 8.2 (8) of the Practice Direction reads rather oddly in the light of the well-established principle that the burden of proof on the issue of mitigation is on the defendant (see McGregor on Damages, 18th ed., para. 7-019); and we were told by both counsel that in this field it is not generally observed. I can see that it is hard on a claimant to expect him to anticipate and rebut points made about avoidable loss: it seems obviously preferable that he should plead his primary loss, wait and see what criticisms are made, and then if necessary plead to those criticisms by way of Reply. But the position is different in the case of a claim for expenditure reasonably incurred in mitigation of the primary loss. In such a case the claimant should plead his case as to reasonableness, including any assertion of impecuniosity: see para. 37 below. [Back]

Note 3 A challenge to this delay was the subject of the ground of appeal which Mr Turner abandoned. [Back]