England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2009] EWCA Civ 580
Case No: B2/2008/2815 & B2/2008/2816

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEEDS COUNTY COURT
HIS HONOUR JUDGE LANGAN QC

Royal Courts of Justice
Strand, London, WC2A 2LL
17/06/2009

B e f o r e :

THE RIGHT HONOURABLE LORD JUSTICE WALLER, VICE PRESIDENT OF THE COURT OF APPEAL
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE JACOB

Between:

JULIE COPLEY	**Appellant**
- and -	
KENNETH LAWN	
- and –	
IAIN MADEN	**Respondent**
- and –	
D. HALLER	**Appellant**
	Respondent

Mr Christopher Butcher QC & Mr Benjamin Williams (instructed by Burges Salmon LLP) for the Appellants
Mr Ronald Walker QC & Mr James Sullivan (instructed by Rollingsons) for the Respondents
Hearing dates : 14th May 2009

HTML VERSION OF JUDGMENT

Lord Justice Longmore:

Introduction

1. These two appeals raise a common issue. If, after a road accident caused by a defendant's negligence the insurers of the negligent defendant offer to provide a "free" car to the claimant for such period as the claimant needs a replacement car while his own car is being repaired but that offer is rejected by the claimant (whether because he has already got a replacement car from his own insurers or any other reason), can the negligent defendant say that the claimant has failed to take reasonable steps to mitigate his loss? HHJ Langan sitting in the Mercantile Court in Leeds has held that such an argument is open to the two negligent defendants in the present case and that, on the facts, the rejection of the defendants' insurers' offer was unreasonable; he held, further, that the hire costs incurred by the claimants were irrecoverable. In so holding he disagreed, on this second point, with an earlier decision of HHJ Wyn Rees sitting in the Pontypridd County Court in Evans **v** TNT Logistics Ltd [2007] Lloyd's IR 708 in which that learned judge had held that, although the offer of the defendant's insurers could be taken into account, it could (if unreasonably refused) only go to reduce the claim for loss of use to the cost that would have been incurred by the defendants' insurers if the offer had been accepted. If, therefore, the claimant incurred a cost of £100.00 per day for use of a replacement car, but the defendants' insurers would only have had to pay £60.00 per day, it would only be the latter cost that would be recoverable.

The Facts

2. The primary facts may be shortly stated.

   i) Mrs **Copley's** car was damaged in an accident caused by the negligence of Mr **Lawn** on 23rd November 2006. She was an estate agent and needed a replacement car immediately. On 26th November she made an agreement with Helphire (UK) Ltd ("Helphire") whereby she agreed to hire a car, while her car was being repaired, for £39.90 per day. On the same day (but after she had signed the Helphire agreement) she received a cold telephone call from Mr **Lawn's** insurers, KGM Policies at Lloyd's ("KGM"), offering her a replacement car. Unsurprisingly perhaps Mrs **Copley** could not recall this telephone call when she came to give evidence but her response was, no doubt, non-committal, if not frigid. Nothing daunted, KGM wrote to Mrs **Copley** on that day repeating their offer; she received that letter on 28th November 2006 and immediately asked her solicitor for advice. Apparently no advice was tendered until 5th March 2007 but the repairs had been completed by 2nd February and Mrs **Copley** therefore claimed for loss of use of her own car for 71 days at the price agreed with Helphire of £39.90 per day. Deputy District Judge Reed only awarded 7 days hire because, in his **view,** Mrs **Copley** should, by the expiry of that time, have availed herself of the right to cancel contained in the Helphire agreement.

   ii) On 26th July 2006 Captain Maden's car was damaged in an accident as a result of Mr Haller's negligence. Captain Maden was a marine consultant and also needed a replacement car. This time it only took 24 hours for KGM to offer him a replacement car. It was found that Captain Maden ignored the offer and made an agreement with Helphire for a replacement car on 18th August 2006 of £156.80 per day. He took his car for repair on 21st August and the repairs were completed 3 days later. He accordingly claimed for 3 days hire in the sum of £611.47. District Judge Flanagan dismissed the claim on the basis that Captain Maden had ignored KGM's reasonable offer.

HHJ Langan dismissed appeals in both cases upholding the reasoning that refusal of an offer of a "free" car amounted to a failure by the claimants to take reasonable steps to mitigate their loss.

Legal background and submissions

3. No doubt defendants' insurers wish to take steps to inhibit unreasonable car hire costs incurred by claimants. But not the least curious thing about the dispute which has arisen in these standard running-down cases is that it is well settled that, although a claimant can recover the cost of hiring a replacement car, he can only recover the reasonable rate of such hire; that has been held in Dimond v Lovell [2002] 1 A C 384 to be the market or "spot" rate. Thus to the extent that the Helphire rate contained an element of uplift due to the fact that payment of hire was deferred or the claimant was given easy credit terms or the fact that the possibility of failure to recover from the defendant was covered by insurance, that uplift could not be recovered. It is not usually difficult to ascertain the spot hire rate for cars equivalent to a claimant's car and one would therefore expect any argument between claimants and their insurers on the one hand and defendants or their insurers on the other hand to be confined to ascertainment of the "spot" or market rate.

4. Mr Butcher QC for the claimants did not, however, feel able to submit that the doctrine of mitigation had no application at all to claims for loss of use of a car whenever a claim for the "spot" rate was made. He accepted that if a defendant's insurers could obtain an equivalent replacement car and offered to provide it to a claimant, the question could arise whether it was reasonable for a claimant to reject that offer. His submission was first that on the facts of the present case it was not unreasonable for Mrs Copley and Captain Maden to have taken no (or no positive) action in response to KGM's letters and secondly that, if it was unreasonable to have failed to respond, they could nevertheless recover the rate that the defendants' insurers would themselves have had to pay. Since the defendants' insurers had never stated what rate they would have had to pay, there was no basis for making any deduction from the rate claimed which should be recoverable in full.

5. Mr Walker QC for the defendants relied on what he called the "findings of fact" of Deputy District Judge Reed and District Judge Flanagan that the claimants had acted unreasonably in failing to respond to the defendants' insurers' offer of a replacement car and submitted that it followed that, since the replacement offered was free to the claimants, their loss could have been wholly (or in Mrs Copley's case mainly) avoided; no claim for loss of use was, therefore, sustainable.

6. Despite Mr Butcher's recognition that the doctrine of mitigation can have a part to play in cases like the present, judges should, in my view, be reluctant to become too readily involved in complicated mitigation arguments since the major protection for the defendant and his insurers is that the claimant can only recover the "spot" or market rate of hire as explained in Dimond v Lovell. One rarely encounters mitigation arguments in ordinary sales of goods cases precisely because the relevant statute provides that damages are to be prima facie assessed by reference to the market value of the goods. The reason is that it is usually open to the innocent buyer or seller to go into the market to acquire other goods or dispose of the contractual goods and that is what he ought to be doing by way of mitigation of his loss. There is no reason why loss of use claims based on the hire of goods should be any different. I would, therefore, look with some scepticism on arguments that an innocent claimant should take further steps (over and above ensuring that he is not hiring a replacement car for more than the market rate) by way of mitigating his own loss or protecting the tortfeasor's position.

Further facts

7. Before considering the legal submissions it is necessary to set out or summarise some further facts. As far as the claimants are concerned, their arrangements with their insurers and Helphire (to the extent that they are relevant to the dispute between the parties) required them to sign (1) a Mitigation Questionnaire which informed them of their duty to mitigate their loss and asked if they had had any offer of a replacement from the defendants (2) a hire agreement with Helphire and (3) a combined Credit Agreement which enabled the claimants to cancel the hire agreement up to 14 days after its receipt. The effect of those agreements together with a tied insurance policy is that the victim of a motor accident can hire a replacement without himself having to lay out funds. The position was explained by the claimants in their skeleton argument in the following way:-

"Helphire provides a hire car, and where appropriate will also arrange **vehicle** repairs. It does so under credit agreements, where liability to pay is deferred while a claim is pursued against the insurer of the culpable motorist. A tied insurance policy protects its client against the risk the claim will fail, or take longer than the credit period to settle. On the sooner of the failure of the claim or the expiry of the credit period, the policy will cover the indebtedness to Helphire (whose claims for hire payments would be pursued by the insurer as a subrogated claim). In addition, the policy insures all legal costs."

8. KGM's letter to the claimants needs to be set out, regrettably at some length:-

"We are sorry to learn that you have been involved in a road accident with a KGM customer. We would like to assist you in trying to make the process of pursuing your claim as painless as possible.

We are able to offer you the benefit of our own approved repairer scheme to repair any damage to your car caused by this collision.

PROVIDED YOUR **VEHICLE** IS ECONOMICAL TO REPAIR, YOU WILL BE ENTITLED TO THE FOLLOWING:

1. A **vehicle** to suit your need will be made available at no cost to you for the period your own **vehicle** is off the road.

2. Free transportation of your **vehicle** to and from the repairer.

3. Inspection and authorisation of repairs, with the account sent direct to us for payment.

4. A three-year repair guarantee.

5. You will not have to pay any excess.

IF YOUR **VEHICLE** IS CONSIDERED TO BE BEYOND ECONOMICAL REPAIR, WE CAN PROVIDE THE FOLLOWING:

1. An inspection of your **vehicle** by an independent engineer with a copy of the report sent to you.

2. A cheque representing the engineer's considered pre-accident market **value** of the **vehicle,** less any salvage **value.**

……

5. A hire **vehicle** to suit your needs will be made available at no cost to you for the period it takes for the engineer to inspect your **vehicle,** and a cheque will be sent to you for the market **value.**

Should you wish to use your own chosen repairer, please provide us with their details or their estimate to enable us to authorise repairs to them. Our offer to provide a replacement **vehicle** free of charge will still be applicable.

Even if you have already intimated a claim through your own insurer and choose not to use our approved repair service, we are still able to offer the benefit of a free replacement **vehicle** whilst your own is off the road.

If your **vehicle** is off the road and you are already in a replacement, please check the agreement you have signed as, unless the replacement provided is a free courtesy **vehicle,** we would like to substitute this with a **vehicle** supplied by us, at no cost to you.

> Should you elect not to accept the offer of our services, but instead utilise credit repair or credit hire facilities from another source, then we will refuse payment of any such claim made on your behalf.
>
> You will appreciate that if we do refuse payment of the claim for credit hire and/or credit repair, then you may be found liable for any payment that the credit hirer/repairer does not recover from us. No doubt, this will be explained to you when you sign the proposed agreement. We urge you to read the terms of the agreement **very** carefully.
>
> The reason for this is that you have a common-law duty to minimise your loss when making a claim and by choosing to ignore our offer and continuing with repairs and/or hire on a credit basis, you would clearly be failing to satisfy that duty.
>
> We reserve the right to bring this letter to the attention of the Court in any subsequent legal action brought against our Policyholder or us."

9. It is **very** difficult to know what an average driver would make of all of this. It comes (within a day or two of the accident) from the insurers of a defendant who has negligently caused damage to the claimant's car and perhaps his person too. It has an unpleasant threatening tone to it and does not even suggest that the recipient should pass it to his insurer or solicitor for advice as to its contents. It is tempting to say that any recipient should be entitled to ignore it completely. But that is not a course which any of the judges below adopted. What is completely clear to me is that the cold telephone call to Mrs **Copley** was inappropriate. If that is KGM's practice it should be discontinued forthwith.

Mitigation in ordinary running-down cases

10. The defendants' case was attractively put by saying that the claimants had entered an agreement with Helphire by which they rendered themselves liable to pay £39.90 per day in Mrs **Copley's** case and £156.80 per day in Captain Maden's case for their replacement cars. What, in those circumstances, could be more reasonable than to expect them rather to accept the defendants' offer of a "free" replacement car?

11. This deceptively simple argument does, however, have to be unpicked. Is the defendants' offer really an offer of a "free" car? If it is right to regard it as "free" because it is right to ignore the fact that the defendants' insurers will incur a cost of hire themselves, would it not also be right to regard the claimant's replacement as "free" because he never has to pay the hire cost as it will be incurred by his own "tied" insurers? If that is the right way to look at the matter, why should the claimant be expected to accept the defendants' "free" car when he has already got (or will shortly get) a "free" car of his own?

12. At this stage it may become important to decide the extent to which (if at all) it is right to take account of the fact that both parties are insured. The traditional English **view** is that insurance is left out of account in ascertaining the parties' rights. That is why, although these appeals are in truth disputes between insurers the formal position is that it is only the insureds who are parties to the actions before the courts.

13. On the traditional **view** of the matter, one would look only at Mrs **Copley's** and Captain Maden's personal position. One would ask whether Mrs **Copley** acted reasonably when on 28th November she received KGM's letter of 24th November. She (as anyone else would) passed it immediately to her solicitors and left them to deal with it. On no **view** could she personally be said to have acted unreasonably in doing as she did and awaiting their advice. The fact that that advice never came was not the fault of Mrs **Copley.** Deputy District Judge Reed held that Mrs **Copley** should, on receipt on KGM's letter, have accepted KGM's offer and cancelled the agreement she already had with Helphire. If one is looking at the matter solely from Mrs **Copley's** **view,** I can only disagree. It is positively unreasonable to expect Mrs **Copley** to take the initiative, without advice, of cancelling an agreement she has already made just so that she can get a different "free" car from the "free" car she already has. It may well be that the deputy district judge and Judge Langan were effectively conflating the position of Mrs **Copley** and her solicitors and deciding that Mrs **Copley's** solicitors should

have advised her to take the defendant's offer of a free replacement car and the question whether it is right to look at it in that way will have to be addressed.

14. Captain Maden's position is somewhat different because District Judge Flanagan's finding was that he ignored KGM's letter. Moreover, when he came to sign the Helphire agreement forms on 18th August he omitted to tick a box in which he was specifically asked if he had been offered a replacement car by the defendant or his insurers. The District Judge then held that Captain Maden ought not to have ignored the KGM offer but should have picked up the telephone to KGM and asked what car was available and when it would be available. Significantly the judge did not hold that Captain Maden should have at once accepted the offer. But he said that he should have "actioned the offer that was put to him". I would not myself have come to that conclusion; why should Captain Maden enter into negotiations with the representatives of the defendant who damaged his own car with a **view** to clarifying their offer when he had every expectation (correctly) that he would be able to obtain a "free" car anyway? Why indeed should an innocent car driver be forced to react at all to a complicated letter sent on behalf of a defendant just a day after that defendant has negligently damaged his **vehicle?**

15. In fact the record shows (pages 73-76) that Captain Maden's evidence was that he had sent KGM's letter to his own brokers or insurers (described as SAGA). That was never challenged by counsel for Mr Haller and his insurers and it is a bit of a mystery why the District Judge held that Captain Maden ignored it. The answer must be that, like Deputy District Judge Reed in the case of Mrs **Copley** and her solicitor, he was conflating the position of Captain Maden and his brokers and the question is whether that was the right approach.

16. The answer is that in most cases that will be the right approach because the natural assumption will be that any individual driver will send any letter similar to KGM's letter to his own agents whether they be his solicitors or his brokers or his insurers. It is therefore appropriate to consider the combined position of the claimants and their advisers and, if that is what the judges below did, they were right to do so.

17. This conclusion carries with it an important consequence. If it is right to take into account the fact that insurers on both sides are involved (as is explicit in relation to the defendants and implicit in relation to the claimants), any offer made by the defendants' insurers must contain all such information as will be relevant for the claimants and their advisers or representatives to make a reasonable response. One piece of information missing from KGM's letter was the cost to KGM of hiring the cars. Whereas it might be said that that would be of no interest to Mrs **Copley** and Captain Maden as individuals, it would undoubtedly be of great interest to their advisers or representatives, since, if KGM could genuinely obtain hire cars more cheaply than the claimants could, it might be unreasonable to use the services of Helphire and a mitigation argument might get off the ground.

18. In Evans **v** TNT Logistics Ltd [[2007] Lloyd's Rep IR 708] Judge Wyn Rees accepted a mitigation argument on different facts. The accident had taken place on 14th February 2005. On 21st February the defendants themselves offered to provide an equivalent type **vehicle** during the repair period.

> "at a fully inclusive rate of £29.00, of which the cost will be met and the arrangement will be serviced by [the defendant] company."

That letter was received by Mr Evans at the same time as he was negotiating with a company called Albany with whom he made a hire agreement for 7 days for an equivalent **vehicle** at a considerably higher cost (the report mentions both £70.00 and £50.00 per day). Albany were a company associated with Mr Evans' own insurers (Admiral) and the claim for loss of use was a subrogated claim brought in the name of Mr Evans for the benefit of Albany/Admiral. It appeared that Mr Evans had passed the defendants' offer to Albany but they had advised him that he need not respond to the offer. The deputy district judge decided that Mr Evans had not himself acted unreasonably in that he had passed the offer on to Albany and declined to consider the merits of Albany's advice. On appeal to the circuit judge the defendants argued that the claim was a subrogated claim brought for the benefit of Albany/Admiral and that Albany should have accepted (or caused Mr Evans to accept) the defendants' offer of an equivalent car.

19. Judge Wyn Rees said that the matter had to be considered objectively and not solely from the **viewpoint** of the claimant. He cited the well-known dictum of Pearson LJ in Darbishire **v** Warren [1963] 1 WLR 1067 :-

> "The true question was whether the plaintiff acted reasonably as between himself and the defendant and in **view** of his duty to mitigate the damages."

And then said (para 19)

> "… the claimant would have been aware that by hiring the **vehicle** from Albany he was incurring a charge that was significantly more than the cost to the defendant of the **vehicle** which the defendant had offered to supply to him…"

He concluded that the deputy district judge had failed to consider objectively whether the claimant had acted reasonably as between himself and the defendant and concluded that the claimant had not so acted and could, therefore, only recover a sum limited to £29.00 per day for the appropriate period.

20. In that case the comparative cost was clear from the beginning and the claimant could make an informed choice. In the present cases no such informed choice was available to either the claimants or their advisers and I do not see how they can be said to have acted unreasonably in not accepting the offer in the form it was presented to the claimants. The claimants and their advisers need to know the true cost to the defendant and his insurers since it might, as Mr Butcher pointed out, be the case that the cost of the defendants' insurers hiring the replacement car was actually the same as (or more than) the cost of hiring a replacement from Helphire. If that were the true position it could scarcely be said that it was unreasonable for the claimants to pay the Helphire cost.

21. Mr Walker submitted that the cost to the defendants' insurers was entirely irrelevant. If they were prepared to bear that cost in its entirety (whether for good commercial reasons or completely altruistic ones) that was of no concern to the claimants. Judge Langan agreed with the submission but I cannot accept it. The present dispute is an ordinary commercial dispute and the court cannot close its eyes to the obvious fact that hiring cars is a profitable business from the point of **view** of the supplier and a cost–incurring exercise from the point of **view** of the hirer. A claimant who has been deprived of the use of his car by the negligence of a tortfeasor only has to take reasonable steps to mitigate his claim for that loss of use and he cannot, in my judgment, be said to act unreasonably if he makes (or continues) his own arrangements with his own hire company, unless he is made aware that this commercial enterprise can be undertaken more cheaply by the defendant than by his own arrangements.

22. It follows from this that, if a defendant or his insurers does make an offer of a replacement car to an innocent claimant and he makes clear that he is going to pay less for such a car than the claimant is intending to pay (or is paying) for a car from a company such as Helphire, then (other things being equal) it may well be the case that a claimant should accept that lower cost replacement.

23. Mr Walker also submitted the decisions of the judges below were "findings of fact" and should not be interfered with by this court. There is no question of any interference with any finding of primary fact; questions of mitigation are however, questions of evaluation and judgment and there is no reason why this court should not interfere, if the judge's conclusions are, in its considered opinion, wrong.

24. For the reasons given, I do not think that Mrs **Copley** or Captain Maden (whether by themselves or through their agents) acted unreasonably in failing to accept KGM's offers or in failing to explore them further. I would, therefore, allow these appeals.

Consequence of failure to mitigate

25. Nevertheless insurers on both sides are anxious to have an answer to the question whether, if the claimants did fail to take reasonable steps to mitigate their loss, they can recover nothing or can recover, at least, the cost which the defendants' insurers would have had to pay to hire a replacement car themselves.

26. In principle, it cannot be correct that a claimant who rejects a defendant's reasonable offer is entitled to nothing. The claimant has still suffered a loss. If a defendant makes an open monetary offer of a sum of money to which the claimant is entitled and it is rejected, the usual result is that the claimant will still make recovery but will not recover the costs of the proceedings. It should not make any difference if the defendant's offer is not monetary but is an offer in kind or an offer to perform a service which will enable the claimant to avoid his loss.

27. There does not appear to be any authority directly in point but the claimants rely on Strutt v Whitnell [1975] 1 WLR 870 while the defendants rely on The Solholt [1983] 1 Lloyds Rep. 605. In Strutt v Whitnell the defendant sold a house to the claimant. He breached his contract to give vacant possession, with the result that the value of the house was reduced by £1,900. He admitted the breach, and offered to buy the house back. The claimant refused. The defendant contended that this was unreasonable, and that the claimant should recover nothing. Cairns LJ observed (p 873 C-D) that this could not be right, because the offer of buy-back was indistinguishable from an offer to pay damages of £1,900 and the claimant was not bound to choose between his two remedies:-

> "if [the defendant's] contentions were right it would logically follow that if the offer … had been not 'We will take the house back' but 'We will pay you £1,900 damages' and the plaintiff had then, for some reason, refused that offer and had brought an action for damages it could be said that he ought to have accepted the offer and thereby mitigated his damage and therefore he was entitled to nothing at all. That cannot be. Clearly what would happen in those circumstances would be that the defendants, if they were wise, would make a payment into court of the £1,900 and the plaintiff would suffer in respect of costs. But it could not possibly be suggested that the refusal to accept the offer, even if such refusal were wholly capricious was something that deprived the plaintiff of his right to substantial damages altogether"

The decision itself cannot be explained on the basis that a house is always a specific property which a claimant may have a particular reason to want to keep, since the claimant was a property developer who said he had already made a resale contract. The remarks of Cairns LJ quoted above are plainly apposite to the present dispute and seem to me to favour the claimants' case.

28. The Solholt was a rather different case where a seller had failed to deliver the vessel he had sold to the buyer by the contractual date for delivery. The buyer exercised his right to cancel the contract and recover his deposit. He also claimed damages because the vessel was worth $500,000 more on the delivery date than she had been when the contract was made. Staughton J held that a reasonable buyer would have offered, after cancellation, to take the vessel after all and that his loss was attributable to his own unreasonable conduct in failing to make such an offer (which would have been accepted by the seller). The Court of Appeal declined to reverse that decision. Sir John Donaldson MR said that if the House of Lords ever had to consider Strutt v Whitnell they might hold that the judgments confused the proposition that a party deciding whether to rescind or affirm a contract need have no regard to considerations of mitigation with the proposition that, once such a decision had been made, the principles of mitigation apply. For my part I doubt, with respect, whether the House of Lords would hold that this court had been guilty of any such confusion in Strutt v Whitnell since the question to which this court there addressed itself was whether, granted the decision by the purchaser to affirm the contract and claim damages, he could be deprived of those damages by an offer to buy back the property. This court held that he could not be deprived of the difference in value between the contract price and its actual value when the actual value was less than the contract. In The Solholt the actual value exceeded the contract value; the claim was thus a claim for loss of profit rather than diminution in value and it was not surprising that Staughton J and this court considered that that lost profit was occasioned by the buyers' own conduct in refusing to take the vessel rather than the sellers' conduct in missing the delivery date. The claims in the present case are for consequential loss of use and closer to claims for diminution in value than claims for loss of profit.

29. In the present cases there was an undoubted loss to the claimants because their cars had to be repaired and they needed replacement cars during the period of repair. That loss cannot be wiped out by an offer

from the defendants to provide a "free" replacement. As Cairns LJ said it cannot be right that a refusal to accept a defendant's offer

> "even if such refusal were wholly capricious, was something that deprived the [claimant] of his right to substantial damages altogether."

30. I would therefore disagree with the judges below on this question and would agree with Judge Wyn Rees in Evans to the extent that, if the claimants had acted unreasonably, they should at least recover the actual reasonable cost of hire.

31. Judge Langan thought that offers in kind or, as he called them, offers of "restitutio in integrum" were different from cash offers. But, as I have sought to show with the assistance of Strutt v Whitnell, it would be odd if that were so. Mr Walker sought to support this distinction by drawing a further distinction between cases where loss had already been incurred (when as I understood him he would accept that it would be illogical to draw a distinction between offers in cash and offers to restore the original position) and cases where the loss was only to be incurred in the future (when such a distinction would be appropriate). Quite apart from the unattractive artificiality of this double distinction, it seems to me to fall down as a matter of law. The loss of use (although prospective) was a genuine loss at the time of the accident. The cause of action for loss of use accrued then, although it would no doubt be correct to say that any claim was not then quantifiable, see Dimond v Lovell, supra, p 406 G-H and Bee v Jenson [2007] 4 A ER 791, para 15. Moreover in Mrs **Copley's** case her car was already under repair and she had already made the agreement with Helphire when she received KGM's offer, so that on any **view** her loss had already begun to be incurred. In these circumstances Mr Walker's attempt to support Judge Langan's distinction between offers in cash and offers of restitution is misconceived.

Conclusion

32. I would therefore conclude

> i) that, looking at the matter objectively, it is not unreasonable for a claimant to reject or ignore an offer from a defendant (or his insurers) which does not make clear the cost of hire to the defendant for the purpose of enabling the claimant to make a realistic comparison with the cost which he is incurring or about to incur;
>
> ii) that, following Strutt v Whitnell, if a claimant does unreasonably reject or ignore a defendant's offer of a replacement car, the claimant is entitled to recover at least the cost which the defendant can show he would reasonably have incurred; he does not forfeit his damages claim altogether.

If this is correct, the general rule that the claimant can recover the "spot" or market rate of hire for his loss of use claim is upheld, unless and to the extent that a defendant can show that, on the facts of a particular case, a car could have been provided even more cheaply than that "spot" or market rate.

33. Since there is no evidence that the defendants' insurers could, in fact, have hired replacement cars more cheaply than the claimants did or that the claimants' hire rates were any other than market rates, I would allow these appeals and enter judgment for the sums claimed.

Lord Justice Jacob:

34. I agree.

Lord Justice Waller:

35. I also agree.
