



FOIL UPDATE

June 2009

Credit Hire – Copley v Lawn and Maden v Haller
[2009] EWCA Civ 580

The Court of Appeal was asked to consider, if, following an RTA, a replacement car is offered by a negligent defendant to the claimant and it is refused, has the claimant failed to take reasonable steps to mitigate his loss?

In these two cases the court below had held that that argument was open to the defendants; that on the facts the claimants' refusal was unreasonable; and that the claimants' hire costs for replacement vehicles were therefore completely irrecoverable. The claimants could not even recover to the extent of the costs that the defendants would have incurred in providing the replacement vehicles.

Legal Background

It is well settled that a claimant can recover the cost of hiring a replacement vehicle at a "reasonable rate". A reasonable rate was held in *Dimond v Lovell* [2002] 1 AC 384 to be the 'spot' or market rate. Any element of uplift for deferral of payment or for any other reason is not recoverable. It is usually possible to identify the 'spot' rate.

In these two cases, the issue of mitigation having been raised, the claimants did not submit that the doctrine had no application to claims for the loss of a car when the 'spot' rate is claimed: it was acknowledged that where an equivalent car has been rejected a question could arise of whether that rejection was reasonable. They argued, however, that:

- (a) the rejection was not unreasonable: and in any event
- (b) the claimants were entitled to what the defendants would have had to pay for the replacement vehicles. As no rate had been given by the defendants there was no reason to reduce the rate claimed.

The defendants claimed that as the replacement cars offered to the claimants were, in effect, 'free' to them, an acceptance would have wholly avoided the loss and a claim for that loss was therefore unsustainable.

The content and tone of the letters to the claimants (offering the replacement cars, setting out the duty to mitigate and warning that a refusal of the replacement cars would be considered a breach of that duty and brought to the attention of the court), was considered in some detail by the Court. The Court considered that they had an "unpleasant, threatening tone" to them and noted that the text did not suggest that the letters be passed to professional advisors. The claimant, Mrs Copley, had also received a cold call making the offer, a practice which was described as "inappropriate" and one which should be "discontinued forthwith".

The evidence was that the claimant individuals had both passed the letters to their professional advisors (either solicitor or broker/insurer) but took no further action on the offers. In the courts below the evidence had been looked at by conflating the positions of the individuals with that of their professional advisors to consider what the

'claimant side' should have done. The Court of Appeal held that in most circumstances that is the right approach.

On that basis the court considered that all information should be included in a letter offering a car to enable advisors to make a decision. In particular, the cost of the car to the defendant should be included to enable an advisor to judge if hiring a car from a different company would be reasonable. In the cases before the Court the price had not been given.

In the case of *Evans v TNT Logistics* [2007] Lloyd's Rep IR 708 a letter was sent by the defendant to the claimant offering a replacement car and the price was given. The claimant ignored the offer and hired a car at higher cost. It was held by Judge Wyn Rees that, objectively, the claimant had not acted reasonably in rejecting the offer, and could therefore only recover the sum given in the letter as the cost to the defendant of the replacement.

The Court of Appeal held that the claimants in the cases before it were not able to make an informed decision on where to obtain a car as no comparative price was given by the defendants in the letter. A claimant deprived of his car cannot be said to be acting unreasonably if he makes his own arrangements for a replacement unless he is made aware that a car can be obtained more cheaply by the defendant. It follows that if a price is given by the defendant which is lower than the price of a car obtainable by the claimant elsewhere "then (all things being equal) it may well be the case that a claimant should accept that lower cost replacement".

In the present cases, therefore, the claimants had not acted unreasonably in rejected the replacement vehicles.

Consequences of failure to mitigate

The Court of Appeal went on to decide what the position would have been if the claimants had acted unreasonably. What could they then recover? It indicated that, in principle, it could not be correct that the claimants would be entitled to nothing: they had suffered a loss.

There does not appear to be any authority on the point but *Strutt v Whitwell* [1975] 1 WLR 870 (relied upon by the claimants) and *The Solholt* [1983] 1 Lloyd's Rep 605 (relied upon by the defendants) were considered

The Court of Appeal stated that even if the claimants had behaved unreasonably they should at least recover the actual reasonable cost of hire.

Conclusion

- (i) 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 reasonable comparison with the cost which he is incurring, or about to incur:
- (ii) That, following *Strutt v Whitwell*, 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.

Therefore, the general rule that a claimant can recover the 'spot' or market rate of hire is upheld, "unless and to the extent that the defendant can show that, on the facts

of a particular case, a car could have been provided even more cheaply than the 'spot' or market rate.

In the cases before the court there was no evidence that the defendants' insurers could have hired replacement cars more cheaply than the claimants did or that the claimants' rates were other than market rates. The claimants' appeals were therefore allowed and judgment entered for the sums claimed.

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