PARK SQUARE
BARRISTERS

Laura Nelson discusses Humayum Hussain v EUI Ltd (2019)

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[2019] EWHC 2647 (QB)

QBD (Pepperall J) 10/10/2019

The court outlined the principles applying to self-employed drivers whom hire replacement vehicles whilst their own is off the road as a result of a road traffic accident. The true measure of loss is the loss of profit suffered whilst their own, damaged vehicle is reasonably off the road. Hire costs of replacement vehicles are prima facie recoverable, but where the cost of hire significantly exceeds the loss of profit, the court will ordinarily limit damages to the lost profit unless the claimant can establish that they had acted reasonably.

Mr Hussain was a self-employed taxi driver. He had been involved in an accident for which the Defendant's insured was responsible, and therefore brought a claim against the Defendant insurer. Whilst his own vehicle was being repaired, Mr Hussain hired a replacement vehicle on credit terms at a cost of £6,596.50. Judge Wall, sitting in the County Court, limited his claim for hire charges to £423, being the loss of profit that he had avoided by hiring a replacement car. Judge Wall considered that Mr Hussain had not acted reasonably by hiring a car at a cost which equated to almost a full year's profit over an 18 day period.

It is important to note that Mr Hussain argued that he also used his own vehicle for domestic and social purposes. In particular, he stated that he used his vehicle for longer trips and family holidays. It was established that there was another vehicle within his family of four, owned by his wife. It was also established that no such longer trips or family holidays were planned throughout the period in which Mr Hussain's own vehicle was off the road. Judge Wall was not satisfied that Mr Hussain had discharged the burden of showing need for a second car for domestic and social use. She considered

that the need was for a taxi for business use and, where the loss is a profit-earning chattel, the measure of damages is loss of profit. She considered it to be unreasonable mitigation to expend more in attempting to make a profit than the profit itself.

Mr Hussain appealed the decision, arguing that Judge Wall's approach to need was too exacting and that she should have found that Mr Hussain reasonably needed a second car for social and domestic purposes, whatever the business need. It was also argued that the judge was wrong to limit damages to the profit that Mr Hussain would have lost. Counsel on behalf of Mr Hussain argued that the duty to mitigate loss is undemanding and that the court should recognise that many people on modest incomes have a small cushion against loss of income. It was argued that Mr Hussain did not need to prove that he was indigent.

The appeal was dismissed. Need for social and domestic purposes is not self-proving, and Judge Wall was entitled to find that Mr Hussain had failed to prove need for such purposes given the second family car available, and his own vehicle was not needed for any longer trips or holidays. It was a replacement taxi that was needed, not a car for private use. Mr Hussain also failed on his second argument – that damages should not have been limited to the lost profit. Mr Hussain could not place reliance on an argument of impecuniosity, there being a failure to comply with case management directions. Without evidence of Mr Hussain's financial circumstances, Judge Wall would have been quite unable to assess whether his finances were so tight that he could not have weathered a period of 18 days without working.

Pepperall J considered the following principles as applying to claims for financial losses suffered by self-employed drivers when their vehicles are off the road pending repair or replacement:

- The starting point is that the professional driver's vehicle is a profit-earning chattel and that the true loss is the loss of profit suffered while the damaged vehicle is reasonably off the road pending its repair or replacement: Commissioners for Executing the Office of Lord High Admiral of the United Kingdom v. Owners of the Steamship Valeria [1922] 2 A.C. 242; Clerk & Lindsell on Torts (22nd Ed), para.28-121.

- Of course, a claimant might choose instead to hire a replacement vehicle in order to be able to continue trading. Properly analysed, this is a claim for expenditure incurred in mitigation of the primary loss: Lagden v. O'Connor, at [27]; Umerji v. Khan [2014] EWCA Civ 357, [2014] R.T.R. 23, at [37]. Like any other expense incurred in a reasonable attempt to mitigate a claimant's loss, such hire costs are prima facie recoverable. Where, for example, the claimant successfully mitigates his or her loss by hiring a replacement vehicle at a cost lower than the hypothetical loss of profit, the court will award the lower hire charges.
- A claimant cannot recover any additional loss suffered by reason of a failure to take reasonable steps to mitigate his or her loss: British Westinghouse Electric & Manufacturing Co. Ltd v. Underground Electric Railways Co. of London Ltd [1912] A.C. 673, at 689; Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 20, at page 25.
- Claimants cannot, however, be expected to weigh precisely their losses. In Banco de Portugal v. Waterlow & Sons Ltd [1932] A.C. 452, Lord Macmillan observed at page 506: "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures. merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

Accordingly:

1. a) where a claimant acts reasonably in hiring a replacement vehicle at about the same cost as the avoided loss of profit, the court will not count the pennies and hold the claimant to the hypothetical loss of profit if it turns out to be a little lower; but
2. b) where the cost of hire significantly exceeds the avoided loss of profit, the court will ordinarily limit damages to the lost profit.

Pepperall J went on to state that even where the cost of hire significantly exceeds the avoided loss of profit, claimants may still succeed in establishing that they acted reasonably if, for example, there was a need to retain important customers or contracts, there was a proven need for use of the

vehicle for social and domestic purposes, or because the claimant simply could not afford not to work (in which case impecuniosity becomes relevant).

This is an important case which makes clear that hiring a replacement taxi at disproportionate cost in comparison to the potential profit to be made by a claimant in doing so is unreasonable mitigation. The need for claimants to plead and prove impecuniosity, in cases where similar arguments regarding the need to work are to be raised, is made clear. Nevertheless, defendants would do well to obtain basic hire rates evidence in relation to non-taxi vehicles in order to protect themselves in a situation in which need for social and domestic purposes is proved.

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