A824/11

Opinion of John A Baird, Esq., Advocate

Sheriff of Glasgow and Strathkelvin at Glasgow

Marie Brown v Axa Corporate Solution Services UK Limited

Background

- This case came before me for proof as a summary cause action in 2012. The case started life in the Court of Session, where it was raised in 2009, but was remitted from there to this court after it had got to the stage of the record being closed. The pleadings on which it proceeded took the form of a Court of Session Closed Record dated 12 October 2010.
- The pleadings are not in acceptable form and it is surprising that pleadings in that form were ever placed before the Supreme Court. They are full of errors, infelicities and inconsistencies. The case for the pursuer omits to aver certain essential facts.
- The claim arises out of a road accident, for which liability is admitted. It ought not to be difficult to give an articulate description of that accident, its consequences, and the basis of the claim to which it gave rise, together with an articulate categorisation of the heads of claim. The sum sued for is £4,412.72.
- In fact, I was left to guess at what the true circumstances of the accident were and what the basis for the pursuer's claim was. The pursuer's case is so badly written, and so lacking in specification, that in an ordinary action it should have been (and would successfully have been) taken to debate. There is no excuse for pleadings such as those on page 7E-F, in Condescendence 4 for the pursuer, where there appears the apparently complete sentence, "The relevance or otherwise of her own money the defenders desiderate she should have spent on ordinary hire and how long it would have been outstanding." No further comment is required.

Circumstances of the Accident

- What seems to have happened, though it remains unclear from the pleadings, is that while parked outside his house, the car owned by the defenders' insured (a neighbour of the pursuer) rolled backwards down a slope and collided with the rear of the pursuer's car, an Audi A4, which had been parked outside her house. No one was in the pursuer's car at the time and there is no claim for personal injury.

The Loss Claimed as a Result of the Accident

- The pursuer avers that her vehicle suffered extensive damage and required repair. She avers that she was denied the use and amenity of the vehicle for the period of the repair. However, she was not denied the use of any vehicle during that period, because she avers that she entered into a Credit Hire Agreement with Accident Exchange Limited who arranged for her vehicle to be inspected by an engineer and for repairs to be carried out. She avers that they also provided her with a replacement vehicle during the period of the repair. She says she is contractually obliged to pay to Accident Exchange the cost of the repairs, including any surcharges, and the cost of the engineer's report, and is further contractually obliged to meet the hire costs of Accident Exchange for the replacement vehicle, including credit hire rates and interest on all sums until payment. The claim appears to be summarised in the non-grammatical and inspecific sentence: "Further as a result of the accident and being deprived of her vehicle, the pursuer suffered a loss of use of her vehicle diminution and inconvenience as a result" (sic). The word "diminution" is not explained or defined there, or anywhere else in her pleadings.

- The pursuer also avers that she was put in touch with the credit hire company, whom she wrongly describes as "Accident and Exchange" by her Audi dealer. That averment was to have considerable significance later. She avers, also significantly, that her car ***was*** roadworthy after the accident, that she is not "absolutely" impecunious, (whatever that is meant to mean), and that she needed a car for her part time job and to drive her son about. That is *not* the reason she gave in evidence for needing one.
- Almost extraordinarily, in a case where the pursuer was to claim for hire of a replacement car, she does not aver in her pleadings the period of the hire, the cost of it, nor the period of time during which her car was off the road for repair.

The Position of the Defenders on Record

- Liability for causing the collision was not in dispute. Further, the defenders aver that they have paid the cost of repairs, being £3547.55, the engineer's fee, and the hire charges, to a total of £5921.52, which sums they aver they had paid as long ago as 21 November 2008. The dispute seems to be as to the allowable extent of the hire charges actually incurred by the pursuer, and the defenders' case as pled indicates that they do not accept liability for the total amount of the hire charge claimed by the pursuer.
- They take a substantial point about the pursuer's duty to mitigate her loss, and that the hire charges actually incurred are unreasonable and excessive. They also disclose that the period of hire claimed for by the pursuer was 3 October 2008 to 22 October 2008, but that in the period from the date of the accident, 21 September, until 3 October, the start of the hire, the vehicle remained roadworthy, a point admitted by the pursuer. They take issue with the period from 3 to 7 October on the basis that as the vehicle was in fact roadworthy, there was no need to hire a car during those 4 days.
- They challenge the cost of the actual hire (£152.71 per day plus VAT) and aver that an equivalent vehicle could have been hired at spot hire rates at less than half the cost of that charged by Accident Exchange, and also challenge the proposition that the pursuer's vehicle has diminished in value. They lodged a Notice to Admit, the terms of which were not disputed by the pursuer. That amounts to there being evidence in the case that an exactly equivalent car to that involved in the repairs could have been hired at the relevant time at rates available from "High Street" commercial car hire companies (Avis, Car Hire 3000, and Hertz) varying from £72.94 to £97.62 to £108.93 per day.
- I may say in general terms that there are substantial numbers of claims which come before this court in which pursuers have taken out credit hire agreements following an accident, and in which defenders' insurers complain about the excessive and in some cases apparently exorbitant rates which are charged by credit hire companies. The point always taken is that the rates charged are inflated in comparison to what can be had on the spot hire market and that as a result, insurers are having to pay excessive claims to the detriment of all of their policyholders, to whom increased charges have ultimately to be passed on.

The Evidence for the Pursuer

- If there was any doubt about the correctness of the point taken by the defenders that the pursuer had failed to mitigate her loss, such doubt was comprehensively removed by her evidence. It emerged that she had in fact taken no steps to mitigate her loss. In fact, ultimately there was a substantial argument as to whether she had suffered any loss at all.
- The pursuer gave evidence that she and her husband had bought the car involved only the week before the accident, as a second hand vehicle. They had bought it from Glasgow Audi, which is a main Audi dealership. She was not asked, nor did she volunteer, how much they had paid for it. It is a prestige type of vehicle, but a standard model of a commonly available car, and it is well within judicial knowledge that manufacturers such as VW Audi insist that their cars are serviced, maintained and repaired, as need be, only by authorised agents, in order to preserve the customers' warranty. The dealership in question is such an authorised agent, and since the accident had come, unfortunately, so soon after their purchase, it is entirely natural and only to be expected that she would return the car to that dealer for inspection of the damage and repair.

- In fact, the extent of the damage was not obviously great. The neighbour whose car had rolled down the slope was apologetic and immediately accepted responsibility. The visible damage was only to the rear bumper. The boot was still capable of being opened, closed again and secured. Of course, in such an impact, damage may have been sustained by panels which are not obvious to the car owner, and the accident may well have resulted in the need for more extensive repair than just to repair the bumper. It is also correct to acknowledge, and was not in dispute, that the cost of repair of such prestige vehicles tends to be considerably higher than most average car owners expect, but that is a product of the combination of a number of factors, including the value of the car, the cost of parts, and the need to ensure proper and authorised repair such that warranties are preserved. Another reason emerged during the proof.
- As I have said, the defenders in this case have accepted the actual cost of the authorised repairs in this case and paid that sum, more than 31/2 years ago.
- When asked what she did after the accident, the pursuer replied that she phoned her own insurance company, whose name she could not remember, and that they told her to get estimates (she used the plural form of the word) for the repair. At no time was she asked if her own insurance policy included the cost of a hire car. In fact, because the day of the accident was a Sunday, she did not do that then, and because the car remained driveable, she continued to use it for almost another 2 full weeks, until she took it, on 3 October, to the dealer from which she had bought it. She did not in fact make any effort to get any estimate for the cost of repair (or indeed of any replacement hire) in that whole time. She said she was told by Audi Glasgow that they had Accident Exchange who could deal with everything regarding the car for her and that would save her going round to get estimates, and so she went along with that. She said she was told that Accident Exchange would be in touch with her, get her a hire car, and take her own car to Audi to be repaired, which they did, though not until 3 October, and she continued to use her own car in the interim. She said in terms, "It was driveable; the damage had no impact on my use of it whatsoever".
- That means that she was inconvenienced only to the extent of making one phone call and taking her car to the dealer for examination.
- She then explained the real reason for wanting a replacement car which was that she and her husband and son were due to go on holiday using the car to drive to Blackpool and no doubt while they were there, and therefore needed a replacement for that purpose. There had been no averment on record to that effect.
- The pursuer was supplied by Accident Exchange with a replacement car which was more or less the same model as the one which had been damaged. At no time in her evidence did she claim that she actually needed an exact replacement. It is axiomatic that it will be more expensive to hire a prestige, high value, motor car than one of lower value. She had said that she needed a car to take her son to various clubs and activities, and to visit her parents, and obviously, if the family had been due to go on a holiday which required them to drive, they would need a replacement saloon car, but at no time was it claimed by the pursuer that for the short period of time it would take to effect the repairs that they actually needed one of similar type and cost to the one damaged. Nonetheless, and apparently without giving the matter any thought, she accepted the actual car supplied by Accident Exchange.
- She did sign the Vehicle Rental Agreement (number 5/2 of process) but admitted that did not read the terms and conditions attached to it, nor did she claim that these were explained to her by Accident Exchange, or Audi Glasgow. She agreed to hire it from 3 October 2008. The daily rate is stated to be £143.21 and the agreement also provides for a daily Collision Damage Waiver fee of £9.50, to both of which there falls to be added VAT. It also provides for a delivery fee of £100, which by signing, she accepted. In due course, there was also added an "Admin" fee of £50.
- Pausing there, that means that without having taken any steps to investigate any alternative means of obtaining a replacement car, including even investigating whether such was available from her own insurers, she accepted without apparent question an assertion from Audi Glasgow that Accident Exchange would deal with everything for her, and without even reading the terms of the agreement she was signing, allowed Accident Exchange to deliver a car to her house at a cost of £100 and when her car had remained driveable and she could have taken it herself it to a garage or depot, accepted the need for Collision Damage Waiver, again without any attempt to check whether she needed that level

of extra insurance during the period of hire, and accepted responsibility for the payment of a total daily sum of £152.71 plus VAT on a completely open ended agreement.

- That figure for daily hire of a comparable replacement car is accordingly £43.78 per day more expensive than the highest quote obtained by the defenders, and £79.77 per day more expensive than the lowest quote obtained. Over a period of 20 days, the actual cost claimed therefore varies between £875.60 and £1595.40 more than rates which were at the time available on what is known as the "spot hire" market.
- It was quite clear to me that the pursuer actually had no idea that the obligation for payment of that sum, for however many days of hire there were, was in fact hers. As was to emerge clearly later, the terms of clause 3.1 of the agreement she signed read "You will pay hire charges to us for the rental of the vehicle together with any interest during any period (including the credit period) in which hire charges are outstanding."
- As was also to emerge later, that agreement also includes clause 4, which makes it clear that Accident Exchange are to authorise the undertaking of repairs (not the pursuer's own insurers) and that those charges are also due to be paid to Accident Exchange at the conclusion of the hire period, *by the pursuer*. The significance of the requirement for the authorisation of repairs to come from Accident Exchange was to emerge later, during the evidence for the defenders.
- It is clear therefore that the pursuer gave her car over to Accident Exchange on 3 October, and incurred hire charges from that date, but that her car was fully driveable at that time. Repairs were not in fact authorised by Accident Exchange until 7 October. During that period of 4 days, the pursuer's own car was capable of being used by her in exactly the same way as she had been doing since 21 September.
- Her own car was repaired and returned to her on 22 October 2008, meaning that she incurred the aforesaid daily rate to Accident Exchange from 3 to 22 October 2008, a period of 20 days. The total cost claimed by the pursuer in this action amounts to £3,764.94, though that figure does not in fact appear in the pursuer's pleadings, as it ought to. The pursuer expressed surprise at the actual figure of the cost of the repairs, which came to £3,547.55, and as I have said, was paid by the defenders in November 2008. I have already commented on why the repair bill appears to be so high when the damage appeared to be restricted to the rear bumper. The pursuer said she was simply told by Audi Glasgow that there had been further damage underneath which she could not see. She had not been told the cost of the repairs, had not authorised them, and had not in fact seen the document which itemises them until shown it in court.
- She was then asked if she had any view on whether the value of her car had depreciated as a result of the accident damage, to which she replied that she had been advised by the solicitors acting in the claim that she should get a report done on that aspect, and that they had told her that the depreciation had been estimated at £2863. She seemed to think that the cost of the repairs was indicative of the fact that the level of depreciation would be high, but that suggestion was to be seriously disputed in evidence for the defenders. In fact, she described the car, post-accident and post-repair, as being in "forecourt condition", being very good and with low mileage. She then gave two answers to consecutive questions, which are mutually contradictory. In the situation which exists with her car, which has been professionally repaired after an accident, she was asked if she personally would buy a car which she knew had been in an accident. She replied that she would not, giving as her reason, "I wouldn't think it would be roadworthy". She was then asked about her own car, which she had continued to drive for over 31/2 years since it was damaged and repaired, and said that her car *was* roadworthy, thus exposing the inconsistency of her position.
- She then gave in response to a leading question an answer which I suspect the questioner did not anticipate, in that she was asked if it was her perception that a damaged (but repaired) car was somehow inferior to a non-repaired car, and answered, "No".
- In cross examination, she confirmed that she had not read the terms and conditions of the agreement she had signed with Accident Exchange. The terms of clause 3.2 of the agreement were explained to her, which provide that she is responsible for paying the hire charges to Accident Exchange, with interest, in full and by a single payment immediately upon the expiry of the hire period, which the agreement confirms as being September 2009. She confirmed that she had not been made aware of that

requirement when she signed the agreement, nor had she in fact been asked to make that payment by Accident Exchange.
- She gave a significant answer when asked whether it was not correct that when she signed that agreement, she had no way of knowing what the actual costs would be, and replied that she had not expected to be charged anything at all, because "I took out insurance". It was then pointed out to her that she had not gone through her own insurance company at all, but had simply gone to Audi Glasgow, and replied, "I was not aware of the difference; I took it out because Audi said so and I was quite happy with that".
- She confirmed that she had never been told that there was any reason why she could not continue to drive her own car after the accident and prior to it actually going in for repair. With regard then to the critical period of 4 days between the 3rd and the 7th October, when her car her been removed by Accident Exchange and she had been given the replacement one, but before the actual inspection date and the date when repairs were authorised to be commenced, she was asked what she would have done if she had realised that she did in fact have personal liability for payment of the hire charges for those 4 days (which is £152.71 x 4 = £610.84), she replied, "I would have carried on using it [her own car] if I'd known I'd have to pay the hire charges".
- Finally, she confirmed that she was very satisfied with the quality of the actual repair carried out on her car by Audi Glasgow.

The Remaining Evidence - The Dispute Between the Experts

- As I have said, the defenders had averred that the actual daily hire cost for a replacement vehicle could have been less than half of that charged by Accident Exchange, and had lodged an unchallenged Notice to Admit which allowed them to argue that an excessive amount was being charged in respect of hire charges.
- The remaining evidence in the case came from two automotive engineering assessors, one from each side. Mr Charles Welsh gave evidence for the pursuer and Mr Alan Bathgate for the defender. Both have extensive experience in the assessment of damage to motor vehicles, the expected cost of repairs, and the giving of advice relating to the authorisation of such and dealing generally with all such claims.
- As it happens. Mr Welsh had been the engineer asked in October 2008 by Accident Exchange to prepare a valuation on the cost of the repair to the damage of the pursuer's car. He explained the principles by which he would assess whether a particular vehicle could in fact be economically repaired. This one could. He explained why some car dealers, on being offered a car as a trade-in, might take the view that because of its age, condition, mileage, or a combination of all of these factors, they could not retail it themselves, in which case they would offer the customer a lower trade-in value and then send the car "to the trade" for re-sale, which means send it to auction rather than offer it on their own forecourt. He had in fact been instructed by Accident Exchange to do the report only on 6 October 2008, did the examination on that day and reported to Accident Exchange on the 7th October, that day being the day on which they authorised Audi Glasgow to do the repairs identified in Mr Welsh's report.
- Pausing there, and since he reported that the damage was moderate and to the rear, and that the car was, at 6 October, "mobile" that means that there is a period of at least 4 days, between the 3rd and the 7th October when the pursuer could have continued to use her car, and did not require to have hired a replacement car at all. That would have reduced the cost of the hire by £152.71 x 4 = £610.84. He later tried to suggest that although it may have been mobile, it shouldn't really have been driven, but that opinion was challenged by Mr Bathgate, whose view was that if the assessment was that it should not be driven, then it ought to be classified as non-mobile. I preferred the position taken by Mr Bathgate on this point.
- In any event, Mr Welsh confirmed what was later given in greater detail by Mr Bathgate that the whole question of a "trade-in" value offered by a dealer to a customer depended on a range of factors which

include customer loyalty, the desire of the dealer to retain that, and the need of the dealer to make an acceptable profit on re-sale.

- What happened then was that Mr Welsh was much later approached to provide an opinion on whether there had been a diminution in value of the car as a result of the accident. It is interesting to note that that request did not originate from the pursuer, her insurers, the company which carried out the repairs (Audi Glasgow), or the credit hire company, but instead from the pursuer's solicitors.
- Put shortly, the only area in which it might be suggested that there was a diminution in the value of the repaired car in this case is in relation to what is referred to as "perceptual diminution", which is the perceptual loss of a vehicle's retail market value arising from an accident or incident. It must be pointed out, however, that he gave his opinion when this vehicle was 51/2 years old, and even if it has average mileage or less than that for its age, its age has an effect on its trade-in value and its worth to a dealer wishing to retail it.
- For the purposes of formulating his opinion as to whether there had been a diminution in value as a result of the accident, Mr Welsh did not in fact re-examine the car. That is significant. The repairs were authorised by Accident Exchange on the basis of Mr Welsh's report, but that was written in October 2008. He did not see or examine the car after it was then repaired, nor has he seen it since. He did not know the current mileage, which of course is a relevant factor affecting re-sale, though he understood it to be lower than average (which the trade regards as 10,000 miles per annum).
- His opinion was that the car had suffered a diminution in value of 20% as a result of the damage sustained in the accident. That however, is an assessment of a reduction in the pre-accident value of the car, and while that may well cause a reduction if the pursuer had decided to part with the car more or less immediately after the damage had been repaired, it was now over 31/2 years later, the pursuer still owns the car which was professionally repaired to restore it to pre-accident condition, and if I understood his position, he assessed a minimum diminution in value of £1975, but also accepted that a dealer may still give to the seller of the car on trade-in a good price equal to the trade price. That means that a dealer may still make a profit on re-sale of that car and still offer the seller a price which does not reduce its value by £1975.
- He disagreed with the proposition put forward by Mr Bathgate that there would be a maximum diminution value of 3%, explaining that if there were two more or less identical cars for sale, one of which had been damaged and repaired and the other not, a dealer would have to offer a purchaser more than 3% off to buy the repaired one, so the differential would have to be greater. He confirmed however that the perception of diminution was that of the prospective purchaser, which is subjective, and also depends on the dealer disclosing that there has been damage which has been repaired. It also depends on the extent of any such repaired damage.
- Whatever else may be said about the opinion evidence given by Mr Welsh, his evidence as to the factual nature of the accident damage was that it was "to the rear, of a moderate nature". A rear panel underneath had been cut off and replaced. He did not re-inspect the vehicle after the repairs had been effected, but held the view that in every case of a repair where a part has been cut off and replaced, there will be diminution of value. He also agreed that a dealer may give to the seller a good price equal to the trade price.
- In cross examination, he stated that since the issue of diminution was perceptual, it may well be that to the prospective purchaser, there may not be any diminution at all, saying that that proposition was "exactly right" and that if someone was keen to buy it, there might be no loss at all. That may well of course be the case if the car is being sold with lower than average mileage.
- Mr Bathgate was a highly experienced assessor, and the critical difference between him and Mr Welsh was that Mr Bathgate had actually taken the trouble to inspect the vehicle in question before preparing the report to which he spoke. His is number 6/2 of Process. He described the repair as having been full and correct to an extremely high standard and that the vehicle had been returned to its pre-accident standard. Later, he said that only someone carrying out the sort of detailed professional inspection that he had would even know that there had been a repair, there being no obvious external sign of that. He proposed that the maximum perceptual diminution in value as a result would not exceed 3%, which would be a maximum loss of £429.45. He said the damage had had no effect on the vehicle's structural integrity and did not require jig re-alignment.

- He said a figure of 20% such as proposed by Mr Welsh may be appropriate for a vehicle where there had been major re-structuring and re-alignment, but here the damage was cosmetic, moderate, and non-structural to external panels only. It was also the case that the longer you keep a vehicle after it has been repaired, any potential loss due to the accident also diminishes.
- He concluded by going further than his report and saying that by 31/2 years after the repair, which is when he was considering it, any diminution would have diminished to virtually zero. He opined that his assessment of a loss of some £429 as at September 2008 would by now have diminished to zero, and so in this case, there simply was no diminution in value at all.
- He disagreed with the suggestion by Mr Welsh in evidence that the car might not have been mobile at the time of his inspection, saying that if that was so, he should have said so at the time, but in fact had said the opposite. It seemed to me that Mr Bathgate was clearly correct about that.
- He also pointed out that although not in any way challenging the method of repairing or the time taken, the analysis of the figure actually charged here by Glasgow Audi was that they had been paid £45 per hour for the work done, that figure being authorised by Accident Exchange. If the exact same work had been authorised by insurers, they would have allowed only a maximum of £32 per hour. Accordingly, by having the credit hire company authorise the work, the garage benefitted to the extent of approximately £13 per hour, a cost which of course was met by the third party's insurers and would in turn be passed on to their policyholders.
- It came as a considerable surprise to me to learn this, but it shows how the market is in fact distorted by virtue of the fact that a credit hire company and not the insurers do the authorising of repairs, to the benefit of the repairing garage, but not to anyone else. It also helps to explain why repairing garages are so keen to pass customers to credit hire companies.
- He also said that there was no justification for any selling dealer to try to sell this vehicle for less than a comparable but never damaged model, and in particular, there was no justification for the dealer doing so if it was the one which had actually carried out the repair, because they would thereby be calling into question their own workmanship.
- I have no hesitation in saying that while Mr Welsh gave his opinions in a clear and honest manner, those given by Mr Bathgate as to the critical issue of diminution of value carry considerably more weight, and I accept the evidence given by Mr Bathgate on this point. He had the benefit of having actually examined the vehicle and gave full and acceptable reasons for saying that having regard to the passage of time since the repair, and the quality of it, and the relatively low mileage of the vehicle, it simply has not been established that this vehicle has suffered, or will on re-sale suffer, any perceptual diminution of its value.

Submissions - Pursuer

- It was clear from these that this is not a subrogated claim nor one in indemnity. This is a claim by the pursuer for reparation for loss and damage flowing from the accident. I was asked two questions; what loss and damage did she suffer flowing from the accident, and what sum of money the defenders ought to pay to make reparation therefor.
- It is explicitly accepted on behalf of the pursuer that she was told by Glasgow Audi that she was entitled to use the services of Accident Exchange and that they would deal with everything for her. There is no doubt that she needed a replacement car, at whatever the appropriate rate is, and whatever the appropriate period is. Of course, her own car had to be repaired and the engineer's assessment fee paid.
- Since the repair costs and engineer's fee have already been paid, this all boils down to the issues of hire charges, period of hire, alleged diminution in value of her own car, and inconvenience. It is also explicitly accepted that the pursuer was not impecunious at the time of the hire. It is also accepted that the pursuer said that if she had been hiring a car in the local market, she would have got more than one quote and probably taken the lowest one. Further, as I have already recorded, she said that if she had realised that she had personal liability for payment of the hire charges in the critical period 3 - 7 October, she would have carried on using her own car during that period, as it was perfectly roadworthy.

- The pursuer relied on the principle of *restitutio in integrum* but explicitly accepted that the party aggrieved must take all reasonable steps to mitigate the resulting loss.
- As to the hire charges, the claim was for 20 days at £152.71 per day (plus VAT) which comes to £3764.94, to "enable her to extinguish her contractual liability". I pause to observe that her contractual liability is as set out in clause 3.2 of her agreement, which was to pay the hire charges in a single payment immediately upon the expiry of the hire period, which the agreement defines as being by September 2009. The pursuer has not done that, said that she had not expected to be charged anything at all, and there was no evidence from the hire company, Accident Exchange, that they ever intended to enforce that agreement. There was no evidence from them at all. The pursuer also explicitly accepts that an equivalent vehicle was available locally at between £43.78 and £79.77 per day less than the hire company charges.
- Now the defenders do not dispute that the pursuer was entitled to hire a replacement vehicle, but do dispute the period, which they say should be only 16 days, for the reasons already set out, and also dispute the appropriate rate. They have already paid £2315.22, and so the balance claimed is £1449.72. Reference was made to the cases of Dimond v Lovell [2000] UKHL 27 and Lagden v O'Connor [2003] UKHL 64. The courts are concerned to be aware of the issue of any additional benefits included in the actual hire charges. The recoverable loss was sated in Dimond (*supra*) to be the market rate for hiring a car from an ordinary hire company. In Lagden (*supra*), Lord Hope of Craighead said that there is an onus on the defender to establish that a lower cost than the hire company charges will be appropriate, and that it has to be shown that the claimant had a choice and would have been better to mitigate [her] loss at less cost. His Lordship said that if the evidence showed that the claimant had a choice, and that the route to mitigation which [she] chose was more costly than an alternative that was open to [her], then a case will have been made out for a deduction.
- The pursuer therefore threw the burden of making out a deduction on the defenders. She argued that the case of Tkachuk v Stevenson 2010 SLT (Sh Ct) 238 was wrongly decided and in any event was distinguishable. It was argued that the pursuer's contractual liability was the measure of her loss (Clark v City of Edinburgh Council 2010 CSOH 144 and Greenlees v Allianz 2011 CSOH 173).
- The argument about the appropriate length of the hire period is a simple question of fact in the circumstances.
- As to the issue of whether the market or "spot" rate is appropriate for the purpose of quantifying the sum due for hire charges, reference was made to Burdis v Livsey 2002 EWCA Civ 510, where it was said that the claimant was entitled to hire a replacement car at the top end of charges available locally, and was not restricted to claim thereafter an average of all available local charges, but qualified that by saying that it was subject to a duty to take reasonable steps to mitigate the loss. In Bent v Highways and Utilities Construction 2011 EWCA Civ 1384, Aikens LJ said that the court should make a calculation of what the basic hire rate (spot rate) was for the car actually hired and so compare it with the credit hire rate actually paid. It must be pointed out however that the vehicle hired in that case was an extremely expensive high performance vehicle, not easily available for hire, and had a daily rate of £573.28 plus VAT.
- I have already set out the case for diminution, which depends on which of the two experts I accept. The actual claim was for a maximum of £2863, or at least £1975.
- Finally, there was a claim for a small sum for inconvenience, though it must be pointed out that the only inconvenience was making one phone call and taking the car to the repairer. The replacement car differed from the pursuer's actual car by not having cruise control.

Submissions - Defender

- They pointed out that Accident Exchange intimated a claim to them in October 2008 and that on 21 November 2008 they paid Accident Exchange the sum of £5921.52 in settlement of it. The pursuer eventually raised an action in the Court of Session and that has now come to proof in its present form.
- They had a number of submissions. The primary one was that the pursuer has not proved that she has suffered any loss in respect of the repair costs, hire charges or engineer's fee because she has not had her obligation enforced by Accident Exchange and there was no evidence that she ever will have.

Reference was made to Tkachuk (*supra*). She said that she had not expected to be charged anything at all, nor has she been. Also, it was said that she had not suffered any loss of use or inconvenience and *esto* there was any diminution in value as a result of the accident, it has been superseded by the natural diminution in value since then and was now nil.

- Their secondary position was that the repair charges were valued at £3547.55, and that although there was clear evidence that these had been inflated above the price which would have been payable if authorised by insurers, rather than by a credit hire company, they had nonetheless been paid in full. As to the hire charges, it was said that the pursuer had failed to quantify her loss in this regard (Tkachuk (*supra)*). If there was any inconvenience or loss of use, it was minimal, as was any diminution in value, and as any such total was bound to be less than what had already been paid, the net result would be the same as if their primary submission was upheld; viz:- absolvitor. As an alternative to the proposition about non quantifying of the hire charges, they submitted that in any event 4 days (3 to 7 October) fell to be excluded on the clear evidence of the pursuer herself that no hire car was necessary on those days and the daily rate should be taken as the lowest available on the spot market as accepted by the pursuer to be £72.94 x 16 =£1167.04, which of course again means that the defenders have already paid more than any such quantification of the claim.
- They said that the pursuer had failed to prove that she required to pay Accident Exchange for either the hire or the repair charges. The pursuer had never been asked to pay anything to Accident Exchange and had been told that they would handle everything for her. She was clearly under the impression that she had no liability for either aspect. The terms of her agreement provide, at 3.2 and 4.4 that it is her obligation to pay both to Accident Exchange by September 2009, that date being defined by clause 1.7. She has neither done so, nor been called upon to do so. No evidence was given by or on behalf of Accident Exchange. There was no evidence that they ever intend to enforce their agreement with her. Quite simply, if there is no requirement for her to make payment under those heads to Accident Exchange, there is no loss at all, and therefore nothing to recover. They pointed to the decision of the Sheriff in Tkachuk (*supra*) where he accepted that a future loss is recoverable, but only if established that it is exigible. He there distinguished an earlier case where there had been evidence from the credit hire company to the effect that they would obtain the deferred payment from the pursuer, but there had been no such evidence in Tkachuk and none here. The only difference between the pursuer in Tkachuk and the pursuer here was that Mr Tkachuk had repeatedly been re-assured that he would not have to pay anything, whereas here the pursuer was told that only once, but, it was said, the effect was the same: no loss.
- Turning to their secondary position, they said that the case of Tkachuk was also in point because there was no proper quantification of the hire charges. As I have already observed, there are actually no averments by the pursuer as to what the hire charges she claims for actually amounted to. She never had any discussion with Accident Exchange; the only conversation she had was with Glasgow Audi. In the present case, as with that of Mr Tkachuk, the part in the agreement which formed the basis of the assertion that the rate was £152.71 per day is to be found immediately after the words "The charges shown below are the maximum amount we may charge; they may be significantly discounted if properly settled by an insurer in accordance with the terms of the Association of British Insurers General Terms of Agreement". No evidence was given as to what such Terms of Agreement say, or that settlement has not in fact taken place in accordance with them, or what a "significant" discount amounts to. Again put simply, there is actually no basis for saying that the appropriate multiplicand is £152.71. It could in fact be much less, even on the face of the pursuer's agreement itself. Even then, as pointed out, there was no evidence that that portion of the figure claimed representing collision damage waiver at £9.50 per day was ever necessary.
- The document produced by the pursuer as number 5/1 of process, which was not spoken to by anyone from Accident Exchange, and bore to be a Statement of Charges was not an invoice, and although ostensibly addressed to the pursuer, had never been sent to her nor seen by her. Again, simply put, there was no evidence of what the appropriate charge was, and therefore no basis for establishing the quantum of any actual loss. In Dimond (*supra*) the trial court had heard from the credit hire company, and in Lagden (*supra*) the claimant had entered a policy of insurance with a subsidiary of the credit hire company in order to cover the hire charges if not otherwise recovered. Neither of those features

was present in Tkachuk, or in the present case. The cases of Clark and Greenlees (both *supra*) were both distinguishable on the basis that in Clark Accident Exchange gave evidence that the moneys were recoverable, and in Greenlees they gave evidence that the obligation would be enforced.
- As to the period of hire, this submission dealt with the 4 days between 3 and 7 October, and in short it was said on the pursuer's own evidence that it was not necessary for her to have had a hire car on these days.
- As to the rate of hire, assuming one attempts some sort of quantification, the defenders pointed out that an equivalent car could have been got for £72.94 per day, as opposed to £152.71 per day.
- It was said that by using Accident Exchange, the pursuer did get additional benefits as defined in Dimond (*supra*). She did not have to go looking for quotations for repairs, or correspond with insurers, or concern herself with the funding of any, and in particular, this, litigation, and of course, she was not in any event impecunious.
- On the question of diminution, I was asked to accept the evidence of Mr Bathgate, which I have already set out. This aspect had not in any event been quantified in the pleadings. While it is correct that the pursuer does not have to wait to sell in order to quantify any such element, here there was no acceptable evidence that there would be. Mr Welsh had taken the pre-accident value as his starting point, which was far too high, given the passage of time since October 2008.
- The inconvenience factor was at best wholly nominal.

Decision

- I agree with the defenders' submissions, and on every point. I prefer the evidence of Mr Bathgate to that of Mr Welsh. He gave cogent reasons for his opinions and I accept them.
- Dealing firstly then with the issue of claimed diminution of value, the fact is, simply put, that the pursuer did not establish, even on Mr Welsh's evidence, that there was any probability of a diminution of value, and the defenders did establish, on the basis of Mr Bathgate's evidence, that there was every likelihood that there would be no such diminution. That element, which represented a minimum claim of £1975, therefore simply falls away.
- Next, I am satisfied that the element of inconvenience, which amounts to no more than one phone call and a trip to the repairer 12 days later, is wholly *de minimis*. That therefore falls away too. In any event, the sum suggested by the pursuer in submission was no more than £50 and having regard to the amount already paid by the defenders, any such claim would be subsumed in that figure.
- That leaves the main arguments as to whether there was any actual loss at all, and if so, whether the pursuer succeeded in quantifying any such loss, either in respect of repairs or credit hire costs.
- I do not accept that pursuer's argument that Tkachuk was wrongly decided, and on the contrary, since in almost all respects the evidence in the present case was similar to that, I agree with the decision and the reasoning of the Sheriff in that case. Here, there was evidence that the pursuer's ostensible obligation to repay repair and hire costs to Accident Exchange crystallised in September 2009. She was unaware of any such obligation. She had not expected to be charged anything at all. She has not discharged it. She has not been called upon to discharge it. Unlike other cases where evidence has been given by the credit hire company, there was no such evidence here from which any future loss on the part of the pursuer can be determined. There was no evidence that she will ever be asked to pay these sums.
- If I am right about that, the result is absolvitor. If I am right about that, but wrong to dismiss the elements of diminution and inconvenience, the amount already paid far exceeds the claims for those elements and the result is the same, absolvitor.
- If I am wrong about that, then I hold that the pursuer has in any event failed to prove the extent of any such loss as she may have suffered. I remain satisfied on the facts that there is no claim for diminution, and since the amount suggested for inconvenience was so small, this claim consists of the elements of the repair costs and the hire charges. The repair costs are what they are, inflated though they may be, but that sum has already been paid, so that leaves only the hire costs. I accept that the pursuer has wholly failed to establish what these actually were. A claim such as this cannot be based on a suggestion that the sum used as the multiplicand is the maximum that may be charged, though subject

to a significant discount if the claim is settled in accordance with an ABI agreement, where there was no evidence that that has not happened, what any discount might be, and what those terms are. If that is correct, that leaves only the repair costs, and the sum already paid greatly exceeds those, so the result is once again absolvitor.

- If I am wrong about that, then it is clear that this pursuer did have a choice to hire from the available local market but chose not to do so. As a result she received considerable benefits above the supply of a replacement car. That means I am entitled to look at the spot hire or basic hire rate. It is clear to me that the pursuer took no steps at all to mitigate any loss. I am also completely satisfied that this car was roadworthy right up until the 8th October and so 4 days fall to be deducted from any multiplier. As to an appropriate multiplicand, the maximum sum claimed is £152.71 per day. The highest available alternative was £108.93 per day. Unlike the cases of Bent and Tkachuk (both *supra*), both of which involved high performance specialist and limited availability cars, the pursuer's car here was not such and an equivalent alternative was available in the area, though she chose to ignore that market. That means that she could have had that car for £108.93 x 16 days at a total cost of £1742.88. She could have had it for much less, in fact, but taking the highest alternative quote produces a figure as shown. Adding that to the repair costs of £3547.55 gives a total of £5290.43, which is still considerably less than the sum of £5921.52 which was paid to Accident Exchange as long ago as November 2008. The sum actually paid exceeds any sum which might have been due by that method of calculation by £631.09. which sum itself exceeds the original estimate of a maximum 3% diminution of value suggested by Mr Bathgate and much more than the suggested inconvenience factor.
- As a result, whichever way this claim is looked at, it fails, and on every point. That being the case, the defenders are entitled to expenses and to have Mr Bathgate certified as an expert witness. Since the pursuer originally thought it worthy of raising in the Court of Session, and then moved to remit it to the sheriff court, a motion which was opposed by the defenders, and since the pursuer thereafter moved to remit it again from the Ordinary Roll to the Summary Cause Roll, I have to consider the appropriate scale of expenses. Given the scope, complexity and importance of the action, it seems to me to be appropriate to award expenses on the Ordinary scale. If the pursuer had succeeded and made that motion, I would have granted it for the same reasons.

NOTE:

Following the issuing of the judgement in this case, the pursuer appealed to the Sheriff Principal by way of Stated Case. The Questions of Law set out for the Opinion of the Sheriff Principal were as follows:

Questions of Law

- Was I entitled to hold that the pursuer had failed to establish that her said car had suffered any diminution in value as a result of the said accident and the need for it to be repaired thereafter ?
- Was I entitled to hold that any claim by the pursuer in respect of inconvenience following on the said accident was *de minimis* ?
- Was I entitled to hold that the pursuer had not proved that she had suffered any loss or damage in respect of repair costs or hire charges for a replacement car ?
- Was I entitled to hold that the pursuer had not in any event proved the extent of any such loss in respect of hire charges for a replacement car, or that it was required for the full period claimed ?
- Was I entitled to hold that in any event, the defenders having already compensated the pursuer for any loss, damage or inconvenience she may have sustained, the defenders should be assoilzied, with expenses ?

On 6 December 2012, without issuing a separate Opinion, the Sheriff Principal, having heard counsel in the appeal, answered Questions 1 to 5 (set out above) in the affirmative, adhered to the Interlocutor (being the Opinion of the Sheriff set out above) dated 20 August 2012, and refused the appeal.