Case No: (1) B2/2015/1054/CCRTF
(2) B2/2014/3494/CCRTF

Neutral Citation Number: [2017] EWCA Civ 144

(1) IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SALISBURY COUNTY COURT
DISTRICT JUDGE BROOKES

Lower Court Claim Number 3YQ70083

(2) ON APPEAL FROM CHELMSFORD COUNTY COURT
HER HONOUR JUDGE STAITE
Lower Court Claim Number 2IR76777

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2017

Before:

LORD JUSTICE FLAUX
SIR TIMOTHY LLOYD
and
SIR STANLEY BURNTON

- -

Between:

(1) NEIL MCBRIDE	**Appellant**
- and -	
UK INSURANCE LIMITED	**Respondent**
-And between-	
(2) PETER CLAYTON	**Appellant**
- and -	
EUI LIMITED (Trading as Admiral Insurance)	**Respondent**

(1) Mr Benjamin Williams QC & Mr Glenn Willetts (instructed by **Breens Solicitors**) for the **Appellant** in **McBride**
Mr Steven Turner & Mr Edward Ramsay (instructed by **Keoghs LLP**) for the **Respondent** in **McBride**
(2) Mr Richard Spearman QC & Mr Stuart Nicol (instructed by **True Solicitors**) for the **Appellant** in **Clayton**
Mr Jonathan Hough QC & Mr Stephen Bailey (instructed by **Horwich Farrelly Solicitors**) for the **Respondent** in **Clayton**

Hearing date: 22 February 2017

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Judgment

Lord Justice Flaux :

Introduction

1. These two appeals are the latest round in the long-running battle between the motor insurance market and the credit hire companies. Both appeals raise issues as to the effect of the nil excess provided by Accident Exchange Limited ("AEL"), which was the credit hire company in both cases. In the first appeal, *McBride v UK Insurance Ltd*, AEL, which stands behind the claimant, seeks permission to appeal on two further grounds of appeal which were adjourned to the full Court by Underhill LJ at the permission hearing. One of those grounds contends that the judge erred in law in assessing quantum by applying the judgment of this Court in *Stevens v Equity Syndicate Management* [2015] EWCA 93; [2015] 4 All ER 458, because that case is inconsistent with earlier decisions of this Court and was wrongly decided.

2. Given that it will be necessary to consider the proceedings and judgments in the courts below in detail, particularly in *Clayton*, I will continue to refer to both appellants, who, in each case, were the claimants in the court below, as "the claimant" and to the respondent insurers as "the defendant", in order to avoid any confusion.

The facts and judgment in *McBride*

3. The claimant's Jaguar XJ Supersport V8 5.0l motor car (in insurance group P10) was damaged in an accident due to the negligent driving of the defendant's insured. The car was rendered unroadworthy. The defendant organised and paid for the repairs which took a protracted period of time. The claimant was a company director who used his car extensively for business, social and domestic purposes, commuting from the south coast to London five days a week, a daily commute of some 150 miles.

4. During the period that he was without his car and it was being repaired, the claimant hired a broadly equivalent car, a Jaguar XK 5.0l (also in insurance group P10) from AEL. The daily hire charge was £409 (a discount from the daily rate shown on the original Vehicle Rental Agreement of £649.31). In addition, AEL provided collision damage waiver ("CDW") at £10 per day, the effect of which was to reduce AEL's default insurance excess of £2,500 to nil. There were also charges for hiring satnav equipment, an additional charge to reflect the claimant's penalty points and £120 delivery and collection. The total hire period was 77 days and the total charges incurred were £40,215.11 inclusive of VAT.

5. In circumstances where it is reasonable for a claimant to hire a replacement car for his own vehicle and to do so on credit hire terms, it has been established since the judgments of the majority of the House of Lords in *Dimond v Lovell* [2002] 1 AC 384 (to which I return in more detail below), that the claimant cannot recover as damages for the loss of use of his car the full amount of the credit hire, save in cases where the claimant is impecunious in the sense of not being able to afford to hire a replacement car in the normal way by payment in advance: see the decision of the majority of the House of Lords in *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067, not relevant in the present cases because neither claimant was impecunious. In cases of pecunious claimants such as the present claimants, the damages recoverable will be

the sum attributable to the basic hire rate (BHR) of the replacement car. The burden is on the defendant to demonstrate by evidence that the credit hire rate exceeds the BHR of an equivalent vehicle to that hired from the credit hire company. Where such a difference is demonstrated, that takes account of the additional services that a credit hire company provides to a claimant, such as credit, the cost of claims handling and recovery, the risk of not recovering from the defendant driver and an element of profit, all elements of betterment which the majority of the House of Lords in *Dimond v Lovell* held have to be "stripped out" and are not recoverable as damages.

6. So it was that, at the trial in the present case (as in the multitude of credit hire cases which come before the County Court), both parties produced evidence of the basic hire rate. The defendant produced evidence of hire charges for a number of allegedly comparable cars to a 5 litre Jaguar XJ, three of which were Mercedes S350s which were not in the P10 category, which left a Jaguar XJL from Civilised Car Hire at a hire rate £242.62 a day with a £1,500 excess and a Mercedes CL500 from Prestige Car Hire at a hire rate of £320.96 a day with a £3,000 excess. The terms of both hire companies said of CDW that it was "to be confirmed on booking".

7. The claimant produced a table of basic hire rates for cars in insurance group P10 compiled by APU Limited (a sister company of AEL) which showed ranges of daily hire rates from £1,000 (Signature Car Hire and Sport Car Hire) to £225 offered by three companies, Coretec Cars, Dream Car Hire and Premiere Velocity. In the case of each of those three companies, the table stated that there was a "Non waivable excess" of £2,000.

8. In his judgment, the District Judge found in favour of the claimant on most issues, holding that the claimant did have a need for a replacement vehicle and that it was reasonable for him to hire the model of Jaguar which he did. The judge also found that it was reasonable to have hired the car for 74 out of the 77 days.

9. When it came to the quantum of damages, the judge referred to the decision of the Court of Appeal in *Stevens v Equity Syndicate Management* (which had come out only the week before the hearing) and in particular to the guidance given in [35] and [36] of the judgment of Kitchin LJ (set out at [47] below) which the judge quoted. That guidance was to the effect that the lowest reasonable rate quoted by a mainstream car hire company or a reputable local company would be a reasonable approximation of the basic hire rate for the *Dimond v Lovell* exercise.

10. In the light of that judgment the judge in the present case said that: "What I am seeking to do…is to find out what is the appropriate basic hire rate for the vehicle actually hired by the claimant in this case. It is not an exact science and we have to get an approximation. So I am looking for the lowest reasonable rate quoted by a mainstream supplier for the hire of a vehicle of the kind actually hired". He then considered the evidence of basic hire rates produced by the parties. In relation to the defendant's two comparable vehicles, the Jaguar XJL and the Mercedes CL500, the judge noted that in relation to CDW the terms were "to be confirmed on booking" and accepted the claimant's submission that one simply did not know what the cost of reducing the excess to nil would be in circumstances where the burden was on the defendant to provide the relevant figures. Accordingly, the judge said he was turning to the claimant's figures.

11. He noted that he had heard of some of the car hire companies in the claimant's table, but not all, but said that he was prepared to accept that they were all mainstream suppliers. In determining the lowest reasonable rate, in accordance with the judgment in *Stevens*, he said that since the lowest figure of £225 was quoted by three companies, it was not a rogue figure and must be reasonable. He held that the lowest reasonable rate quoted by a mainstream supplier was £225 per day. With the addition of VAT that became £270 per day. Accordingly, he awarded damages of £19,980 for 74 days hire.

The grounds of appeal in *McBride*

12. The claimant puts forward four grounds of appeal in his Amended Appellant's Notice which in summary are:

(1) The judge erred in law in applying the test of "the lowest reasonable rate quoted by a mainstream supplier" in accordance with *Stevens*, as that case is inconsistent with earlier decisions of the Court of Appeal in *Pattni v First Leicester Buses Ltd* and *Bent v Highway and Utilities Construction Limited (No. 2)* [2011] EWCA Civ 1384; [2012] RTR 17 (referred to hereafter as *"Pattni/Bent (No. 2)"*) and *Burdis v Livsey* [2003] EWCA Civ 510; [2003] QB 36.

(2) Alternatively, even if it was right to apply *Stevens*, the judge erred in law in his approach to the BHR because there was no evidence that the three suppliers who quoted £225 a day were "mainstream suppliers".

(3) In any event, the judge erred in his assessment of the BHR because having said that the defendant's BHR evidence was to be disregarded because it did not demonstrate the cost of hiring at a nil excess, it was irrational to then rely on the claimant's BHR evidence which also failed to demonstrate the cost of hiring at a nil excess. He should have concluded that the defendant had not proved that the credit hire rate exceeded the BHR.

(3A) Alternatively, he had erred by failing to make a reasonable adjustment to the £225 rate to allow for the cost of an excess waiver so as to facilitate a comparable hire at a nil (alternatively low) excess.

13. At the permission hearing (permission having originally been refused on paper by Kitchin LJ), Underhill LJ only granted permission to appeal on Ground 3 and permitted the claimant to put in the alternative ground which is now Ground 3A, with the question of permission to appeal in relation to that Ground to be determined by the full Court. He did not consider that Ground 2 was arguable but said the question of permission to appeal should be determined by the full Court. On Ground 1, he said he was not persuaded that there was any arguable inconsistency between *Stevens* and the earlier decisions of the Court of Appeal and that it was extremely doubtful that exception 1 to *stare decisis* in *Young v Bristol Aeroplane Company Ltd* [1944] 1 KB 718 applied. Accordingly he was not prepared to grant permission but considered that, given the wider litigation context, there was something to be said for an authoritative ruling from the Court of Appeal. Accordingly, he adjourned the application for permission on Ground 1 to the full Court on a "rolled up" basis.

The facts of *Clayton* and the proceedings and judgments

14. The claimant was the owner of a 1973 Ford Mustang. On 31 August 2011, it was parked in a car park in Colchester, when the defendant's insured negligently drove into the front and front nearside of the vehicle. Damage was caused to the front of the car and although it was driveable, parts were hanging off. In particular the front offside headlamp unit surround, made from heavy metal, was damaged and hanging loose. The defendant arranged the repairs. It took some weeks to authorise them and then parts had to be ordered from the United States so that from authorisation to completion of the repairs was a further three weeks. In the event, the total period for which the claimant lost the use of his car was 52 days.

15. During that period, the claimant hired a series of replacement vehicles from AEL pursuant to a credit hire agreement, first a BMW M3 until a convertible Mercedes E350 became available, then a BMW M3 convertible. The district judge held that these were all reasonable replacements for the Ford Mustang, a ruling that the defendant did not and does not challenge. The daily hire charge was £355 per day. There were additional charges for CDW, £12.50 per day for Basic Excess Waiver to reduce the waivable excess from £3,500 to £1,750 and £17.50 per day for Residual Excess Waiver to reduce the residual excess from £1,750 to zero. There was also a £3 per day charge for Windscreen, Tyres and Underbody Waiver. The total hire charges were £24,823.20 inclusive of VAT.

16. Both parties served BHR evidence. Unfortunately, apparently due to a "postcode error", the claimant's evidence, in the form of a report from APU Limited did not relate to cars available for hire in Colchester but in York, more than two hundred miles away. The claimant decided not to use this evidence and at the last minute before trial produced a report of rates for hire in Colchester. At the fast track trial before District Judge Mitchell in the Colchester County Court, he held that the claimant needed relief against sanctions under CPR 3.9, but had failed to produce any evidence in support of an application for relief against sanctions as required by the Rules. He refused to admit this Colchester evidence on the basis that it was too late. This meant that there was no BHR evidence from the claimant.

17. The defendant produced a witness statement from Mr Andrew Gadd, a rates surveyor from UK Rate Services Limited. He produced evidence of hire rates for comparable vehicles to those hired by AEL to the claimant, from four national car hire companies in the Colchester area. These were all rates for a 28 day period of hire. One of these, from Thrifty, for a BMW 330, was not for a comparable car to the ones the claimant hired from AEL, which left three rates, all for Mercedes. Europcar had a basic hire rate for 52 days of £7,158.37 (excluding VAT) for a Mercedes E350 Cabriolet with an additional charge of £14 per day to reduce the excess from £1,250 to nil (although this excess reduction provision excluded 'damage caused to the vehicle hitting a bridge, car park barrier or other overhead object or damage caused by driver/renter negligence'). Avis Prestige had a basic hire rate for 52 days of £5,784.23 (excluding VAT) for a Mercedes E250 Sport Cabriolet with an additional charge of £15 per day to reduce the excess from £1,500 to £750. Hertz had a basic hire rate for 52 days of £7,391.43 (excluding VAT) for the hire of a Mercedes E250 Sport Cabriolet with an excess of £2,000. No reduction or elimination of that excess was available. Accordingly, two of the three companies would not provide a nil excess.

18. Mr Gadd did not produce any figures for a 7 day rate, or a 14 day rate in addition to his evidence about a 28 day rate, presumably because he focused on the actual length

of hire of 52 days. Prior to the trial before the district judge, the claimant did not suggest either in his pleading or in his witness statement that a 7 day rate was the appropriate rate because he had only expected to be without his car for a short period of time. However, in re-examination of the claimant, who gave evidence at the trial, counsel asked him what he had thought the timescale for the repairs would be. His evidence was that he was hoping it would be done very quickly, in hopefully about a week. That evidence seems to have been the genesis for the submission that the appropriate basic hire rate to compare with the credit hire rate should have been a 7 day rate (which would of course have been higher than a 28 day rate).

19. There was also evidence from Mr Gadd of a quotation from Questor Insurance (one of the companies providing stand-alone excess elimination insurance) obtained through an internet search. This quoted £90.26 for a 28 day period to reduce the excess on a car rental agreement of £2,000-£3,000 to zero.

20. As appears from the transcript of the proceedings, the judge clearly had a sense of anger and frustration about the fact that, despite having been given ample time following case management directions, the parties had not settled the dispute and about what he saw as inefficiency by the solicitors on both sides. However, his conduct of the hearing was not judicial: he went beyond being robust, and was hectoring and offensive and expressed views about credit hire and the insurance industry generally that he would have been better keeping to himself. Apart from what he said about 7 day rates, which I refer to below, it is not necessary to cite specific instances of what he said. My firm view is that, despite his intemperate comments, he did not show any actual or apparent bias against the claimant or in favour of the defendant. It might be said that he was even-handedly offensive.

21. Of more concern for present purposes is what the judge said during the course of submissions about the evidence or lack of it in relation to the 7 day rate. Because the judge had refused permission to the claimant to adduce the APU Colchester evidence (which was of 7 day rates, apparently in line with APU's usual practice) and because there was no evidence from Mr Gadd of anything other than 28 day rates, the judge had no evidence of 7 day rates. In those circumstances, counsel for the claimant, Ms Beaulieu, invited the judge to take judicial notice of the fact that the rate is very different if you hire for one day or if you hire for 7 days, in which case the rate goes down, or if you hire for 28 days in which case the rate goes down again.

22. Counsel for the defendant, Mr Bailey, submitted in relation to the evidence available of the 28 day rate, that assessment of rates is always a rough and ready exercise, to which the judge responded, why should it be, given that the onus was on the defendant to produce evidence of comparable rates. He said: *"without any evidence from you as to what the rate for seven days is, you are sunk, are you not?"* A little later he said: *"You had your chance: one day, seven days, 28 days. You put in 28 days. The onus is on you to disprove. How do you do it?"* Counsel said that there were sufficiently comparable rates to consider and that, even if the judge did not agree with that, this was an assessment process. The Court had very broad powers to assess what the basic hire rate was, to which the judge's response was: *"Like that?"* raising his finger in the air. Counsel pointed out that the Court had some rates and referred the judge to what counsel described as the "sanguine" approach which should be adopted to rates set out by Jacob LJ in *Bent (No 1)* (to which I will return below).

23. The judge then said, with evident sarcasm: *"What exercise should I be taking? If I find that no, this is not comparable, should I just say 'Well, with my extensive experience of hiring Mercedes 350E Cabriolets, I know that if you go for seven days instead of 28 days, you pay 25% more? Or 50% more? Or 100% more? What should I be doing then?"* Counsel suggested that the judge could either take judicial notice of the fact that if you hire a car for 52 days, as here, you generally end up with a 28 day rate or take the rates he had and apply them because they are relatively comparable. If not satisfied with the 28 day rate, the judge could apply a percentage uplift such as 20%. The judge asked why it would be 20%, to which counsel said the Court had broad assessment powers. The judge's response was: *"Which is actually putting a bit of seaweed out of the window to see if it is raining, is it not? You want me to guess?"* Counsel said he did not want the judge to guess but to take a sanguine approach to stripping out what the courts have said are irrecoverable benefits (another reference to *Bent (No 1)*). He also pointed out that the point about the 7 day rate was not pleaded and only emerged in re-examination of the claimant that day. The judge suggested that was a risk that the defendant took by running the case to trial.

24. In relation to the nil excess, counsel for the claimant relied upon the judgment of Morison J in *Bee v Jenson* [2006] EWHC 3359 (Comm); [2007] RTR 32 (to which I will return later in this judgment) in support of the submission that a person in the position of the claimant was entitled to hire a car with a nil excess. She pointed out that with prestige cars, such as in this case, there was generally a great problem getting a nil excess from car hire companies, hence the defendant's reliance on a quote from Questor Insurance of £90.26 for a 28 day period to reduce the excess to zero. She submitted that the judge should ignore the Questor quote on the basis that it was not part of the basic hire rate from the car hire companies which were not, therefore, comparable rates. Also, obtaining cover with Questor was not something which ordinary people did when hiring a car. She also pointed out that there was no quote from Questor indicating they would cover for 52 days.

25. In response, counsel for the defendant submitted that the claimant had not said in evidence that he needed a nil excess and that what was said in *Bee v Jenson* was only obiter. In relation to the suggestion made in other cases that the basic hire rate from car hire companies was not comparable because they would not provide a nil excess, he submitted that in the present case there was evidence of the Questor Insurance product, readily available from an internet search and vastly less expensive than the cost of a nil excess with AEL.

26. The judge proceeded to judgment immediately after submissions. He began by referring to the fact that the defendant's report ignored the fact that the rates would be for shorter periods than the 52 days. He said that once again he had to do the best he could when the solicitors had shown a total inability to run the case in an effective, cost-effective way. He found for the claimant on the type of vehicles hired from AEL and the period of hire. In relation to rate, he referred to *Dimond v Lovell* so he was clearly aware of the exercise in which he was engaged. He alighted on the Hertz rate for a Mercedes E250 given by Mr Gadd. He referred to the two bases on which the claimant disputed that as a comparable rate. First was the absence of a nil excess. He referred to the defendant's suggestion that Questor should have been used to reduce the excess to zero as: *"quite a rich argument…because it is they who have come up with this idea that people are supposed to ring up or do their own arrangements".* He

said that until he started doing these cases he had never heard of Questor and doubted whether the claimant would have done. He would have been faced with a large excess, so the Hertz rate was not on a like-for-like basis.

27. The second basis for disputing this as a comparable rate was that it was for a 52 day hire when, if he had been doing it for himself, the claimant would have been looking for a seven or fourteen day hire, not imagining that the repairs could take as long as they did. The judge said in terms at [14] of his judgment that he could use judicial knowledge to find that you pay more for a seven or fourteen day hire than if you say you want a long term hire for 28 or 52 days, so that the hire rate put forward was also not on a like-for-like basis.

28. In the last paragraph of his judgment, the judge went on to find in favour of the defendant in these terms:

> "15. But do I then just say that, because it is not like-for-like, I take no notice whatsoever of the fact that you can hire for 52 days at a rate for £10,500 instead of the £24,000 claimed by Accident Exchange? Well it would stick in my craw to do that and I am not going to do that. I am going to have to take a rather rough and ready approach to the two elements. Yes, I expect if you went for a no waiver, you would probably pay maybe another 10%; and, if you said you wanted it only for a seven-day rather than a 28-day rate – I am just going to have to make a guess at it – I think you would probably pay another 15%. So, all in all, you would probably end up paying something like 25% more if it was a like-for-like. Going for the top rate of £10,505.33, that comes out at £13,131.66, and that is my award of damages in this case."

29. The claimant appealed that decision to a Circuit Judge. HHJ Staite at Chelmsford County Court dismissed the appeal in a judgment dated 2 October 2014. The claimant's criticism focused on the last paragraph of the judgment of District Judge Mitchell, submitting that whilst there was a wide margin of discretion, the judge had referred to the 15% uplift as a "guess" and his reference to it sticking in his craw to find for the claimant showed a prejudice which he should have put aside and made a full finding in favour of the claimant. HHJ Staite was referred by counsel (Mr Williams on that appeal) to the various comments the judge had made about guesswork and the like during the course of argument (which I referred to at [22] and [23] above). Counsel submitted that the district judge had then carried out exactly the guessing exercise he had shunned in making the upward adjustment of 15% in respect of the period of hire.

30. HHJ Staite concluded that the reference to it sticking in his craw to find for the claimant by the district judge was inflammatory language which did give the appearance of bias in favour of the defendant and which she found was not an appropriate exercise of judicial discretion and decision making. On the basis of that conduct at the hearing, she granted permission to appeal. However, she went on to dismiss the appeal. She said the judge knew the law and had made it very clear that he had considerable experience of these type of cases. She then said:

> "24…It seems to me in my overview of the case that the district judge applied his knowledge and experience of credit hire cases to the best of his ability having regard to the paucity of evidence before the court. He adopted (entirely properly) the Hertz figures for basic hire rates (£10,505) and then provided for a 25% adjustment upwards to reflect the sum payable for excess insurance cover and the differential costs of hire for 7 and 28 days. There was some limited evidence from Mr Gadd to support the 10% excess waiver adjustment (which is not appealed against) and although there was no direct evidence to support the 15% for the period of hire, I have concluded that this judge, with his level of experience, did his best and arrived at a percentage adjustment, which, even if lacking documentary support, fell within the range adjustment which he could reasonably apply to the facts of this case. Although there was a lack of clarity (from an evidential perspective) about the 15% adjustment, the alternative resolution of the case that the claimant should therefore succeed on [his] claim in full, did not as I find, meet the justice of the case.
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> 25. It is clear from the decided cases that if there is some evidence before the court to challenge the credit hire rates claimed by a claimant, the court will make an appropriate adjustment from the pleaded claim to reflect the betterment element of the credit hire agreement. It is only if the claimant's evidence for the full amount of the credit hire is unchallenged in its entirety by the defendant…[that] the court [will] contemplate an award of damages which reflects the full amount claimed under the credit hire agreement."

31. The reference to there being no appeal against the 10% adjustment in respect of nil excess is in error. This was also the subject of appeal, the claimant arguing that it was arbitrary. The defendant had also cross-appealed against the district judge's refusal to endorse the Questor Insurance policy as providing comparable excess waiver cover to AEL, on the basis that the judge's 10% adjustment in respect of nil excess was too generous to the claimant. HHJ Staite refused permission to appeal on the cross-appeal, saying she supported the judge's findings that it would not have been reasonable to expect the claimant to have obtained additional insurance from Questor to cover any excess on car hire from Hertz. She concluded that the 10% adjustment for nil excess was well within the ambit of the judge's discretion when carrying out the evaluation exercise on this issue.

The grounds of appeal in *Clayton*

32. The claimant advances five grounds of appeal in this Court which in summary are:

(1) Having found that the District Judge's approach was or appeared to be biased, it had been irrational and wrong in law for HHJ Staite to accord the District Judge the 'margin of appreciation' appropriate for a fair and unbiased tribunal.

(2) HHJ Staite was wrong in any event to affirm the decision of the District Judge as a reasonable exercise in evaluation having regard to his 'experience and knowledge' given that he had expressly disavowed any such experience and knowledge and stated in terms that he was making a guess. HHJ Staite had no more knowledge than he did to determine whether he was correct.

(3) HHJ Staite should have concluded that by making a guess the District Judge went outside the widest parameters of judicial decision making and should have concluded that the defendant had failed to discharge the burden of proving that the credit hire charges were unreasonable.

(4) Alternatively, if it was open to the District Judge to guess, HHJ Staite should have concluded that there should be a greater allowance for the margin of error in favour of the claimant and should have increased the 25% increment to no less than 100%.

(5) HHJ Staite had erred in law in stating that the authorities showed that the court will only allow full hire charges to be recovered where a defendant serves no evidence to challenge a claim. The relevant principle is that it is for the defendant to prove by evidence that the credit hire charges exceed the basic hire rate and, if so, by how much.

33. Permission to appeal was granted on all grounds by Tomlinson LJ at an oral hearing on 26 January 2016 (following initial refusal on paper by Kitchin LJ on 4 June 2015). Tomlinson LJ directed that the appeal should be heard together with the rolled up permission to appeal hearing and appeal in *McBride*.

The legal background in relation to assessment of the basic hire rate

34. Before considering in more detail the submissions made by Mr Benjamin Williams QC in *McBride* as to why *Stevens* is inconsistent with the earlier Court of Appeal authorities and/or wrongly decided, it is necessary to examine how the law has developed in relation to the assessment of the basic hire rate in credit hire cases. This legal background is also of some relevance to the appeal in *Clayton*. It is not necessary to examine all the legal principles established by the earlier decisions, as these are distilled in a helpful analysis by Aikens LJ in *Pattni/Bent (No. 2)* at [29] to [41] of his judgment. I intend to focus on the assessment of the basic hire rate.

35. The starting point is the speech of Lord Hobhouse in the House of Lords in *Dimond v Lovell* [2000] UKHL 27; [2002] 1 AC 384, the case in which, albeit obiter, the majority of their Lordships laid down the principles by reference to which damages have been assessed in credit hire cases in the intervening fifteen years and more. At 403G he said:

> "However it is much more expensive than simply hiring a car from an ordinary car hire company. The evidence was that it cost Mrs. Dimond £41.37 per day to hire from the accident hire company First Automotive; a similar car could have been got from an ordinary car hire company for under £24 per day. The reason for this discrepancy is not hard to seek. The accident hire company is doing more than just hiring out a car. It is

> financing the transaction until the expected recovery is made from the other party; it is bearing a commercial (though normally not the legal) risk that there may be a failure to make that recovery; it is bearing the cost of handling the claim and effecting the recovery. The £17 per day covers this and a margin of profit."

36. At 407A-B he made the same point:

> "What Mrs. Dimond was paying for here was more than the cost of hiring a car for a week. It was reasonable for her to pay the additional sum in order to obtain the additional benefits enjoyable under the scheme even though the accident hire company were under no legal obligation to do more than provide her with a car on credit. The sum which she paid, having regard to what she was to get was, on the evidence, reasonable. But she cannot claim the whole cost as the cost of mitigating the loss of the use of her car. The cost of that was, on the evidence, only about £24 per day."

37. Given that, as appears from [10] of Sir Richard Scott V-C's judgment in the Court of Appeal: [2000] 1 QB 216 at 223, the basic hire rate for car hire in the relevant area for the relevant period varied between £23.89 and £27.42 per day, it is quite clear from Lord Hobhouse's reference to £24 per day, that he had in mind that the lowest locally available hire rate represented a reasonable approximation of the BHR. I also agree with Mr Steven Turner's submission on behalf of the defendant that it is implicit in Lord Hoffmann's reference at 402H to the value of the additional benefits being represented by: "the difference between what [the claimant] was willing to pay [the credit hire company] and what she would have been willing to pay an ordinary car hire company for the use of a car", that he also had in mind the lowest reasonable rate locally available. It belies common sense that a reasonable person in the position of the claimant, confronted with a range of rates, would normally do anything other than pick the lowest reasonable rate from a reputable car hire company.

38. The appeals heard together in *Burdis v Livsey* [2002] EWCA Civ 510; [2003] QB 36 included appeals in four test cases decided by HHJ Charles Harris QC in the Oxford County Court. One of the issues in those cases was how the spot hire rate or basic hire rate was to be calculated in circumstances where hire rates were in constant flux and different companies' hire rates varied considerably. As the Court of Appeal (Aldous, Tuckey and Jonathan Parker LJJ) recorded in their judgment at [137] to [139], the judge identified three ways of arriving at the correct measure of loss:

> "137…First, to break down the charge made by the accident hire car providers so as to enable the unrecoverable element to be stripped out. This was in theory an acceptable solution, but the judge rejected it as being too cumbersome and expensive in hostile litigation as it would entail detailed disclosure and analysis in thousands of small cases. The cost involved would not be proportionate and for that reason he did not favour it as a practical solution. We agree.

> 138 The judge's second approach was to apply a "reasonable discount" to the rate charged which would by its nature be somewhat arbitrary. We understand that this approach has been adopted in a number of cases. Even so, we do not believe it appropriate in the absence of agreement between the parties or without cogent evidence as to what the discount should be. Further, as the judge pointed out, once the courts start applying a particular discount the total charge may be increased. For those reasons we do not favour this approach.
>
> 139 The third solution was to look at actual locally available figures. That, the judge said, leads to the difficulty of deciding what figures should be taken and from where. Should the highest figure be taken or the lowest or an average?"

39. In applying that third approach, the judge took the average of the rates set out by the experts and concluded that the figures of the defendants' expert, Mr Mainz plus 10% might reasonably be accepted as a guide for general use. The Court of Appeal rejected that approach at [146] to [148] of its judgment:

> "146…If Mainz plus 10% is justified to arrive at the reasonable charges incurred in hiring a replacement car, then it must be capable of application whether or not an accident hire company is involved. That cannot be right. A person who needs to hire a car because of the negligence of another must, subject to mitigating his loss, be entitled to recover the actual cost of hire not an average derived from the Mainz report. If the principle adopted by the judge is correct then it would seem appropriate also to apply that principle to the cost of car repair, namely a claimant may only recover the average of the charges of garages. But a person whose car is damaged should in appropriate circumstances recover the cost to him of repair and loss of use. His recovery should not be restricted to an average of car repair or hire rates nor should he be able to recover that average cost if the actual cost is less. We believe that the solution is to apply normal legal principles.
>
> 147 The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use and he establishes a need for a replacement, he is entitled to the cost of hiring a replacement car. He can go round to the nearest car hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances.
>
> 148 We do not anticipate that the application of the correct legal principles will lead to disproportionate costs in small cases. The claim will be based on evidence as to the rate

> charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates. Thereafter the evidential burden passes to the insurers to show that it would not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate. What is reasonable and whether a loss is avoidable are questions of fact, not law, which district and county court judges regularly decide. It can arise in many different types of cases, ranging from damage to chattels to a failure to take action. We do not believe that a decision on such issues in respect of car hire charges will be any more difficult than in respect of car repair charges." (emphasis added)

40. This reasoning, particularly the passages I have underlined, is illuminating in considering whether, as Mr Williams QC contends, *Stevens* was wrongly decided. As I see it, the reference to not being able to recover the average cost if the actual cost is less in [146] is predicated on the actual cost being the lowest reasonable rate, otherwise it could not be less than the average. By definition, if Mr Williams QC were right that the claimant is entitled to adopt a rate at the top end of a range, the actual rate could never be less than the average. The second underlined passage also recognises that if the defendant can show that the rate at the top end of the range is not the rate which a reasonable person hiring in the local area would have been willing to pay, then it will not be reasonable to take the higher rate. The reasonable person in the position of the claimant will normally be willing to pay no more than the lowest reasonable rate available locally from a reputable car hire company.

41. In *Pattni/Bent (No. 2)* [2011] EWCA Civ 1384; [2012] RTR 17, as I have said, Aikens LJ reviewed the earlier authorities and summarised in a series of propositions at [29] to [41] of his judgment the approach to be adopted in these cases. Relevantly for present purposes, he reviewed the three possible methods of calculating the basic hire rate identified in *Burdis v Livsey*. He noted that the Court of Appeal in *Burdis* had rejected the first approach, of breaking down the charges made by credit hire companies so as to strip out the irrecoverable elements on the basis that it would entail detailed disclosure and analysis, which would be cumbersome in small cases and would lead to disproportionate costs. However, at [38] he observed that this did not mean that such an approach was wrong in law and that if such direct evidence were available, it might very well be the best evidence.

42. At [39] he agreed with *Burdis* in rejecting the second approach of applying a reasonable discount to the credit hire rate, as being too arbitrary. At [40] he identified the third method, preferred by the Court in *Burdis* of looking at actual locally available figures for car hire. He endorsed the statement at [146] of *Burdis* that the claimant must be able to recover the actual cost of hire, not an average cost of hire, and continued:

> "Once the court has concluded that it was reasonable for the claimant to hire the type of car that he did, then the task of the court is to find what constitutes the BHR for the particular type of car actually hired. As this court put it at [147] in *Burdis*:

> '[The claimant] can go round to the nearest hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However, the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances.'
>
> 41 In practice, therefore, on the issue of what BHR is recoverable in a case where the claimant who has hired on credit is not "impecunious", a judge may have two sorts of evidence. First, he may have direct evidence, in the form of published rates, from the actual credit hire company that hired the replacement car which demonstrates either that the credit hire rate and the BHR for that type of car is the same or it is different and what the difference is. Secondly, the judge may have evidence of the BHR charged by other car hire companies in the area for the type of car actually hired. From that he will be able to ascertain, on a balance of probabilities, what the BHR for the actual type of car hired was and so arrive at the measure of damages recoverable, subject to the issue of the reasonable time for hiring the car."

43. At [73] Aikens LJ summarised the questions to be asked in calculating the basic hire rate:

> "To summarise, the questions are: (i) did the claimant need to hire a replacement car at all; if so, (ii) was it reasonable, in all the circumstances, to hire the particular type of car actually hired at the rate agreed; if it was, (iii) was the claimant "impecunious"; if not, (iv) has the defendant proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the BHR for the model of car actually hired and if so what is it; if so, (v) what is the difference between the credit hire rate and the BHR?"

44. *Stevens v Equity Syndicate Management* [2015] EWCA Civ 93; [2015] 4 All ER 458 was a second appeal to this Court. One of the issues was what sum was attributable to the basic hire rate of the replacement vehicle the claimant hired on credit hire from AEL, which was also the credit hire company in that case. At first instance, the recorder took an average of rates quoted by four mainstream car hire companies to arrive at the basic hire rate of £63.02 per day. On appeal it was common ground that this approach of taking an average was contrary to the decisions of the Court of Appeal in *Burdis* and *Pattni*/*Bent (No. 2)*. Nevertheless, Burnett J (as he then was) upheld the recorder's decision on the basis that despite his error in taking an average, he had not arrived at a figure to the claimant's disadvantage because the correct approach would have led to a slightly lower figure. Burnett J considered that the correct approach would have been to take a figure somewhere in the middle of the range of rates, to reflect the fact that the claimant was not particularly affluent and had demonstrated by his evidence his disinclination to spend more than necessary.

45. In his judgment in the Court of Appeal, Kitchin LJ (with whom Jackson and Floyd LJJ agreed) set out in detail the general principles to be derived from the line of cases running from *Dimond v Lovell* to *Pattni*/*Bent (No. 2)*. He quoted the passages from the judgment of Aikens LJ in *Pattni/Bent (No. 2)* at [40]-[41] and [73] which I set out above. In relation to the latter passage, he said this at [21]:

> "This is a helpful passage for it explains a structured approach which may usefully be adopted in deciding cases of this kind. It also makes clear once again that the burden lies upon the defendant to establish that there is a difference between the credit hire rate actually paid and the BHR for the model of car actually hired. The aim of the exercise is, Aikens LJ continued (at [74]), to ascertain the BHR for the vehicle that the claimant actually hired. After again referring to the decision of this court in *Burdis*, Aikens LJ emphasised (at [76]–[77]) that, so long as it was reasonable to hire a particular vehicle and the credit hire rate was reasonable, the court has to calculate the BHR on the basis that the claimant notionally went round to an equivalent non-credit vehicle hire company. As he put it, the claimant has not gone out to hire a vehicle on non-credit terms but the object of the exercise is to find out what the BHR would have been had he done so. That figure can only be arrived at on an objective basis."

46. Later in his judgment, he returned to the three possible approaches to assessing the basic hire rate identified in *Burdis* and analysed further by Aikens LJ in *Pattni/Bent (No. 2)*. At [32] he posed the question how a judge in a fast track claim was to proceed in applying the third, preferred, approach:

> "Should the judge take a figure from the top or the middle or the bottom of the range? Or should he take an average? Or should he conclude, as Mr Butcher [counsel for the claimant] urges us to conclude in this case, that, if one of the figures at the top of the range is close to or exceeds the credit hire rate, then the defendant has simply failed to prove that the BHR is less than the claimed credit hire rate and so not apply a discount at all?"

47. Kitchin LJ referred at [34] to the difficulty faced because credit hire companies do not routinely value the additional benefits but charge a single credit hire rate, so that any attempt to value the benefits subsequently in a proportionate way necessarily involves a degree of imprecision. He then continued:

> "…Nevertheless, as Lord Hoffmann went on to explain in *Dimond*, a reasonable estimate could be arrived at by considering what Mrs Dimond would have been willing to pay an ordinary hire company for the use of a car. I do not understand Lord Hoffmann to have been saying that it was necessary to consider what Mrs Dimond would herself have been prepared to pay. The attitude of the driver who is not at fault must be irrelevant to the analysis. For example, it may be

> that, as in the present case, that person would never have hired a car at all. The analysis is, as Aikens LJ said in *Pattni*, an objective one and it is to determine what the BHR would have been for a reasonable person in the position of the claimant to hire a car of the kind actually hired on credit.
>
> 35 Here I think one finds the answer to the questions I have posed. The rates quoted by companies for the basic hire of a vehicle of the kind actually hired by the claimant on credit hire terms may vary. No doubt some are offered on very favourable terms. So also those at the top of the range may reflect particular market conditions which allow some companies to charge more than others. But it seems to me reasonable to suppose that the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the claimant is a reasonable approximation to the BHR. This is likely to be a fair market rate for the basic hire of a vehicle of that kind without any of the additional services provided to the claimant under the terms of the credit hire agreement.
>
> 36 It follows that a judge faced with a range of hire rates should try to identify the rate or rates for the hire, in the claimant's geographical area, of the type of car actually hired by the claimant on credit hire terms. If that exercise yields a single rate then that rate is likely to be a reasonable approximation for the BHR. If, on the other hand, it yields a range of rates then a reasonable estimate of the BHR may be obtained by identifying the lowest reasonable rate quoted by a mainstream supplier or, if there is no mainstream supplier, by a local reputable supplier. I would reject Mr Butcher's submission that in circumstances such as these it is permissible simply to look at the highest figure in the range and, if it is greater than or equal to the claimed credit hire rate, conclude that the defendant has failed to prove that the BHR is less than that rate. That, it seems to me, would be manifestly unjust particularly since the credit hire company is in the best position to elaborate upon and give disclosure relating to its charging structures but has not been required to do so in light of the modest size of the claim."

48. Kitchin LJ commented at [37]:

> "I believe that this approach is not only consistent with the observations of Lord Hoffmann in *Dimond* but also with those of Lord Hobhouse. It will be recalled he thought there were other ways of reaching the same answer, one of which was that preferred by Judge LJ in the Court of Appeal. He had taken the view that the excess cost was not reasonably incurred as the cost of hiring the substitute car. The right of recovery was limited to the reasonable cost, that is to say the lesser sum."

He then went on to find that the approach adopted by Burnett J had been erroneous, but that the correct approach would have yielded a figure very close to, albeit slightly less than that arrived at by the recorder, so that the appeal was dismissed.

Ground 1 in *McBride*: Was *Stevens* wrongly decided?

49. Mr Williams QC's primary submission in support of his application for permission to appeal on Ground 1 was that *Stevens* was wrongly decided because it was inconsistent with the earlier decisions of this Court in *Burdis* and *Pattni/Bent (No. 2)*. He submitted that *Stevens* was particularly difficult to reconcile with what Aikens LJ said at [76] of *Pattni/Bent (No. 2)*:

> "Given that the claimant will actually have hired the replacement car on credit hire terms, I take that passage to mean that even if the credit hire rate for the car hired is at the top of the range of credit hire rates, so long as it was reasonable to hire that car and the credit hire rate is reasonable, then the court has to calculate the BHR on the basis that the claimant notionally went round to an equivalent non-credit car hire company. If there is a difference between the two rates, the claimant will recover the BHR that the non-credit car hire company would have charged, even if the BHR that the car hire company charged was at the top end of the range, provided that the claimant acted reasonably."

50. In those circumstances, Mr Williams QC submitted that the first exception to the doctrine of *stare decisis* recognised in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718 at 729 applied: that the Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow. Mr Williams QC urged us to follow *Pattni/Bent (No. 2)* rather than *Stevens*, submitting that the long term viability of the credit hire industry was at stake and that, prior to *Stevens*, cases had proceeded on the basis that, provided that the credit hire rate did not exceed a basic hire rate which was within the range of such rates, even if at the upper end of that range, the credit hire rate would be recoverable.

51. Mr Williams QC also submitted that the third exception to *stare decisis* in *Young v Bristol Aeroplane* was applicable, that *Stevens* was decided per incuriam, because it had failed to refer to the decision of this Court in *Dickinson v Tesco* [2013] EWCA Civ 36; [2013] RTR 27.

52. In his oral submissions, Mr Williams QC recognised that he faced an uphill struggle on this first ground and essentially took his stand on asking this Court to grant permission to appeal but then, if so minded, to dismiss the appeal, so that AEL would, if it could persuade the Supreme Court to grant permission to appeal on this ground, have the opportunity of ventilating its arguments about the correct approach to assessing the basic hire rate before the Supreme Court. At the end of his oral submissions on this ground, we indicated that we would adopt that course, gave permission to appeal but said the appeal would be dismissed for reasons to be given in our judgment. Those reasons I can set out briefly.

53. I am far from satisfied that there is any real conflict between *Stevens* and *Pattni/Bent (No. 2)*. As Aikens LJ recognises in [76] and elsewhere in his judgment, such as at [40] and [46], taking a basic hire rate at the top end of the range is always subject to the claimant having acted reasonably. In practical terms, if the defendant can show that a basic hire rate at the top end of the range exceeds the lowest reasonable rate within the range charged by a mainstream supplier or reputable local supplier, then the claimant will not recover more than that lowest reasonable rate, unless he or she can demonstrate that it was appropriate on the facts of the particular case to take some higher rate, which is extremely unlikely ever to be the case. In a modern context, where it is no longer necessary to pore through the Yellow Pages and telephone a whole series of car hire companies, but comparable prices can be obtained very quickly and painlessly through an internet search, the reasonable person in the position of the claimant will not wish to pay more than the lowest reasonable rate charged by a mainstream supplier or a reputable local supplier.

54. Furthermore, it will be apparent from my analysis of the earlier authorities that I agree with Kitchin LJ that the approach of taking the lowest reasonable rate of a mainstream supplier or a reputable local car hire company is entirely consistent with the analysis of the majority of their Lordships in *Dimond v Lovell*. As I have already intimated at [19] above, it seems to me that Kitchin LJ's approach is also consistent with the relevant passages in the judgment of the Court of Appeal in *Burdis* which I highlighted at [39] above.

55. I am not impressed with the suggestion that *Stevens* was decided per incuriam. The four appeals considered in *Dickinson v Tesco* concerned procedural issues arising out of widespread dishonesty by Autofocus, a company which provided market evidence of basic hire rates. The appeal was not concerned with the method to be adopted in calculating the basic hire rate. It is also noteworthy that, in *Stevens*, the credit hire company was AEL and that the claimants were represented by Mr Christopher Butcher QC (who also acted for the claimants in *Pattni/Bent (No. 2)*) and who has considerable experience of credit hire cases. It seems to me highly unlikely that, if there had been anything in *Dickinson* which was thought to have any bearing on the analysis in *Stevens*, Mr Butcher QC would not have cited *Dickinson* to the Court of Appeal in *Stevens*. Mr Williams QC sought to counter this sort of point by suggesting that the "lowest reasonable rate" had not been contended for in *Stevens*. However, as Mr Turner was able to demonstrate, that was simply wrong. The argument for the lowest reasonable rate was expressly advanced by Mr Turner on behalf of the motor insurers/defendant in *Stevens*.

56. For those reasons, I consider that *Stevens* was correctly decided and that, in any event, it is binding on this Court. Although permission to appeal is granted on the first ground, the appeal is dismissed.

Ground 2 in *McBride*: the rate allowed not the rate of a mainstream supplier

57. The second ground of appeal, on which Mr Williams QC also seeks permission to appeal can be disposed of even more shortly. Mr Williams QC argued by reference to the evidence before the judge that none of Coretec, Dream Hire Care or Premiere Velocity was a mainstream supplier of hire cars and that none of them was an appropriate post-accident provider of a hire car for 74 days. Rather they catered for the "event" end of the market, providing luxury cars on short term hire for weekends,

stag parties and the like. I agree with Mr Turner that there is nothing in this ground. On the evidence before him, the judge was entitled to conclude that each of these companies was a mainstream supplier or, at the very least, a local reputable supplier. This proposed ground of appeal seeks to challenge the judge's findings of fact on a point which was open to him on the evidence and which cannot be disturbed on appeal. The application for permission to appeal on this ground is refused.

Ground 3 in *McBride*: the nil excess point

The parties' submissions

58. The issue relating to nil excess was where the overlap lay between the two appeals. As Mr Williams QC said, in *McBride* the evidence of the claimant was that whilst he had a low excess of £100 or £200 on his own car insurance, whenever he hired a car he always took out CDW to reduce the excess to nil. It is implicit in [19] of the judgment, rejecting the defendant's BHR evidence because none of the car hire companies allowed a nil excess, that the judge accepted that it was reasonable for the claimant to take full CDW with AEL reducing the excess on the insurance of the hire car to nil. In any event, on the reasonableness of that course of action, Mr Williams QC relied upon the decision of Morison J in *Bee v Jenson* [2006] EWHC 3359 (Comm); [2007] RTR 32 at [15]-[16]:

> "15 On the question of quantum, it is now clear on the evidence that the rate charged by Helphire, with a nil excess, was very good value for money, by comparison with other spot rates. Many hire companies are unwilling to remove the excess; some will merely reduce it. Had the point been live, I would have held that it was reasonable for the replacement vehicle to have been provided with a nil excess regardless of the excess which applied to Mr Bee's own car. I do so for the reasons advanced by Mr Butcher. I quote from para.35 of his skeleton argument, with which I fully agree:
>
> > 'The fallacy in [the defendant's expert witness'] case on [collision waiver damage] is that whilst asserting the betterment of the nil excess, he disregards the detriment [Mr Bee] suffered by being placed in a car belonging to a hire company. He treats Mr Bee as if, on receiving the hire car, he was in the same position after the accident as he was before it. Obviously, he was not. He was not in his own car; he was in somebody else's. He was obliged to return the car in the same state as he received it. Were his own car damaged, he could defer repairs, perform amateur or temporary repairs or not bother with repairs. These would not be options with Helphire. Moreover, were [Mr Bee] to blame for damage to that vehicle, he would be subject not only to a claim for the cost of repair, but also for Helphire's loss of profit whilst it was out of commission. In other words, by forcing [Mr Bee] into a hire vehicle, [the defendant] was exposing him to risks which he did not previously face, such that his insurance needs were different.

> As such, it is impossible to portray the nil excess as a betterment. It was a reasonable arrangement, consequential on the tort.'
>
> 16 In any event, there is a decision on this issue in a decision of the Court of Appeal given on February 20, 1985 in *Marcic v Davies* [1985] C.L.Y. 12. There, the court held that the claimant who hired a replacement vehicle and paid the waiver fee to achieve a nil excess when his own excess had been £150 was entitled to recover that fee since if there had been no collision the claimant would "never have come under any contractual liability to the car hire company". "It was entirely reasonable that he should pay the waiver fee to cover himself against a contractual liability which he would otherwise never been under": per Browne-Wilkinson L.J. Mr Flaux accepts that this case is binding on me. I have no hesitation in following it for the reasons expressed above."

59. Given that it was reasonable to hire from AEL with a nil excess, Mr Williams QC submitted that the appropriate comparator in assessing whether the credit hire rate was reasonable or exceeded the basic hire rate was with rates of hire from car hire companies which provided a nil excess. The judge had recognised this in declining to use the defendants' BHR evidence for the comparison exercise at [19] of his judgment, but had then fallen into error in [20] by overlooking the fact that the three suppliers at £225 per day in the claimant's evidence also had excesses of £2,000, so that the judge should have concluded that there was no BHR evidence to demonstrate that the credit hire rate exceeded the basic hire rate. Given that the burden of proof was on the defendant to so demonstrate, Mr Williams QC submitted that the judge should have awarded the full credit hire rate.

60. Mr Williams QC recognised that in other cases this position might lead to extreme results and he accepted that if CDW/nil excess was not available in the car hire market but a mainstream provider was prepared to hire a comparable car to that hired from the credit hire company with a modest excess of a few hundred pounds, then it could be said that it was not reasonable to insist upon the credit hire rate with a nil excess. In such a case, the full credit hire rate would not be recoverable but only the basic hire rate plus some allowance for the nil excess. However, he emphasised that the present was not such a case. There was no evidence that it was not possible to hire this Jaguar on the car hire market with a nil excess and the defendant had not put forward any rate quoted by a mainstream or reputable local supplier with a modest excess of the kind to which he had referred.

61. Mr Williams QC made submissions on the alternative Ground 3A, on the basis that, if the Court was against him on his principal Ground 3, the Court should make some reasonable adjustment upwards of the £225 basic hire rate to reflect the cost of a nil excess in order to reflect a true comparison with the credit hire rate which included a nil excess. He submitted there were three indicators towards an appropriate adjustment.

62. First, there was some evidence before the judge (and indeed before the District Judge in *Clayton)* of the availability of alternative stand-alone insurance products which

would provide cover to reduce the excess or CDW on a hire car down to zero. In the present case, the relevant cover was from Insurance4carhire.com and in *Clayton* it was from Questor. Mr Williams QC submitted that the evidence about this alternative product in this case was exiguous. The evidence in the witness statement served on behalf of the defendant in April 2014 was that Insurance4carhire.com would not insure vehicles valued at over £50,000, which the relevant Jaguar would have been. Further evidence was produced that by October 2014, the limit had increased to £65,000. However, even assuming that the Jaguar hired from AEL was worth less than that because of its age (11 registration so 14 to 20 months old at the start of the hire), Mr Williams QC pointed out that the evidence from April 2014 was closer to the date of the accident in November 2012. It was apparent that, as at the date of the accident, this product would not have provided cover for a vehicle of the value of the Jaguar hired from AEL. Mr Williams QC also pointed out that the terms and conditions of Insurance4carhire.com were for cover for up to 62 days, whereas the period of hire in the present case was for 74 days, and there was no evidence that they would have extended cover beyond 62 days. Overall, Mr Williams QC submitted that the defendant, upon whom the burden lay, had simply not produced evidence that this product would have provided nil excess cover for the relevant car over the relevant period of hire.

63. The second indicator of what would be a reasonable adjustment was the amount which AEL charged for a nil excess in the present case, £10 per day, but Mr Williams QC submitted that this was not a true indication of the cost of a nil excess from an alternative source to the credit hire company. The third indicator was that one of the car hire companies on the defendant's table, Avis Prestige, would have charged £20 per day to reduce their standard excess of £2,000 down to £1,000. Mr Williams QC submitted that, in determining what the appropriate adjustment would be to reflect a nil excess, given that the burden of proof was on the defendant, the Court should make an adjustment on a basis favourable to the claimant, which he submitted would be £50 per day.

64. Mr Turner reminded us that the purpose of the exercise is to strip out the surplus costs occasioned by the claimant's decision to hire on credit. Although he accepted that the burden of proof was on the defendant to demonstrate that the credit hire rate exceeded the basic hire rate, he pointed out that the only exception where the credit hire rate was recoverable without that stripping out exercise taking place which had been recognised as a matter of law, was the impecunious claimant who was treated differently because he or she had no way of hiring a car except on credit hire terms: *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067. He submitted that the effect of Mr Williams QC's argument in the present case would be to undermine the stripping out exercise which *Dimond v Lovell* had said should take place in principle by extending the *Lagden* exception to cases where the defendant could not show the availability of a nil excess from car hire companies. This would be wrong in principle.

65. He submitted that in the present case, it could be seen that the hire rate from AEL before the application of any nil excess was £409 per day and it was that figure which could and should be compared with the £225 from the three suppliers identified by the judge, demonstrating that, leaving the nil excess question out of account, there were differences between the credit hire rate and the basic hire rate which should be

ascribed to the irrecoverable elements of credit hire, applying the principles laid down in *Dimond v Lovell*.

66. Mr Turner submitted that a separate question then arose as to whether it was reasonable for the claimant to pay £10 per day to the credit hire company to eliminate the excess of £2,500 which would otherwise apply. That question could and should be viewed separately from the comparison between the credit hire rate before the nil excess and the basic hire rate with the excess. Although he recognised that the Court might well conclude that it was reasonable for a claimant who hired a car to protect himself with a nil excess for the reasons accepted by Morison J in *Bee v Jenson*, he submitted that the availability of the nil excess should be treated separately from the credit hire rate/BHR exercise, effectively as an optional extra in the same way as collection and delivery charges: see [153] of *Burdis*. He submitted that in *Marcic v Davies* the CDW charge had been treated separately from the cost of car hire generally in a similar way.

67. On the facts of this particular case, he submitted that the judge had had evidence before him in relation to the cost of a nil excess of the £3.99 per day charged by Insurance4carhire.com and the £10 per day charged by AEL which the claimant had agreed to pay. Whilst the judge had not addressed the recoverability of an element for the nil excess in his judgment, Mr Turner submitted that counsel for the claimant had not pursued the point with sufficient vigour in his submissions to the judge and had not sought clarification after the judgment was delivered ex tempore, so that his primary position was that the appeal should be dismissed.

Analysis and conclusion

68. I agree with Mr Turner that the inability to obtain a nil excess from a mainstream supplier or reputable local supplier of hire cars in circumstances where, as in the present case, the evidence demonstrates that there is a difference between the credit hire rate before the application of any nil excess and the basic hire rate without the availability of a nil excess, which demonstrates that the credit hire rate includes the irrecoverable elements identified in *Dimond v Lovell*, should not as a matter of principle, lead to the credit hire company recovering the credit hire rate in full. That would erode *Dimond v Lovell* and would in practice lead to a further exception to the general principle laid down in that case. Pursuant to that general principle, in a case such as the present, the Court should ensure that the irrecoverable elements of the credit hire evident from that difference in rates (ignoring the nil excess) are stripped out. It should not allow the fact that the credit hire company offers a nil excess on prestige vehicles which other car hire companies are not prepared to offer to be used as a smokescreen to enable credit hire companies to recover their charges in full, notwithstanding that a comparison of rates ignoring the nil excess demonstrates that there are such irrecoverable elements.

69. It was no doubt in recognition of the fact that blanket recovery of the full credit hire in all cases where the evidence was that a nil excess could not be obtained from a mainstream or reputable local supplier would provide the credit hire companies with an unwarranted windfall that Mr Williams QC accepted that in cases where the evidence was that the excess could not be reduced to nil but only to some modest amount, it might very well not be reasonable to hire through a credit hire company and, accordingly, the full credit hire rate should not be recoverable.

70. That concession suggests one of the ways in which the anomaly of the credit hire companies recovering the credit hire rate in full even where there is evidence that it includes irrecoverable elements, merely because the car hire companies will not provide a nil excess, might be addressed. However, it seems to me that there are two potential problems with approaching the nil excess issue on the basis that there will be cases where it is not reasonable to hire from a credit hire company. The first problem would be where to draw the line. Mr Williams QC accepted that if the excess available from the car hire company was modest, then it might be possible to say that it was not reasonable to insist upon hiring on credit hire with a nil excess. However, in the case of prestige car hire such as the present case, even the reduction to a modest excess in Mr Williams QC's terms may not be possible precisely because where someone is hiring a valuable high performance vehicle, the car hire companies want the hirer to "have some skin in the game" as Mr Jonathan Hough QC put it for the defendant in *Clayton*. Even in such cases, it remains the position that the credit hire rate includes irrecoverable elements which should be stripped out.

71. The second problem is that the suggestion that, in certain cases, because of this nil excess issue, it may not be reasonable to hire on credit hire with a nil excess does seem to me to run contrary to the conclusion of the House of Lords in *Dimond v Lovell* that it is reasonable for a claimant who loses the use of his or her car as a consequence of an accident for which the defendant is to blame to hire a car from a credit hire company. It also runs contrary to the conclusion of Morison J that it is reasonable for a claimant to reduce the excess on a hire car to nil for the reasons he gave in *Bee v Jenson,* with which I agree. In my judgment, it is simply not principled to conclude that it is unreasonable to hire a car from a credit hire company with a nil excess, merely because mainstream car hire companies will not provide a nil excess.

72. Another way of addressing the nil excess issue which I consider is far more principled and which has the elegance of simplicity is the approach which Mr Turner advocated, of treating the availability of a nil excess and the reasonableness of the sum claimed in respect of it separately from the comparison between what might be described as the "default" credit hire rate with, in this case, the £2,500 excess and the basic hire rate with a similar excess. It may not be entirely apt to describe it as an optional extra in the same way as collection and delivery, but however it is categorised, it seems to me that the approach of treating it separately is the correct one, in cases where the terms of hire available from car hire companies do not include a nil excess.

73. Mr Williams QC submitted that this approach was not open to the Court because the nil excess is treated as part of the terms of hire and is thus part of the comparable BHR. He referred the Court to [27] and [29] of the judgment of Kitchin LJ in *Stevens* and [100] to [103] of the judgment of Aikens LJ in *Dickinson*. He submitted that, absent any evidence of an available nil excess, the defendant had simply failed to make an appropriate comparison with the credit hire rate and should fail on the burden of proof.

74. I cannot accept that submission. Whilst a number of cases proceed on the assumption that the cost of nil excess forms part of the credit hire rate and of the comparable basic hire rate, none of those cases has had to grapple with the specific problem which faces the Court in the present case. It certainly could not be said that any case had determined that, as a matter of law, the nil excess has to be regarded as part of either the credit hire rate or the basic hire rate for the purposes of the comparison exercise.

75. It is striking that, in *Stevens*, AEL itself was contending for a comparison between the credit hire rate and the hire rate quoted by Europcar with a £500 excess on the basis that that excess could be insured separately (presumably with Questor or Insurance4carhire.com or a similar specialist provider) and the combined figure would demonstrate that the credit hire rate did not include irrecoverable benefits: see the argument of Mr Butcher QC recorded in [29] of the judgment of Kitchin LJ. This demonstrates, as I see it, that the nil excess can be treated separately and that, where it suits them, credit hire companies are content to do so.

76. Accordingly, in my judgment, where a nil excess is not available from car hire companies, the correct approach is to treat the nil excess separately from the comparison exercise between the default credit hire rate and the basic hire rate with an excess. It will almost invariably be the case that it was reasonable for the claimant to seek a nil excess for the reasons given in *Bee v Jenson* and, on that hypothesis, the only question for the Court will be how much should be recoverable as the cost of purchasing a nil excess.

77. Given the availability of stand-alone products which offer the elimination of the insurance excess on a hired car for a relatively modest daily rate, provided by companies such as Questor and Insurance4carhire.com, it may well be that in a particular case the Court may decide that it was not reasonable to purchase the nil excess offered by the credit hire company at a much higher rate (in the present case AEL's cost was £10 a day plus VAT against the £3.99 a day (inclusive of VAT) offered by Insurance4carhire.com). This is particularly so because the terms and conditions and the rates for these products are readily available over the internet. Whether it was reasonable to accept the credit hire company's rate or a claimant should have taken out such a stand-alone excess elimination insurance will depend upon the facts of the particular case, but it should certainly not depend upon the happenstance of whether the judge has heard of the product, as appears to have been the case in *Clayton*. I return to this issue in the context of the appeal in *Clayton* below.

78. On the basis of the evidence in *McBride*, I do not consider that the defendant would have been able to establish that the product offered by Insurance4carhire.com was an appropriate alternative to AEL in respect of the nil excess in the present case. The terms and conditions for the product which the defendant's insurers produced themselves, which are closest in time to the actual period of hire, indicate that vehicles valued at over £50,000 would not be insured. Even allowing for the fact that the car hired by the claimant had a value when new of about £70,000 which would have reduced as it was 14-20 months old at the time of the hire, its value was still greater than £50,000. Furthermore, the terms and conditions suggest that the maximum hire period was 62 days. It was incumbent on the defendant to produce evidence from Insurance4carhire.com that it would have insured a Jaguar XK valued at around £60,000-£65,000 for a period of 72 days in November 2012 and it has simply not done so. Accordingly, on the facts of this case, the only viable nil excess cover on offer was that provided by AEL at £10 per day and it was reasonable for the claimant to take out such cover.

79. I should add that, in cases where the mainstream or reputable local car hire companies in relation to which BHR evidence is obtained in any particular case do quote for a nil excess, it should not be necessary to engage in the separate assessment exercise in relation to the nil excess which I have described. This is because any difference

between the cost of the nil excess charged by the credit hire company and the rate quoted by the car hire company will be brought into account because only the lowest reasonable basic hire rate (including in such cases the cost of a nil excess) will be recoverable, on the assumption that the defendant has demonstrated that this is less than the charges of the credit hire company.

80. I was not impressed by Mr Turner's submission that the appeal on this point should be dismissed because the claimant's counsel failed to pursue the point with sufficient vigour or to seek clarification after delivery of the judgment. The fact remains that the judge erroneously failed to address the nil excess point in his judgment when he came to choose the claimant's £225 daily rate as the comparator because he overlooked that all three of those rates included a £2,000 excess. In the circumstances, he should have made an appropriate adjustment to reflect the cost of excess elimination included in what AEL offered.

81. In the circumstances, whilst the appeal on ground 3 is dismissed because it was not appropriate or just for AEL to recover the full credit hire rate merely because the comparable basic hire rates did not include nil excess, I consider the appeal on ground 3A should be allowed, and an appropriate reasonable upwards adjustment of the damages recoverable to reflect the cost of the nil excess would be £10 per day plus VAT.

The appeal in *Clayton*

The parties' submissions

82. In his oral submissions on behalf of the claimant, Mr Richard Spearman QC focused more on the argument that the District Judge's approach to the adjustments of 15% for 7 day hire and 10% for nil excess had been wrong in law and unfair because, on his own admission, they were no more than guesswork, than on the argument that HHJ Staite had been wrong to endorse his approach because of his apparent bias. It seems to me he was wise to do so. Despite the ill-advised and intemperate comment about finding for AEL sticking in his craw, I do not consider that the District Judge did show apparent bias towards the defendant. As I have said, a careful reading of the transcript of the hearing and of the judgment suggests to me not bias but an even-handedly offensive attitude to both parties. It seems to me that the comment about it sticking in his craw when read in context is really the judge saying, albeit in an intemperate fashion, that he does not regard it as just or appropriate for the claimant to recover the credit hire rate in full in this case, a view which he would have been entitled to express. Furthermore, as Mr Jonathan Hough QC for the defendant rightly pointed out, bias in a sense is a red herring, since the claimant does not seek the usual remedy in a case of bias, namely that the case be remitted for a new trial.

83. Accordingly, the real issue on this appeal is whether the approach of the district judge to the nil excess and to the 7 day hire point was wrong and unfair or can be justified as within the range of permissible adjustment in what is necessarily a "reasonable approximation" as Kitchin LJ described it in *Stevens* at [34]. Before considering the parties' submissions on this issue in more detail, I can dispose shortly of the fifth ground of appeal. The reasoning of HHJ Staite in [25] of her judgment that: "It is only if the claimant's evidence for the full amount of the credit hire is unchallenged in its entirety by the defendant will the court contemplate an award of damages which

reflects the full amount claimed under the credit hire agreement" is simply wrong as a matter of law. Mr Hough QC did not seek to justify that reasoning, but accepted that the burden is on the defendant to demonstrate that the credit hire rate exceeds the basic hire rate and thus includes irrecoverable elements which need to be stripped out.

84. Mr Spearman QC urged upon the Court the need for a rigorous approach to the evidence in this category of case and for as much certainty as possible, which he submitted would help in reducing the volume of such litigation. In relation to the 7 day rate point, his submission was that this point was always in the frame, given that the damage was only to a headlight surround and that it would not have been thought the repairs could take 52 days. It may be that something had gone wrong at the stage when the Court gave directions, but it would not have been onerous for the defendant insurers to produce evidence of 7 day rates. It was pretty standard to put in all the rates for 7, 14 and 28 days in such cases. Mr Spearman QC submitted that the approach of the district judge in circumstances where there was no such evidence produced was profoundly unfair. Having indicated in the exchanges I have quoted at [22] and [23] that he had no appropriate judicial knowledge or experience to make the adjustments for which the defendant's counsel had contended and that the defendant had not produced the evidence to discharge the burden of proof which was on him, it was fundamentally unfair and wrong for the district judge to make those adjustments as he did in his judgment.

85. He submitted that the approach of HHJ Staite at [24]-[25] of her judgment on appeal did not remedy that injustice, given that she not only erred in law in her approach, as I have already found, but knowing no more about the matter than the district judge, she had relied upon his experience and knowledge, which on his own admission did not exist. It was not appropriate or just to rely upon comparables being the bread and butter of judges in the County Court and points about an inevitable degree of imprecision in making adjustments. There did not have to be if the relevant evidence could be made available, as here, in which case the Court should expect it to be deployed, citing Devlin J in *Biggin v Permanite* [1951] 1 KB 422 at 439.

86. Mr Spearman QC's primary position in relation to the nil excess was a more robust one than the concession made by Mr Williams QC in *McBride*. He submitted that where the only evidence of comparable rates was for hire cars with an excess, however modest, then there was no comparable rate to the credit hire rate which should be recoverable in full. The defendant insurers were a large commercial organisation who knew the ground rules in these cases as to the burden of proof and the evidence which needed to be produced to demonstrate that the credit hire rate exceeded the basic hire rate and they had had ample time to prepare the case. Policy considerations of certainty in litigation favoured the approach he advocated and allowing the claim in full in cases such as this was the best means of discouraging avoidable credit hire litigation.

87. He submitted that the Questor quote could not and should not be used to fill the lacuna in the defendant's evidence. The district judge had ruled it out on the basis that someone in the claimant's position would not have taken it out and although the defendant had sought to cross-appeal the point, HHJ Staite had refused permission and there was no cross-appeal before the Court of Appeal. Mr Spearman QC submitted that this point was not open to the defendant in this Court. In any event, the approach of the district judge to the point had not been unreasonable in the context of

the objective reasonable hirer of a hire car. The defendant insurers were fully capable of alerting the claimant to this type of product, but had chosen not to do so.

88. The starting point of Mr Jonathan Hough QC for the defendant was that the district judge had correctly directed himself as to the law by reference to *Dimond v Lovell* and that his assessment of damages was reasonable. This was necessarily an imprecise and artificial exercise, where the credit hire package includes irrecoverable elements such as the cost of credit and claims handling services. He submitted that the imposition by the Court of the sort of strict evidential requirements suggested by Mr Spearman QC would not reduce the scale and cost of credit hire litigation in the County Courts. For example requiring a search for CDW which precisely matched the offer from the credit hire companies would cause considerable additional work for defendant's surveyors and lawyers. It was obvious that it was in the interest of the credit hire companies to make the *Dimond v Lovell* exercise as precise and exacting as possible, with a view to rendering it a dead letter.

89. He submitted that the only restraint on the charges of credit hire companies was the *Dimond v Lovell* exercise required by the Courts. The claimant faced no financial risk at all since he signed a credit hire agreement backed by an insurance policy protecting him if his claim failed so he had no incentive to seek a competitive rate from the credit hire company. The claimant's evidence had been that he had not looked at what AEL was charging him. Courts had in the past taken a realistic approach to the evidence to be adduced in these cases, many of which were low value, and had fought shy of imposing exacting standards precisely because of the costs involved. In that context he cited the judgment of Jacob LJ in *Bent v Highways and Utilities Construction Ltd (No 1)* [2010] EWCA Civ 292. In that case the accident had occurred in February 2007. The judge at first instance did not have evidence from February 2007 of basic hire rates for equivalent cars to the Aston Martin DB9 which the claimant had hired on credit hire from AEL, though he did have such evidence for 2009. He concluded that this evidence of hire rates at a somewhat later date was irrelevant. The Court of Appeal disagreed, allowed the appeal and remitted the case for retrial.

90. In relation to the judge's rejection of the BHR evidence he had as irrelevant, Jacob LJ said this:

> "9 With respect, that was a mistake. Very often when one is assessing valuation evidence in all sorts of fields, one has evidence of prices of the same or similar things at different dates and has to make appropriate adjustments. Working with comparables and making adjustments is the daily diet of judges concerned with valuation in all sorts of fields. Clearly evidence of the spot rate a year or so later than the relevant date is likely to throw considerable light on what the spot rate would have been at the time.
>
> 10 I would add further that one must not be hypnotised by any supposed need to find an exact spot rate for an almost exactly comparable car. Normally, the replacement need be no more than in the same broad range of quality and nature as the damaged car. There may be a bracket of spot rates for cars

> rather "better" and rather "worse". A Judge who considered that bracket and aimed for some sort of reasonable average would not be going wrong."

91. In relation to nil excess, Mr Hough QC accepted that it was very often reasonable to have a nil excess but submitted that there was no absolute rule. To that extent, he submitted that Mr Williams QC's concession in *McBride* was rightly made, but Mr Spearman QC put the case too stringently in *Clayton.* In the present case, although the judge had not referred in his judgment to any of the evidence about the cost of nil excess, Mr Hough QC submitted that there was ample evidence which justified the 10% uplift allowed by the judge to the Hertz basic hire rate with a £2,000 excess, which equated to about £17 per day before VAT. Mr Hough QC submitted that this equated closely to the "residual excess waiver" charged by AEL of £17.50 per day to reduce the excess from £1,750 to zero. There was also evidence that (i) Thrifty quoted £12 per day to reduce the excess to zero, albeit on a BMW 330 which was a less prestigious car than the ones the claimant hired from AEL and (ii) Europcar charged £14 per day to reduce the excess from £1,250 to nil (albeit with the exclusions I have noted at [17] above). Although Mr Hough QC accepted that these were less than perfect comparisons, because, as Mr Spearman QC pointed out, the CDW in each case could be withdrawn at the discretion of the car hire company, they were evidence which went towards justifying the judge's approach.

92. Mr Hough QC accepted that it was not open to him on the present appeal to rely upon the Questor Insurance product, which was much cheaper, given that permission to cross-appeal had been refused. However, he said that insurers acting for defendants have consistently said in these credit hire cases that evidence about such products can and should be used in cases where car hire companies will not provide a nil excess. He made the point, to which I have already alluded, that this is because, in the case of a substantial number of hire cars, the hire company wants the customer to have "some skin in the game". He submitted, much as Mr Turner had in *McBride*, that it was wrong in principle for credit hire companies to be able to recover the credit hire in full merely because the defendant insurer cannot evidence a basic hire rate with a nil excess.

93. In relation to the point about 7 day rates, Mr Hough QC made the point that this did not emerge until the re-examination of the claimant. There was nothing in any suggestion that the defendant should have seen the point coming when the claimant's BHR evidence for York and Colchester from APU (which was of 7 day rates) was served, because all APU rates were 7 day rates. Furthermore, although the claimant had said he expected his car back within a week, realistically the repairs would have taken (as they did once the defendant had authorised them) three weeks, given the need to obtain parts for a Ford Mustang. In the real world, if the claimant had been hiring a car from a mainstream supplier, before committing himself to any particular hire period, he would have asked the repairing garage and his insurance company and appreciated that a repair period of some three weeks was likely, so that he would probably have been hiring at the 28 day rate.

94. Mr Hough QC submitted that the claimant's submission that precise evidence should have been obtained of a range of rates including 7 day rates faced the difficulty that it involved double standards. In the context of the present case and the fact that the claimant was not permitted to adduce the late-served APU Colchester evidence, the

claimant's counsel had had to ask the judge to take judicial notice of the fact that 7 day rates were higher than 28 day rates (see [21] above) and yet before this Court, the claimant was criticising the judge in effect for taking judicial notice of the same point in making the assessment he did. Mr Hough QC pointed out that the judge had twenty years of experience of credit hire cases and he would necessarily have seen 7, 14 and 28 day rates and the difference between them in many other such cases. In the circumstances, it was not unreasonable for the judge to have made the adjustment he did to reflect that 7 day rates were higher because the marginal expenses were higher for car hire companies the shorter the period of hire. It was not necessary to have precise evidence, given that the adjustments required in conducting the *Dimond v Lovell* exercise necessarily involved a degree of approximation.

Analysis and conclusions

95. As a general proposition, Mr Spearman QC is no doubt right that, so far as possible, there should be certainty in this area of the law and of commercial activity, as in many others. However, one should never lose sight of the fact that the "stripping out" exercise advocated by *Dimond v Lovell* is necessarily an approximate and artificial one because, by definition, the claimant did not in fact hire a comparable car from a mainstream or reputable local car hire company. He actually hired from the credit hire company, so that inevitably the evidence is sought after the event of what rate of car hire could have been obtained, on the hypothetical basis that he had hired from a car hire company instead.

96. It is also the case that, as Aikens LJ noted in [38] of *Pattni/Bent (No. 2)*, the best evidence of which elements should be stripped out of the credit hire rate as irrecoverable would come from the credit hire companies themselves by producing evidence and disclosure of their charging structures. As Kitchin LJ said in *Stevens* at [36] they do not do so because of the modest size of the claims (and I would add no doubt for other good reasons such as commercial confidentiality). However, given that the credit hire companies do not produce that best evidence and, even though the burden is on the defendant insurer to demonstrate that the credit hire rate exceeds the basic hire rate and thus includes irrecoverable elements, it seems to me that it would be unjust to insist upon the rigorous and exacting approach to rates evidence in credit hire cases for which Mr Spearman QC contends.

97. Furthermore, even if that rigorous and exacting approach were appropriate, which for the reasons I have just given, I do not think it is, I consider it would not be just to require that approach in the present case, which the judge described at [2] of his judgment as a "dog's breakfast", clearly a criticism directed at both parties. One consequence of the inefficiency of which the judge was being critical was that the claimant produced rates evidence for the wrong geographical area and then produced evidence for the right area too late. The claimant did not seek to appeal the judge's ruling refusing permission to adduce that evidence and there would have been no basis for doing so, but it is faintly ironic that it is only because of that inefficiency on the part of the claimant's solicitors that the judge had no evidence before him of 7 day rates.

98. I also agree with Mr Hough QC that the claimant's case on appeal does involve double standards. Given that it was the claimant's counsel who invited the judge to take judicial notice or make use of judicial knowledge of the fact that 7 day rates are higher than 28 day rates, which the judge said at [14] of his judgment that he had done, there is an obvious inconsistency, as I see it, in the claimant criticising the judge for then using that judicial notice or knowledge to adjust the 28 day rate upwards.

99. Logically, if, as the claimant contends, the judge should not have made the 15% adjustment because there was no evidence of 7 day rates to support it, there would have been much to be said for the judge using the rates he did have in evidence, the 28 day rates, and taking those as a reasonable approximation of the basic hire rate for the purposes of the *Dimond v Lovell* exercise, applying the sanguine approach of Jacob LJ in *Bent (No. 1)*. There was no cross-appeal by the defendant on that basis, so that that is not a live point before this Court, but the point does highlight the inconsistency in the claimant's argument.

100. It seems to me that, taking a realistic approach to the manner in which these credit hire cases are handled and tried, the judge was entitled to make the 15% adjustment. He had, as he said at the hearing, twenty years' experience of credit hire cases and will have seen many instances of the differences between 7 day, 14 day and 28 day rates in the cases he has tried. That was precisely the matter of which the claimant was inviting him to take judicial notice. He will also have been well aware of *Pattni/Bent (No. 2)*, which counsel for the claimant cited to him in her submissions and also of the 12% discount of the 7 day rate to reflect the 28 day rate which the judge at first instance applied, albeit after counsel for the claimant had indicated he would accept a discount of 10-12%, and which was accepted as correct by the Court of Appeal (see [90] of the judgment of Aikens LJ). Mr Hough QC accepted that the judge in the present case could not treat that 12% figure as evidence in this case, but submitted, it seems to me correctly, that it would have been a "sense check" for him as to whether the 15% uplift was reasonable.

101. Mr Spearman QC can, of course, make great forensic play of the point made by the judge both in argument and in the judgment about guesswork, but in my judgment, if the judge had not made all those comments but had just made the adjustment to reflect the higher rate a car hire company would charge for a 7 day rate rather than a 28 day rate, of which the claimant had asked him to take judicial notice, drawing on his own considerable experience of credit hire cases, he could not have been criticised. It seems to me that, despite his colourful comments about guesswork, in arriving at the 15% upward adjustment, he must in reality have been drawing on his considerable experience of such cases and the judicial knowledge to which he had referred in the previous paragraph of his judgment that you pay more for a 7 day hire than for a long term hire. Accordingly, whilst the judge can be legitimately criticised for his conduct of the hearing, I do not consider that he can be criticised for making the 15% adjustment which he did.

102. Turning to the 10% adjustment he made in relation to the nil excess, it emerges from the transcript of the hearing that the judge's various comments about guesswork were made in the context of the 7 day/28 day rate point, rather than in the context of the nil excess. In relation to the latter point, once he had rejected the evidence of the quotation from Questor Insurance, the judge only had basic hire rates from mainstream car hire companies which would not provide a nil excess, no doubt

because these were prestigious cars (apart from Europcar (whose excess reduction was subject to significant exclusions) and Thrifty, whose car, the BMW 330, was not as prestigious as the cars the claimant hired from AEL). Against that background, the claimant was contending that there was no proper comparable to the credit hire rate, so that the credit hire rate should be recoverable in full. In circumstances where it was apparent that the AEL daily rental charge of £355 was considerably in excess of the highest basic hire rate in the range (Hertz at £168.35, which the judge took, this case having been decided before *Stevens*), demonstrating that there were probably irrecoverable elements in the credit hire rate which required stripping out, the judge was entitled to conclude that it was not just or correct in principle for the credit hire to be recoverable in full, for the reasons I have given in relation to the *McBride* appeal.

103. If the judge had engaged in the separate assessment of the reasonableness of taking out a nil excess with a credit hire company which I have said should take place in cases such as the present where the car hire companies from which basic hire rates have been obtained do not offer a nil excess, he would (on the basis that he had rejected the Questor evidence) have had evidence of: (i) the £12 per day charge by Thrifty to reduce a £750 excess to zero, albeit for a car which was not as prestigious as the ones he hired from AEL and on terms where the CDW could be withdrawn at the discretion of the car hire company; (ii) the £14 per day charged by Europcar to reduce its excess from £1,250 to zero (albeit subject to significant exclusions); and (ii) the £17.50 per day charged by AEL to reduce a £1,750 excess to zero. In those circumstances, he might well have concluded that the latter was reasonable and awarded it. As it is, the figure he took of 10%, equivalent to about £17 per day, was closely parallel to the AEL rate.

104. Mr Spearman QC submitted that it was not appropriate to make a comparison with the AEL rate which was part of a package or to say that it represented what a hypothetical claimant would do, given that it could not be bought separately. However it seems to me that, given that the exercise is a hypothetical and objective one designed to ascertain what if any elements of the charges of the credit hire company are irrecoverable, it is permissible to have regard to the charge by the credit hire company for a nil excess as evidence of the cost of a nil excess. Depending on the other evidence, it may transpire that the credit company's charge for a nil excess is a reasonable one and thus recoverable in full.

105. In that context, I should add that, although Mr Hough QC quite rightly accepted in the present case that he could not rely on the evidence of the quotation from Questor Insurance, I consider that where there is evidence of the availability of an excess elimination insurance as a stand-alone product from Questor or other providers such as Insurance4carhire.com, the Courts should admit and accept such evidence as evidence of the reasonable cost of obtaining a nil excess, provided of course that the quote obtained from such a provider is for a car which is comparable with the one hired from the credit hire company and is for the same period as the period of actual hire from the credit hire company. Certainly the Court should not reject such evidence because the judge or the claimant has not heard of the product, as the district judge did here. The exercise is an objective one and such evidence should be admissible irrespective of the subjective knowledge or lack of it of the Court or the claimant. Information about the availability of such products can, in any event, be readily accessed on the internet. It is apparent that, whilst some judges in the County Courts

have not been admitting such evidence, others have: see the findings of the judge in one of the cases appealed in *Dickinson v Tesco* [2013] EWCA Civ 36; [2013] RTR 27 referred to at [26] of the judgment of Aikens LJ. The admission and acceptance of evidence of these stand-alone products should be the norm.

106. In the circumstances, although, as I have said, the conduct of the hearing by the judge in the present case is open to criticism, on analysis, I consider that the adjustments he made in respect of the 7 day rate and the nil excess are justified. It follows that the appeal in *Clayton* must be dismissed.

Disposal

107. In *McBride*, permission to appeal on Ground 1 is granted, but the appeal is dismissed. Permission to appeal on Ground 2 is refused. Permission to appeal on Ground 3A is granted. The appeal on Ground 3 is dismissed, but the appeal on Ground 3A is allowed. In consequence, there will be an increase in the damages awarded to the claimant of £888 (£740 plus VAT).

108. In *Clayton*, although as I have found, the analysis of the law by HHJ Staite in [25] is wrong, the appeal overall is dismissed.

Sir Timothy Lloyd

109. I agree.

Sir Stanley Burnton

110. I also agree.