Case No: A3/2012/2800

Neutral Citation Number: [2013] EWCA Civ 1704
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE COOKE
(2012) EWHC 2848 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2013

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE AIKENS
and
LORD JUSTICE VOS

- -

Between :

Coles & Others	**Appellants**
- and -	
Hetherton & Others	**Respondents**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Michael Curtis QC & Justin Davis (instructed by **DAC Beachcroft LLP**) for the **Appellants**
Christopher Butcher QC & Jonathan Hough (instructed by **Herbert Smith Freehills LLP**) for the **Respondents**

Hearing dates: 16-17/10/2013

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Judgment

Lord Justice Aikens :

This is the judgment of the court.

I. Synopsis

1. Formally speaking this appeal concerns thirteen comparatively small "managed claims" that arise out of minor road traffic accidents. In reality, however, it is another major battle between large motor insurers, with Royal & Sun Alliance Insurance plc ("RSAI") on one side and Provident Insurance plc ("Provident") and Allianz Insurance plc ("Allianz") on the other. In each case the claimant had motor insurance with RSAI and the claimant's vehicle was damaged as a result of the admitted negligence of the defendant driver, who was insured by either Provident or Allianz. In each case the claimant's motor policy contained an option whereby the insured could have his vehicle reinstated if the cost of repairs were judged to be less than the vehicle's market value. If that option was chosen then the insured had a further choice under the policy terms; he could elect to engage his own repairer or elect to use RSAI's system for repairing vehicles. If the policyholder chose the latter, the policy also gave him the option of using a "courtesy car" if he wanted one. In all 13 cases the claimant policyholder chose the RSAI repair system option and his vehicle was repaired. In some of the cases the claimant also decided to take advantage of the courtesy car offer. In each case RSAI, exercising its rights of subrogation as insurer, has brought a claim (in the name of the insured) against the negligent driver, claiming the total cost of the repairs paid out by it, which included some ancillary charges and the cost of the courtesy car.

2. The main question of principle at issue is whether the claimant (in reality RSAI) can recover the full cost of the repairs to the vehicle (as invoiced to RSAI) when it has been repaired using the RSAI repair system, which has been set up through another company in the RSAI group. Provident and Allianz argue that the RSAI repair system is operated has the effect of inflating by about 25% the total cost of claims for repairs made against the defendant tortfeasor (in reality, his insurer) and that the claimant is not entitled, as a matter of law, to claim that full sum, but only about 75% of it. There is a subsidiary question concerning the right to recover the cost of the courtesy car. We were told that there are a number of claims in the County Courts where similar issues have arisen and that the decisions of County Court judges have not all been to the like effect. That is one reason why permission was granted to appeal the judgments and orders of Cooke J of 15 June and 4 October 2012 .

3. In order to test the issues of principle in the 13 managed cases, in January 2012 Teare J ordered that there be a determination of three preliminary issues. He also ordered that the judge hearing those issues would, at the same hearing, determine an application of the claimants to strike out parts of the defendant's pleadings in these managed cases, or alternatively, to have summary judgment in their favour on the issues raised by those parts of the pleadings.

4. The three preliminary issues are:

    (1) **Measure of Loss:** Where a vehicle is damaged as a result of negligence and is reasonably repaired (rather than written off), is the measure of the claimant's loss taken as the reasonable cost of repair?

(2) **Test of "reasonable repair charge":** If a claimant's insurer has arranged repair, is the reasonableness of the repair charge to be judged by reference to: (a) what a person in the position of the claimant could obtain on the open market; or (b) what his or her insurer could obtain on the open market?

(3) **Recoverable amount:** Where a vehicle is not a write-off and an insurer indemnifies the insured by having repairs performed and paying charges for those repairs, and where the amount claimed is no more than the reasonable cost of repair (on the correct legal test determined under (2) above), is that amount recoverable?

5. Cooke J heard argument on the three preliminary issues on 29 and 30 May 2012 and handed down his judgment on 15 June.[1] His answers to the first two preliminary issues were, in short: (1) yes; (2) the test set out in (2)(a). He was asked not to answer the third question and he did not do so, although he made some statements of principle on that issue.

6. On 4 October he heard further argument on the strike-out/summary judgment points in the light of his earlier conclusions and he gave an *ex tempore* judgment at the conclusion of the argument.[2] At that hearing, counsel for the claimants, Mr Christopher Butcher QC, made it clear (in response to comments concerning the pleadings made in the earlier judgment) that in each case the claim for the cost of the repairs (together with the claim for sundry service charges), and the cost of a courtesy vehicle were sought respectively as direct and consequential "general damages" (as opposed to "special damages") resulting from the collision between the two vehicles, so that the pleaded cases of the claimants should be read in that way. On that basis, Cooke J made orders striking out parts of the pleaded case of the Provident and Allianz policy holder defendants which raised points contrary to his conclusions on the preliminary issues. He also struck out those parts of the defendants' pleadings which objected to payment of (a) an uplifted hourly rate as charged to RSAI; (b) the sundry service charges; and (c) the cost of providing a courtesy vehicle, together with other aspects of the defendants' pleadings with which this court is not concerned.

7. On appeal, Provident and Allianz, through Mr Michael Curtis QC, argue that the judge's answers to the three preliminary questions were wrong. They further submit that the judge was wrong to strike out those parts of the defendants' pleadings challenging (a) the hourly rate claimed; (b) the claim for sundry service charges; (c) the claim for the cost of the courtesy vehicle; and (d) those parts of the pleadings that were to be struck out as a consequence of the conclusions on the three preliminary issues. RSAI, through Mr Butcher QC, opposes all of those challenges.

8. We heard argument on 16 and 17 October 2013 and reserved judgment.

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[1] ***[2012] EWHC 1599 (Comm)*** – hereafter "judgment (1)".
[2] ***[2012] EWHC 2848 (Comm)*** – hereafter "judgment (2)".

II. The RSAI Repair Scheme and how it works in practice.

9. Cooke J described this in some detail at [3]-[13] of judgment (1) and his description is not challenged for the purposes of this appeal, although the defendants emphasise that they will, so far as they can, challenge the claimants' assertions in any subsequent proceedings.

10. The key facts concerning the scheme, for the purposes of this appeal, are: (1) there is a company in the RSA group called MRNM, which is the trading name of RSA Accident Repairs Limited. MRNM owns six garages (called Quality Repair Centres – QRCs) which are staffed by its own employees. (2) If an RSAI policyholder elects to have his damaged vehicle repaired through the RSAI repair scheme under the policy terms, it will either be repaired by one of the QRCs or MRNM will sub-contract the repair to another, independent garage. This garage will be part of MRNM's "Priority Repair Network" (PRN repairers). If neither a QRC or a PRN repairer is used, an independent garage, known as a "non-recommended garage", or NRG, will be engaged. NRGs are outside the RSAI scheme. They are usually used when the policyholder elects to have repairs done outside the scheme. (3) There is a Services Agreement ("SA") between RSAI and MRNM which stipulates in clause 3.1 that MRNM, through the QRC or the PRN repairers, is required to provide the services set out in Schedule 1 of the SA.[3] Clause 7 provides that MRNM's contract charges to RSAI must be those set out in Schedule 3 (which are updated from time to time). Clause 7.4 requires MRNM to raise invoices on RSAI in an agreed manner and MRNM has to provide such information as RSAI reasonably requires to substantiate any charges that it makes on RSAI. Clause 28 stipulates that there will be no relationship of agency between MRNM and RSAI. (4) Schedule 3 of the SA provides for the labour and other charges to be made on RSAI by MRNM according to a set formula, which allows MRNM, when billing RSAI, to make a profit on what it has had to pay its PRN repairers. [4] (5) Schedule 3 of the SA sets out three hourly rates regimes for labour charges. (6) In cases where MRNM's net invoice total (to RSAI) exceeds £300 and more than 4 hours labour has been used on the repairs to a vehicle, Schedule 3 provides for an additional flat rate charge (of three times the appropriate hourly rate charged) which is to be made for "Sundry Services" provided, which MRNM and RSAI agree would cover a number of different services. RSAI asserts (but the defendants do not accept) that in all cases at least some of those services were provided. (7) Courtesy cars were charged at £11 a day and delivery/collection of the damaged/repaired vehicles or courtesy cars were charged at £110. (8) The amounts charged to RSAI by MRNM were designed not to exceed the amount which would be payable by an individual who went out into the market to get the same repairs done to his vehicle. RSAI/MRNM is able to negotiate substantial discounts with its PRN repairers and parts suppliers because of its bargaining power and the volume of work it can supply to them.

11. The way the SA scheme works, in practice, is as follows: (1) when a policyholder has chosen the RSAI scheme option and the repairs have been done, the PRN repairer/QRC will invoice MRNM, using a short form called a "Bordereau", which

[3] This sets out a series of service standards which PRN repairers must meet. These include a delivery/collection service and, if the customer wants it, a courtesy car.

[4] The QRCs and PRN repairers invoice one division of MRNM and another division charges the commercial cost (ie including a profit) to RSAI.

contains little information on the work actually done. MRNM passes on a similar "Bordereau" to RSAI, with its price mark-up. (2) When RSAI makes its claim to the insurance company of the tortfeasor, a document known as a "Breakdown of Invoice Charges", or "BIC", is presented as the basis of the claim. It has more detail than the Bordereaux. It shows the sum paid by RSAI to MRNM, which, in most cases, exceeds the sums paid by MRNM to a subcontractor. (3) RSAI maintains that the sum for repairs etc it is charged by MRNM is no more than any individual policyholder would have to pay a garage and, in most cases, is somewhat less.[5] (4) Provident and Allianz calculate that the overall effect of the interposition of MRNM between RSAI and the garage doing the repairs is to increase the cost of the work done by about 25%, on bills which are usually in hundreds, not thousands, of pounds.

12. All parties acknowledge that there are various different methods used by motor insurance companies which will have the effect of creating savings for a motor insurer who has to indemnify his assured for damage to his vehicle and which may also generate income for an insurer who makes a claim against a tortfeasor in respect of the cost of those repairs. Such schemes involve eg referral fees, using claims management companies and discounts arranged with parts companies. The objection of Provident and Allianz to the RSAI scheme is founded on two particular facts: (1) MRNM charges RSAI higher rates than those charged to MRNM by the subcontracting repairer and those higher charges are the ones claimed against the tortfeasor; and (2) MRNM charges RSAI a flat rate for collection and delivery of the damaged car, for courtesy cars and for "Sundry Charges", even if the subcontracting garage charges nothing for one or all of those services.

III. The judgment of Cooke J dated 15 June 2012: judgment (1).

13. First the judge reviewed[6] the legal basis for assessing the measure of damages which a person will recover when his personal (as opposed to real) property has been physically damaged by the negligence of another. He stated that the measure of damages for this direct loss is the diminution in value of that asset which results from the physical damage caused by the negligence. The "normal" or "ordinary" or "prima facie" way of measuring that diminution in value in the case of an asset that *can be* repaired, (whether or not it is in fact repaired), is the reasonable cost of repairing it. There may be a further claim for loss of use of the asset, which will be characterised as a claim for consequential loss.[7] The judge referred to a number of very well-known cases, most of which concern the measure of damages recoverable by a shipowner whose vessel has been damaged as a result of a collision resulting from the negligence of the other ship (or perhaps both ships). The principles are, however, of general application. The judge also considered two more recent cases[8] concerning damages for consequential loss when a replacement vehicle is provided, on hire, following a motor collision.

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[5] RSAI relies on evidence in the form of the recommended retail price for repairs set out in the Retail Charges Guide that is published by the Auto Body Professionals Club. See [11] of Cooke J's judgment (1).
[6] At [15] to [26].
[7] See [15] and [16].
[8] ***Dimond v Lovell [2002] 1 AC 384; Burdis v Livsey [2003] QB 36.***

14. On the first preliminary issue, the debate before the judge was on what constitutes, in the circumstances of these cases, "the reasonable cost of repair". The defendants strongly relied on a decision of the Court of Appeal in ***Darbishire v Warran.***[9] That case concerned the measure of damages recoverable by a claimant who owned a well-maintained second hand car, which was damaged as a result of the defendant's negligence and which the claimant repaired but at a cost exceeding its market value. Cooke J concluded that the reasoning and decision in that case "flew in the face" of other, binding, authorities and so had to be regarded as an "aberration".[10] The appellants say that the judge's conclusion on that case was wrong.

15. The judge's conclusion on the first question, set out at [42], was:

> "…where a vehicle is negligently damaged and is reasonably repaired, rather than written off, the measure of the claimant's loss can be taken as the reasonable cost of repair. That reasonable cost is not necessarily the repair cost actually incurred, whether by the claimant or its insurer or indeed by anyone else who pays a repairer since the reasonable cost of repair is only a way of ascertaining the diminution in the value of the chattel by reason of the physical damage, though it is the normal and conventional way….A court can assess "the reasonable cost of repair" by reference to any evidence which is sufficient to discharge the burden of proof upon the claimant to establish the amount in question….In each case it will be a matter for the court to determine whether the claimant has made out its case, whether or not repairs have been done and whether or not in invoice is produced for the repair costs".

16. On the second issue, Cooke J concluded, at [60], that the reasonableness of the repair charge, as a measure of the diminution in value of the damaged car, is to be assessed by reference to the position of the individual claimant, without reference to his insurers or to any benefits which the individual obtains under his insurance policy, for which he has paid a premium. The judge emphasised that he had not formed any judgment on any disputed issue of fact as to what the objectively ascertained reasonable cost of repairs for an individual claimant might be. That would have to be established "by any form of admissible evidence in a court": see [61].

17. The judge did not expressly answer the third preliminary issue in his judgment (1) as he was requested to consider that issue in the context of the claimants' applications to strike out or give summary judgment in respect of parts of the defendants' pleadings. But Cooke J noted two matters at that stage: (1) in arriving at a figure for the cost of repairs which would represent the diminution in value of the vehicle, a court could be justified in taking an overall figure for the reasonable cost of repairs, even if individual items were not, in themselves, reasonable. It was the overall figure that counted.[11] (2) The way that RSAI had pleaded its claims was for "damages arising out of a road accident", in which "vehicle repairs" and "incidental expenses" were particularised. There was not a claim for a diminution in the value of the vehicles

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[9] ***[1963] 1 WLR 1067.***
[10] See [35] and [40].
[11] See [63].

concerned, framed by reference to the commercial cost of repairs as charged by MRNM to RSAI. Instead the claim was put as one for financial losses, represented by vehicle repairs, as identified in the BIC form served with the claim. The judge commented that this did not sit happily with the thrust of the claimants' argument that the claim was for "general damages" based on the diminution in value of the vehicle, because the claim, as pleaded, gave the impression that all that was being claimed as damages were the actual cost of repair paid to the repairer and sundry charges, delivery charges and courtesy car charges where applicable, ie. it was a claim only for "special damages".[12]

18. The difference between a claim for "general damages", being the diminution in value of the vehicle (albeit measured in terms of the reasonable costs of repair) and a claim for "special damages" that have been itemised in a claim form and which would have to be specifically proved to be recoverable, surfaced again at the hearing before Cooke J on 4 October 2012. In his judgment of 4 October 2012, Cooke J stated that the "correct jurisprudential basis" for the present claims by the RSAI claimants was one for "general damages" for diminution in value of the vehicle "as reflected by the reasonable commercial cost of repairs to the insured in order to restore the condition of the car to its *status quo ante*".[13] The judge held that the way that the claims had been formulated by the RSAI claimants was for "special damages" as a cost of repair actually incurred by the RSAI policyholder. On that basis any claim which included a sum referred to in the supporting BIC which had not actually been incurred would be irrecoverable.[14] Mr Butcher emphasised that the claims were intended to be put upon the "general damages" basis. The issue arose again before us.

19. Cooke J accepted the arguments of the RSAI claimants that certain specific arguments of the defendants should be struck out. Thus he held, on the footing that the true basis of the RSAI claimants' claim was one for "general damages" for diminution in value of the vehicle measured by the cost of repairs, that the defendants could not argue that the claimants were unable to recover the "uplifted labour rate". The paragraphs dealing with those points were struck out. Similarly, he held that he should strike out the defendants' objections to the items claimed as "sundry service charges", because the issue was whether the repair costs as a whole were reasonable and so could be taken to represent the diminution in value of the vehicle concerned. The judge permitted the points on delivery and collection charges to remain on the pleadings because they raised questions of fact, whichever way the RSAI claimants' case was put.

20. As for the claim for the cost of a courtesy car, where the RSAI policyholder chose to take one, Cooke J held: (1) under the RSAI policy terms the provision of a courtesy car is a "fruit of the policy for which the policyholder has paid premium"; (2) the fact that the policyholder has not had to pay for it (because of the insurance) does not stop him from recovering damages for the loss of use of his own car, which damages will be measured by the reasonable cost of hiring in the courtesy car. Therefore the objection to this head of claim would be struck out.[15]

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[12] See [64] and [65].
[13] See [4] to [7] of judgment (2).
[14] See [11] of judgment (2)
[15] See [28]-[38] of judgment (2).

IV. The arguments of the parties on the appeal

21. On the first preliminary issue Mr Curtis submitted that when a chattel has been damaged by a tortfeasor and is then repaired, the fact of the repairs crystallises the direct loss of the claimant, so that the actual cost of the repair fixes the recoverable amount in respect of this direct loss.[16] Although the loss was suffered at the moment of collision, the overriding compensatory principle required the court to have regard to what had happened subsequently in assessing the proper measure of damages. The case where the chattel has actually been repaired was different from one where it had not. Mr Curtis submitted an alternative argument: the innocent driver has a duty to mitigate his loss and the effect of that is that only the actual cost of repairs can be recovered. For this proposition Mr Curtis relied on statements of this court in ***Darbishire v Warran.***[17] The consequences of Cooke J's judgment would be that (1) the amount of compensation would depend on how the claim was pleaded, whether as "general damages" or "special damages". (2) A claimant could thus profit at the expense of a tortfeasor and recover more than actually spent on repairs. (3) A claimant could just rely on expert evidence to prove the "reasonable cost of repairs" and could avoid having to disclose actual invoices. This would make the resolution of small claims such as the present more cumbersome and expensive and less easy to settle.

22. On the second preliminary issue, Mr Curtis argued that when the policyholder elected to use the RSAI scheme repair service, he made the insurer his agent for the purpose of choosing a repairer. Thus the action of the insurer (in choosing an MRNM "recommended repairer") had to be taken into account when determining the reasonableness of the repair costs. The position of the claimant and the insurer had to be taken together: see ***Copley v Lawn.***[18] Further, the action in choosing the more expensive MRNM repairer meant either that the repair costs were unreasonable or that the claimant had failed to mitigate his loss.

23. On the third preliminary issue and the judge's conclusions on the strike out/summary judgment applications, Mr Curtis dealt with three particular issues: (1) administrative charges; (2) the "Sundry services" charge; and (3) the courtesy car charge. He submitted that these could not legitimately be included in what constituted the "reasonable costs of repair" if the claim is pleaded as one for general damages. The administrative charges were, in any event, insurer's services and did not arise out of the tort. The other two could only be recovered if it was proved that the costs had been incurred and a claim was made for special damages. Thus the judge had been wrong to strike out the defendants' pleadings raising those issues.

24. In relation to the first preliminary issue, Mr Butcher submitted that when loss is incurred by physical damage to a chattel and it can be economically repaired, then the diminution in value caused by the tort is measured by reference to the reasonable cost of repairs which, in practice is "likely to be the lowest reasonably obtainable cost of repairs".[19] That was a question of fact and these cases should be remitted to the

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[16] Mr Curtis relied on the general statement of Lord Blackburn in ***Livingstone v Rawyards Coal Co (1880) 4 App Case 25 at 39;*** the statement of Lord Hobhouse in ***Dimond v Lovell [2002] 1 AC 384 at 406*** and that of Aldous LJ in ***Burdis v Livsey [2003] QB 36 at [85].***

[17] ***[1963] 1 WLR 1067,*** particularly at 1070 (Harman LJ); 1076 and 1077 (Pearson LJ) and 1078 (Pennycuik J).

[18] ***[2009] 1 Lloyd's Rep IR 496 at [12]-[16] per Longmore LJ.***

[19] Transcript: Day 1 page 122 lines 4-18.

Mercantile Court to ascertain whether the sums claimed satisfied that test or not. It was important to recognise that the damage occurred at the moment of the tort and so the diminution in value was taken at that point. Accordingly, there was no question of mitigation of damage, as that was impossible. Insofar as ***Darbishire v Warran*** used the language of mitigation it reflected the argument of the parties. The court had not been referred to the long line of Admiralty cases which dealt with this issue. The statements of the court were inconsistent with Lord Hobhouse's analysis in ***Dimond v Lovell*** and that of Aldous LJ in ***Burdis v Livsey.***

25. On the second preliminary issue Mr Butcher submitted that the test is that set out in question 2(a): viz. the reasonable cost of repair to the individual claimant vehicle owner on the open market. On basic principles, the position of the insurer is irrelevant. It would be unprincipled for a claimant who has comprehensive cover and who could use the RSAI repair scheme to be able to recover less than a claimant with only third party cover whose vehicle had suffered the same physical damage. Agency is also irrelevant as that is concerned only with the means by which the insurer fulfils its obligations under the policy if the insured elects to use the RSAI scheme. The insured authorises the insurer to choose the repairer but the insured is never a party to the repair contract.

26. In relation to the third preliminary issue and the strike out/summary judgment applications, Mr Butcher submitted that because the claim was one for general damages, the hourly labour rates, the administrative charges and the sundry services were all to be regarded as part of the overall cost of repairs. It is that figure that was relevant. When the cases were remitted to the Mercantile Court the defendants could argue about what repairs overall were necessary and whether the overall cost was reasonable. As for the courtesy car which the claimant insured obtains free, that is the fruit of the insurance for which the claimant has paid his premium. On principle, that is to be left out of account when assessing damages.

V. Preliminary issue one: discussion and conclusion.

27. The first question is: "where a vehicle is damaged as a result of negligence and is reasonably repaired (rather than written off) is the measure of the claimant's loss taken as the reasonable cost of repair?" There can be no doubt about the legal analysis of the general rules. It was summarised by Lord Hobhouse in his speech in ***Dimond v Lovell*** at page 406B and the relevant passage was quoted by the judge at [22] of his judgment.[20] ***Dimond v Lovell*** was concerned with the recoverability of the cost of hiring a replacement car on credit hire terms after a claimant's car had been damaged in a collision caused by the negligence of the defendant. But Lord Hobhouse began his analysis with basic principles. Taking Lord Hobhouse's statement together with statements in other cases: (1) where a chattel is damaged by the negligence of another that loss (the "direct" loss) is suffered as soon as the chattel is damaged. (2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. This follows the

[20] Aikens LJ pointed out in ***Pattni v First Leicester Buses Ltd at para 30(1)fn 19*** that the statements of Lord Hobhouse at this point of his speech were *obiter* and the other Law Lords did not expressly agree with him on them. But the general principles had long been authoritatively stated in a series of ship collision cases in the House of Lords in the early part of the twentieth century and cannot be in doubt.

general principle in awarding damages, ie. that of restitution.[21] In Lord Hobhouse's phrase, "this can be expressed as a capital account loss". (3) If the chattel can be economically repaired, the claimant is entitled to have it repaired at the cost of the wrongdoer, although the claimant is not obliged to repair the chattel to recover the direct loss suffered. (4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages.[22] Thus, subsequent destruction of the chattel,[23] or a decision to delay repairs,[24] or an ability to have the repairs done at less than cost[25] or for nothing[26] will not prevent the claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor. (5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer.

28. As Cooke J pointed out at [7] of his judgment (2), the correct jurisprudential analysis of a claim for diminution in value, even if it is measured by the reasonable cost of repairs, is that it is a claim for general damages, not one for "special damages". The diminution in value claim should therefore be pleaded as a claim for general damages. Documents such as an invoice for the cost of the repairs undertaken are no more than evidence of the diminution in value suffered by the chattel as a result of the negligence of the wrongdoer which can be used to make good the claim. Strictly speaking, the cost of the repairs is not itself the loss suffered. In addition to the direct loss represented by diminution in value, there may be other, consequential losses, such as deprivation or "loss of use" of the vehicle, but that constitutes a different head of claim.[27] Once again a claim for simple deprivation, or loss of use, is a claim for general damages. However, if the chattel concerned is one that is normally used in the hope of making a profit, (such as a trading ship, a lorry or a taxi), then a claim for the profits lost because the chattel could not be used for that trading would constitute "special damages". Those damages have to be specifically pleaded and proved.[28]

29. The argument that the claimants cannot recover the full cost of repair to RSAI because they must mitigate their loss by having the repairs done at a lower cost is wrong because mitigation is not relevant in respect of this "direct" loss. As we have already pointed out, the loss to a claimant whose chattel has been damaged by the negligence of another is immediate. That loss cannot be "mitigated" by having the

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[21] ***Livingstone v Rawyards Coal Co (1880) 4 App Cas 25 at 39 per Lord Blackburn.***
[22] ***Burdis v Livsey [2003] QB 36 at [95]***
[23] As in ***The Glenfinlas (Note) [1918] P 3663; The London Corporation [1935] P 70***
[24] ***The Kingsway [1918] P 344***
[25] ***Jones v Stroud DC [1986] 1 WLR 1141***
[26] ***The Endeavour (1890) 6 Asp MC 511; Burdis v Livsey [2003] QB 36,*** where no sum was payable because the repairs were carried out under an unenforceable credit agreement.
[27] In ***The Mediana [1900] AC 113 at 117, Lord Halsbury LC*** deprecated the use of the phrase "the use of" the chattel and preferred simply to say that the tort had "deprived" the owner of the chattel, commenting: "What right has a wrongdoer to consider what use you are going to make of your [chattel]" and he gave the famous example of the chair removed from a room.
[28] ***The Mediana [1900] AC 113 at 117-118 per Lord Halsbury LC*** with whom the other Law Lords agreed, although adding supplementary comments.

chattel repaired free or for a lower cost, because it is not the cost of the repairs that constitutes the loss; the loss is the diminution in value of the chattel.[29]

30. ***Darbishire v Warran*** does not assist Mr Curtis' argument. That was a case where the claimant chose to repair his car that had been damaged in a collision at a cost which exceeded its market value. He did so because he valued and trusted his car. There was also some evidence that it might have been difficult to find another second-hand car of the same type on the market. The argument in the Court of Appeal was whether the claimant was entitled to recover all the cost of the repairs, £192, as he claimed, when the undamaged value of the car was only £85. The straightforward answer is that he could not do so, because, upon proper analysis, the claim should have been one for general damages for the diminution in value to the car.[30] The problem arose because the claim was made for the total repair cost, which led the court into consideration of "mitigation of loss". However, Harman LJ gave the correct answer at page 1073 when he stated that this car was not an "irreplaceable article" and, as the cost of repairs greatly exceeded its value (before damage), "the car should be treated as a constructive total loss and the measure of damage is its value", by which I think he must have meant the diminution in value of the car.

31. Both Harman and Pearson LJJ made some remarks suggesting that the claimant was under a duty to mitigate his loss and that he failed to do so in this case and that was the reason why he could not recover the full cost of the repairs.[31] Pennycuik J made similar comments. In our view these statements suggesting that the principle of mitigation of loss was relevant to the question of what damages could be recovered for the physical damage to the car were, with respect, misplaced. They lose sight of the fact that the cost of repairs is only evidence of the amount of the loss recoverable, viz. the amount of the diminution in value of the chattel. As Cooke J pointed out at [35] of his judgment (1), the court in ***Darbishire v Warran*** was apparently not referred to the long line of Admiralty cases which established the law, such as ***The Endeavour, The Glenfinlas, The Kingsway,*** and ***The London Corporation.*** The principles established in those cases have since been authoritatively reaffirmed by Lord Hobhouse in the House of Lords in ***Dimond v Lovell*** and by this court in both ***Jones v Stroud District Council***[32] and ***Burdis v Livsey.***[33] Thus we agree with the statement of Cooke J[34] that the remarks on mitigation in ***Darbishire v Warran*** must be seen as an "aberration". But the actual decision in that case, based on Harman LJ's analysis, was correct.

32. In summary, if a claimant, whose damaged chattel is capable of economic repair, chooses to repair it at a cost which is not reasonable, then the reason why he cannot recover that unreasonable cost as damages will be because that cost does not represent the diminution in value of the chattel. What is the diminution in value of a chattel

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[29] The statement at para 28-124 of the 3rd supplement to ***Clerk & Lindsell on Torts (20th Ed)*** commenting on Cooke J's judgment (1) to the effect that "where the claimant has carried out the repairs at a lower cost, the claimant has thereby mitigated some of his loss which should therefore be non-recoverable" makes the mistake of identifying the cost of repairs as being the claimant's loss: it is clear from the authorities referred to in Lord Hobhouse's speech in ***Dimond v Lovell*** (and others) that it the cost is not the loss.

[30] Harman LJ noted that the claimant had not proved that there was any "special use" for the car: page 1072.

[31] ***Pages 1071 and 1076 of the report.***

[32] ***[1986] 1 WLR 1141*** especially at ***1150 H per Neill LJ*** with whom Ralph Gibson and Fox LJJ agreed.

[33] ***[2003] QB 36 [84]-[85] per Aldous LJ*** giving the judgment of the court.

[34] [40] of judgment (1).

or the "reasonable cost of repair" will always be a question of fact for the trial judge to determine if it is in dispute.

33. As will be clear from the discussion in the preceding paragraphs, on a strict analysis of the law, preliminary issue one asks the wrong question, because the measure of the claimant's loss that results from the damage inflicted by the tortfeasor is the diminution in value of the vehicle. With that important qualification, our answer to preliminary issue one is: "Yes", because the "reasonable cost of repair" is, as a rule of thumb, taken as representing the diminution in value of the chattel that has been suffered as a result of the damage caused by the negligence of the defendant. However, it may not always represent the full amount of the diminution in value, as this court made clear in ***Payton v Brooks.***[35]

VI. Preliminary Issue Two: discussion and conclusion

34. The second question is: "If a claimant's insurer has arranged the repair, is the reasonableness of the repair charge to be judged by reference to (a) what a person in the position of the claimant could obtain on the open market; or (b) what his or her insurer could obtain on the open market?" This question only arises in the present group of cases because they are all subrogated claims brought by RSAI, which has indemnified its insureds under the motor policies by arranging for and paying for the repair of the vehicles concerned in accordance with the RSAI scheme set out in the policy terms. The question could not arise if the cases were dealing with damage to a chattel that was not insured. For example, doubtless many bicycles used every day in London are not insured, even if some cost thousands of pounds. So the first issue is whether, as a matter of principle, there should be a difference between the case of a chattel that is not insured, or which is insured but whose insurer is not contractually bound to arrange the repair of it if the insured asks him to do so, and a chattel that is insured and whose insurer has arranged the repair in fulfilling his policy obligation under the contract terms.

35. In our view the clear answer to this question is "no" there should not be and there is not a difference. The law has long been settled. There are two basic principles. First, even in a case where a claimant is insured in respect of the loss suffered as a result of the tortfeasor's wrong and the insurer has indemnified the insured and becomes subrogated to the insured's rights against the tortfeasor, the cause of action against the tortfeasor remains that of the claimant, unless it is specifically assigned to the insurer. See, for example, ***Esso Petroleum Co Ltd v Hall Russell & Co Ltd.*** [36]

36. The second basic principle is that, in respect of a loss which is covered by insurance, the benefits obtained under the insurance are irrelevant in assessing the correct measure of damages recoverable. As Longmore LJ put it in ***Bee v Jenson (No 2),***[37] "…ever since ***Bradburn v Great Western Railway***[38] defendants have had to accept that a claimant's insurance arrangements are irrelevant and cannot be prayed in aid to reduce their liabilities". In the present case the RSAI claimants have a form of motor policy which gives them the option to use the RSAI scheme to have the insured

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[35] ***[1974] 1 Lloyd's Rep 241 at 244 per Edmund Davies LJ; 244 per Buckley LJ; 245 per Roskill LJ.***
[36] ***[1989] AC 643 at 663G per Lord Goff of Chieveley; 677A per Lord Jauncey of Tullichettle.*** The other Law Lords agreed.
[37] ***[2008] Lloyd's Rep IR 221 at [9]. Tuckey LJ and Sir Paul Kennedy agreed.***
[38] ***(1874) LR 10 Exch 1.***

vehicle repaired by and at the expense of the insurer. In that way RSAI, the insurer, fulfils its contractual duty to indemnify the insured for loss suffered as a result of an insured peril, viz. damage to the insured vehicle resulting from the negligence of another driver. Lord Reid explained in the leading case of ***Parry v Cleaver***[39] that the reason why benefits provided by way of indemnity by the insurer are to be disregarded when assessing the liability of the tortfeasor is that the insured has bought the benefits by paying the premium demanded. So, in Lord Reid's words: "…it would be unjust and unreasonable to hold that the money which [the insured] prudently spent on premiums and the benefit from it should inure to the benefit of the tortfeasor".

37. Accordingly, our short answer to this second question is: unless the Provident and Allianz defendants can take the present cases out of these general rules, what the insurer can obtain on the open market by way of a "reasonable repair charge" is irrelevant, because the position of the insurer is, as a matter of law, irrelevant.

38. The principal argument of the appellants to escape this conclusion is to say that RSAI acts as the agent of the claimant when arranging the repairs under the RSAI scheme, so that, by some means, it is the contract between MRNM and the PRN repairer that is the relevant one for ascertaining the cost of the repairs. This argument is not supported by the facts. The terms of the policy do not provide that RSAI will be the agent of the insured either generally or in relation to any repair contract that is concluded under the RSAI scheme. The facts of the cases do not show that the claimants have either expressly, impliedly, or ostensibly given RSAI authority to enter into a repair contract on the insured's behalf with a PRN repairer. Thus the PRN repairer could not recover from the insured (as opposed to MRNM) the cost of the repairs done.

39. The appellants also argued that they could rely on the decision of this court in ***Copley v Lawn.***[40] This decision is said to demonstrate that in certain circumstances the court can take into account the position of the insurer. In that case the question before this court was whether two claimants (who were, of course, insured), whose cars had been damaged by the negligence of another, were entitled to recover the cost of hiring a replacement vehicle when they were offered a "free" replacement car by the insurer of the tortfeasor. It was said that they had failed to mitigate their loss and had acted unreasonably in not accepting that offer.

40. Longmore LJ gave the single reasoned judgment. He accepted that if insurers were involved on both sides, then, when considering what the appropriate course was in relation to the hire of replacement cars, it was correct in principle to take account of the "combined position of the claimants and their advisors".[41] In those cases the advisors included their insurance brokers, their insurers and their solicitors. Longmore LJ also stated that if a defendant's insurer made an offer of a replacement car that was cheaper than the one that the claimant was intending to pay for, it may well be the case (all other things being equal) that a claimant should accept that lower

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[39] ***[1970] AC 1 at page 14.***
[40] ***[2009] EWCA Civ 580; [2009] Lloyd's Rep IR 496.***
[41] See [16] and [17]. Waller and Jacob LJJ agreed with Longmore LJ.

offer.[42] But in those cases the court held that all other things were not equal and the claimants had acted reasonably in the circumstances in refusing that offer.

41. We accept Mr Butcher's submission on the effect of the passages in that decision relied on by the appellants. All they do is recognise that where a claimant receives an offer to make amends then the claimant should be credited with the advice which he could (on the facts of the case) have been expected to obtain from other professionals. In deciding whether the claimant acted reasonably, that advice is to be taken into account. But the passages in ***Copley v Lawn*** go no further than that. They do not undermine the general principles that: (i) a claim is that of the claimant, not the insurer who has become subrogated to the claim; (ii) the present claim is one for direct loss, where mitigation is irrelevant; and (iii) the fact that the claimant has been indemnified by the insurer cannot be prayed in aid to reduce the liability of the tortfeasor.

42. Our answer to preliminary issue two is therefore the same as that of the judge: if the claimant's insurer has arranged the repair, the reasonableness of the repair charge is to be judged by reference to what a person in the position of the claimant could obtain on the open market. We emphasise again that the repair charge is only evidence (often the best evidence) of the diminution in value of the vehicle that has been damaged as a result of the negligence of the tortfeasor.

VII. Third Preliminary Issue: discussion and conclusion.

43. The third preliminary issue is: "where a vehicle is not a write-off and an insurer indemnifies the insured by having repairs performed and paying charges for those repairs, and where the amount claimed is no more than the reasonable cost of repair (on the correct legal test determined under (2) above) is that amount recoverable?". The argument on this question concentrated on the issue of the recoverability of "administrative costs", costs of "sundry services" and the costs of a courtesy car, but there is a point of principle that must be dealt with first.

44. The claim in respect of the physical damage to the vehicle is a claim in general damages and the measure of damages recoverable is the monetary amount of the diminution in value of the vehicle caused by the negligence of the defendant. That diminution in value figure is usually calculated, as a rule of thumb, by the reasonable cost of repairs (to the claimant) in a case where the vehicle is capable of economic repair. If, as is assumed by the form of the question in the third preliminary issue, it is the *insurer* that has arranged and paid for the repairs to the claimant's vehicle and the claimant then sues for the cost incurred by the insurer as the sum representing the diminution in value of the vehicle resulting from the negligence of the defendant, the court has only one question to consider. It is whether the actual sum claimed is equal to or less than the notional sum this claimant would have paid, by way of a reasonable cost of repair, if he had gone into the open market to have those repairs done. The court will examine the components of the notional overall figure which is said to represent what the claimant (not the insurer) would have had to pay if he had organised the repairs, to ensure that that sum represents the "reasonable cost" of repairs that the claimant would have had to pay. It will then compare that figure (stripped, if necessary, of any "unreasonable" elements) with the total sum

[42] [22]

representing the actual cost to the insurer, which will be the sum claimed by the claimant.

45. This is the exercise that the parties will have to undertake, if necessary, when these cases are remitted to the Mercantile Court. If so, then the court will not have to examine details of what "administrative charges", or "sundry service charges" have been included in the total repair cost paid by RSAI to MRNM or why those charges have been incurred. The appellants' attack on these specific charges which have been included in the invoice of MRNM to RSAI, alleging that the services were not provided, or they are too high or unreasonable or that they do not represent repairs, all miss the point. The question is not whether each of the items actually charged by MRNM to RSAI is reasonable, but whether the overall cost charged by MRNM is reasonable. If the total repair cost paid by RSAI is more than the reasonable repair cost that the claimant would have paid if he had arranged the repairs on the open market, then the sum claimed (effectively by RSAI) will simply be reduced to the notional reasonable repair cost.

46. **Courtesy car costs:** The position of the cost of a courtesy car is different, because that cost cannot be a part of the repair costs, as the respondents acknowledge. The appellants accept that if a claimant is deprived of his chattel for a time, he can recover a sum by way of general damages for that deprivation.[43] The cases on what sums can be recovered when a claimant has hired a replacement vehicle on a credit hire basis all establish that a claimant can claim that cost of replacement as damages,[44] provided he has reasonably mitigated his loss and that the cost contains no element that is not legally recoverable, such as the cost of hiring on credit.[45] If, under the terms of the claimant's insurance, he is entitled to be indemnified by having a replacement car provided without further charge to him, then the claimant can still claim general damages for the deprivation of his own vehicle. In practice, the amount of those general damages will be the sum it would have cost the claimant to hire (on non-credit terms) a comparable vehicle.[46] Where the replacement car has been provided as part of the indemnity under the motor insurance of the claimant, the general damages he recovers in respect of the deprivation of his own vehicle will be held for the benefit of his insurer.[47]

47. The issue between the parties on the recoverability of the courtesy car costs centres on whether the RSAI policies provide that RSAI will indemnify the insured for his loss of use of his vehicle by supplying a replacement, at no charge to the insured. As we understand Mr Curtis' argument, he submitted that the claimant could not recover any sum[48] because the car was provided as a *benefit* under the policy rather than as an *indemnity* in respect of the claimant's loss of use of his damaged vehicle. Two

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[43] ***The Mediana [1900] AC 113 at 117 per Lord Halsbury LC.***

[44] If a claimant has hired the vehicle and the specific hire cost is claimed, this must be as "special damages" which would have to be pleaded and proved: ***Bee v Jenson (No 2) [2008] Lloyd's IR 221 at [20]- [21] per Longmore LJ*** with whom Tuckey LJ and Sir Paul Kennedy agreed.

[45] ***Burdis v Livsey [2003] QB 36 at [147]; Pattni v First Leicester Buses Ltd [2012] PIQR Q1at [30].*** If the claimant owner is a corporate body, then the general damages recoverable may not be calculated on the basis of the cost of hiring a replacement, but on the basis of the capital and interest involved: ***Beechwood Birmingham Ltd v Hoyer Group UK Ltd [2011] QB 357.***

[46] Compare Lord Halsbury's example in ***The Mediana*** at ***page 117.***

[47] ***Bee v Jenson (No 2) [2008] Lloyd's IR 221 at [22]- [24].***

[48] It will be recalled that the sum claimed is £11 per day, which is very modest.

consequences are said to follow: first, this benefit does not constitute the "fruits of the insurance" and so the benefit has to be taken into account when assessing the measure of damages, ie it falls outside the ***Bradburn v Great Western Railway*** and ***Parry v Cleaver*** rule. Therefore, secondly, by taking this benefit, the claimants have, as they were obliged to do, mitigated their loss, so that the "loss of use" damages are thereby reduced to nil.

48. We cannot accept either of these arguments. The right to a replacement car if the insured vehicle cannot be used after an accident because it has to be repaired is set out in the policy; the right is only dependant upon the insured opting to use the RSAI scheme. It is, as Mr Curtis accepted before the judge, a contractual benefit under the policy which RSAI is bound to supply if the insured exercises the RSAI scheme option.[49] That makes this benefit a "fruit of the policy" and within the ***Parry v Cleaver*** rule. We agree with Cooke J's summary, at [36] of judgment (2): "the insurers provide a benefit to the policyholder who has obtained the use of a substitute car and provided it is at a reasonable rate and was reasonably incurred to cover the cost of the use of the damaged car, it is recoverable".

49. Because the policy provided that the policyholder could have a replacement vehicle at no charge if he elected to use the RSAI scheme, there is no question of "mitigation" by the exercise of that option. Mitigation concerns actions taken to reduce loss after the tort (or breach of contract) has occurred. Here the claimant is exercising rights for which he had contracted (and paid for) before the tort occurred. Exercising that contractual right is not "mitigating" the loss of use of the damaged vehicle.

50. Our answer to preliminary issue three is, therefore, "yes, it is". The issue of the courtesy car charge is different, because it cannot be a part of the cost of repairs. But, for the reasons given above, the reasonable cost of a courtesy car, which in these cases is crystallised at £11 a day, is recoverable by the claimant, which sum he will hold for the benefit of RSAI.

VIII. Disposal

51. We shall therefore dismiss the appeal in relation to all three preliminary issues. I will also dismiss the appeal on the strike out/summary judgment applications.

[49] See [33] of judgment (2).