Neutral Citation Number: [2011] EWHC 2020 (QB)

Case No: 0UA03049

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**LONDON MERCANTILE COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 27th July 2011

**Before** :

HIS HONOUR JUDGE MACKIE QC

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**Between :**

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| --- | --- | --- |
|  | **W** | Claimant |
|  | **- and -** |  |
|  | **VEOLIA ENVIRONMENTAL SERVICES (UK) PLC** | Defendant |

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**Mr Christopher Butcher QC and Mr Benjamin Williams** (instructed by **PCJ Solicitors**) for the **Claimant**

**Mr Andrew Prynne QC and Mr Stephen Cottrell** (instructed by **Weightmans**) for the **Defendant**

Hearing dates: 22, 23 and 24 May 2011

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JUDGMENT

**Judge Mackie QC :**

1. This is another round in the continuing contest between the providers of credit hire vehicles and the insurers of defendants in motor accident claims. Two issues arise. First the defendant says that the credit hire charges are irrecoverable because of the effect of The Cancellation of Contracts Made in a Consumer’s Home or Place of Work etc. Regulations 2008 (“the Regulations”). The claimant disputes this and raises the second issue which is a claim that since the hire charges in this case have already been paid questions of unenforceability under the Regulations are irrelevant and the only question is whether the payment amounted to a failure to mitigate.

**The Background**

1. This action was brought in the Central London County Court but transferred to the Mercantile Court for trial. The most surprising aspect of this case, that hire charges of over £138,000 were incurred to provide a vehicle while the claimant’s car, worth about £16,000, was being repaired is not part of the dispute. There is only limited disagreement about the facts and this turns on the evidence of the claimant W who provided three witness statements and was the only live witness. As this case is in substance a dispute between insurers but involves the Claimant’s financial affairs I have agreed to an unopposed request that he be referred to in this Judgment simply as ‘W’. The bundles of authorities contain 58 items. I shall refer only to those cases which seem relevant.

**Facts Agreed or Not Much in Dispute**

1. The claimant is an actuary who was born in August 1942. He lives in Ennismore Gardens, London and owns a four door Bentley which is now 21 years old with a value of some £16,000. The car was involved in an accident that was not the claimant’s fault in July 2008 and he had the use of an alternative car provided by Accident Exchange while it was off the road. On 12 December 2008 a refuse truck owned by the defendant struck the claimant’s car while it was parked outside his home. The claimant was able to drive the car to Jack Barclay the nearest Bentley repairer. He was told that the car was not roadworthy and Jack Barclay later that day arranged for Accident Exchange to provide a replacement vehicle while the claimant’s car was being repaired. The claimant said that he needed a prestige vehicle to project a “successful and professional image” in his business and when he went to the golf club. The claimant asserts that he did not have any realisable assets that would have covered the cost of hire and had significant financial commitments, matters to which I will turn shortly. Accident Exchange provided a modern two door Bentley Continental GT Coupe at a cost of £863.68 per day. The car was brought to his home where he signed a hire contract and an insurance application provided by the driver. The hire was limited to a term of 85 days. He was therefore sent a second agreement covering the period from 13 March 2009 to, as it turned out, 25 April 2009 which he signed and returned.
2. Despite the absence of serious damage it took 135 days for the car to be repaired. The defendant contends that the claimant failed to mitigate his damage by not pursuing repairs more vigorously. A statement from Mr Ian Bradshaw of Accident Exchange exhibits the case management notes relating to the repair. While it may be true that if W had been paying more than £800 per day from his own funds to hire a replacement he would have pursued more aggressively what was happening with the repairs to his car, the defendant’s representatives were fully aware of the explanations being given and why the process was taking so long. They were paying for it but neither complained nor did anything about the delay.
3. The parties are agreed, see the Order of 8 February 2011, that if the claimant had hired on non-credit terms the reasonable cost of hire would have been £485 per day.
4. This action was brought on 15 February 2010 and when the defendant raised the issue of the Regulations. Insurers responded, in what is accepted to have been a litigation tactic initiated by Accident Exchange, by paying the claim of £138,308.43 notwithstanding that the limit of indemnity was £100,000. An accounting entry and a receipt show that sum being transferred from “Accident Exchange Limited *(in its capacity as Claims Agent for Amtrust Europe Limited)*” to Accident Exchange Limited. A letter to W from Accident Exchange confirms this transaction and reiterates his obligation to cooperate.

**Evidence of the Claimant**

1. W works from his home as an actuary but his earnings at the time of the accident were apparently only enough to cover the running costs of the business. He had not taken a salary for 5 years and had been under financial pressures following a divorce and other family issues. He had an overdraft limit of £30,000 and was overdrawn before the accident and afterwards. The limits on his credit cards had been reduced. He has savings which it seems are between £50,000 to £100,000. He has a state pension and a private pension bringing in some £20,000 pa in all. W owns his flat and it seems may still have some interest in a house. W’s evidence about public school fee commitments in his witness statement was not accurate and he was surprisingly vague about his finances given his professional background. W is clearly a truthful person and it seemed to me that his vagueness was due to two causes. First he did not see himself as directly involved in this litigation and was not as well prepared as he otherwise might have been. Secondly I accept his evidence that while meticulous in his professional affairs his private ones are disorganised. It is the experience of the court that this is quite often the case with professional people. It is not necessary, or possible on the material available, for me to make precise findings about W’s financial position. He is however far from the image conjured up when one thinks of a Bentley driver living in Ennismore Gardens. His credit cards would be unlikely to have been able to meet £485 per day. He has some capital available which could have been used to fund this hire. However, on the evidence before me that is capital which he reasonably needs to deal with possible future family commitments and to help provide for himself given that he cannot be expected to work at his profession for many more years.
2. W was cross examined about the circumstances in which he came to sign the hire agreement. I accept his evidence that both the hire and the insurance which came with it were obtained at the suggestion of Jack Barclay informed by W’s own experience over the previous accident and because he wanted both. I also accept that the second hire agreement was made entirely by correspondence and without a visit from Accident Exchange.

**The Hire Agreements**

1. The structure of the two hire agreements is conventional. The customer assumes liability for the contractual rate of hire. That liability is deferred while a claim for the hire costs is pursued against the defendant. The charges and any resulting legal expense are insured in case they are not recovered within the deferment period. By Clause 5 Accident Exchange is given the exclusive right to pursue any claim and W is to cooperate in various ways including paying over any cheque he receives in payment of the claim. Clause 7.8 makes the Agreement the entire agreement and understanding between the parties, revokes any prior agreement and excludes reliance on representations and warranties.
2. The Accident Exchange policy of insurance for motorist legal expenses and replacement vehicle charges is underwritten by IGI Insurance Co Limited (now AmTrust Europe Limited) an independent onshore UK insurer. Accident Exchange was the appointed claims agent. The defendant contended in its skeleton argument, but with less emphasis at trial, that the claimant could not prove on balance that there was a relevant policy of indemnity insurance in place. There is a skilful and detailed analysis of the documents relied upon in the defendant’s skeleton argument. However the structure of the insurance is no more informal than in many of the policies that come before this court and I have no reason to doubt the truth and accuracy of arrangements put in place between two regulated and reputable companies.
3. The policy must be read as a whole and in context but the following provisions are particularly relevant to the points in dispute:-
4. *Definitions*

*Accident Exchange’s Charges – the amounts incurred by the Insured in connection with Accident Exchange Limited’s credit services (including vehicle hire charges owed to Accident Exchange Limited and any repair costs paid for on behalf of the Insured by Accident Exchange Limited) following an Insured Incident.*

*Limit of Indemnity – is the maximum sum that the Underwriters will pay in aggregate in respect of all Legal Costs and Expenses and Accident Exchange’s Charges, being the sum of £100,000.*

*Period of insurance – the period which commences on the date of Issue of this Policy as shown on the accompanying schedule of cover and ends on the earliest of the following occurrences:*

* + - * 1. *when the legal proceedings in respect of the Claim are concluded in a court of first instance;*
				2. *when the Claim is concluded by negotiation by the Solicitor;*
				3. *when You or the Solicitor give Us notice that the Claim is concluded; or*
				4. *when We give You notice that the cover is withdrawn in accordance with the terms of the Policy…*
1. *Cover*

*Following a Policy Claim, the Underwriters will, subject to the terms and conditions of this Policy, Indemnify the Insured against (a) Legal Costs and Expenses and (b) at the end of the relevant credit period and following demand for payment of the same being made, Accident Exchange’s Charges, in each case, subject to:*

* 1. *the Policy Claim having been made within the Period of Insurance;*
	2. *the Insurance premium having been paid;*
	3. *the Insured incident taking place within the Territorial Limits;*
	4. *the Claim having reasonable prospects of success;*
	5. *the maximum sum the Underwriters pay not exceeding the Limit of Indemnity; and*
	6. *the terms and conditions of this Policy.*
1. *Policy Conditions*

*The following conditions apply to this Policy:*

* 1. *We may attempt to settle the Claim prior to the appointment of a Solicitor or the Issue of legal proceedings on such terms as We consider reasonable even if that means that You are unable to pursue any other losses arising from the Insured Incident.*
	2. *We and/or the Underwriters can take over conduct of any Claim at any time in the name of the Insured.*
	3. *We and the Underwriters can issue proceedings for the Underwriters’ benefit in the name of the Insured to recover any payments We or the Underwriters have made under this Policy…*
	4. *We and/or Underwriters may discharge all liabilities to the Insured by paying a sum equal to that claimed subject always to such sum not exceeding the Limit of Indemnity…*

*3.7.15 notwithstanding any other term of this Policy and as may be requested by Us, diligently pursue a Claim together with the Claim for the costs of doing so in compliance with Our instructions and hold all damages and Legal Costs and Expenses recovered subject to a charge in Our favour in respect of all sums which We have paid out or which We have incurred a liability under this Policy and further immediately reimburse Us all such sums and pay over to Us any recovered costs; and…*

1. A Schedule of Cover records the claimant as being the policy holder, cover is to expire on *“settlement of the Policyholder’s claim or as otherwise set out in the terms and conditions of the Policy”.* That schedule states that the cover is underwritten by IGI and distributed by their Coverholder, Accident Exchange. When it was clear that the hire charges were not going to be recovered within the deferment period the claimant made a claim on 16 October 2009 in a standard form which included a declaration that the claimant would cooperate fully in any action that might be necessary to enforce any rights or remedies that Accident Exchange or IGI became entitled to under subrogation upon payment of Accident Exchange’s charges.
2. A letter from Amtrust Europe from 8 March 2011 confirms the existence of the insurance arrangements asserted by Accident Exchange and records that *“the claim is duly settled on behalf of the underwriter by payment to the hire company of the hire charges by way of bank transfer*”. Amtrust Europe have also produced the bordereau and bank statements.

**Legal Issues – Background**

1. As is well known credit hire arrangements have given rise to a lot of litigation. The legal framework is helpfully summarised in the skeleton argument of Mr Butcher QC and Mr Williams for the claimant as follows:
	1. In Giles v Thompson [1994] 1 AC 142 (HL) it was held that the claimant who entered into this type of arrangement incurred a loss (namely his liability to the credit hire company) for which he could claim compensation from the at fault defendant notwithstanding that the schemes envisaged that the claimant would not have to pay the credit hire company anything.
	2. In Giles v Thompsonit was further held that this type of scheme was not champertous or invasive of any requirement of public policy.
	3. In Dimond v Lovell [2002] 1AC 384 (HL) it was held that, while the amount of the hire charges was *prima facie* the loss the claimant had suffered, in the case of credit hire charges would include amounts for benefits additional to the simple hiring of a car.
	4. The majority of the House found that the claimant would only be entitled to recover that part of his loss which represented the cost of hiring a substitute car, and this would, ordinarily, be what was established to be ‘the equivalent spot rate’ for the relevant kind of vehicle.
	5. In the same case, it was further added that, if the hire charges were incurred under an ‘irredeemably unenforceable’ consumer credit agreement, the claimant could not recover them from the defendant as this would offend the rule against double recovery.
	6. In Lagden v O’Connor [2004] 1 AC 1067 (HL) the majority of the House of Lords found that, in the case of claimants who were unable to afford to pay hire charges ‘up front’, they should be able to recover the entire amount of the hire charges in any event.
	7. In Bee v Jenson [2007] 4 All ER 791 (CA), it was held that even if a hire agreement did not impose a liability on the claimant to pay the hire charges, he could still be awarded general damages for the loss of use of his car, and that these could be calculated with reference to the reasonable cost of hire in any event.
2. Of the two main issues in the case one, the consequence of hire charges having already been paid, has not arisen in previous reported cases but the second, that the Regulations make the hire agreement unenforceable against the claimant by Accident Exchange, stems from Dimond above. The case advanced by Mr Prynne QC and Mr Cottrell for the defendant is supported by a judgment given by His Honour Judge Maloney QC in the case of Chen Wei v Cambridge Power and Light Limited, unreported, Cambridge County Court, 10 September 2010.

**Already Paid – Claimant’s Submissions**

1. Mr Butcher QC and Mr Williams argue as follows. W suffered a loss of use which is a settled head of claim. The issue here is whether the defendant can show that W later avoided this loss by a mechanism that is sufficiently connected to the tort so as not to be collateral – see Dimond. Mrs Dimond had hired a car under a consumer credit agreement held to be “irredeemably unenforceable”. The House of Lords concluded that she had thereby avoided her loss by obtaining a replacement vehicle for free. Damages would not be awarded as that would offend the rule against double recovery (see Dimond 397F, 400 C and D and 406 F to G). In Burdis the court again explained that the principle was the avoidance of double recovery and explicitly referred, at paras 57 and 58 to the fact that the *“claimant has not paid and cannot be required to pay…”* In Clark v Ardington [2002] Lloyd’s Rep 138 (a county court case which went to the Court of Appeal as part of Burdis) Judge Harris QC pointed out that it was *“virtually certain”* that the defendants in the cases with which he was there dealing *“would have had to pay them if the Claimants had themselves not sought to question the validity of the credit agreements, and paid Helphire whilst seeking recovery from the Defendants.*” There can be no double recovery in this case because W has paid the loss and will not be compensated twice. In practice the charges have been paid by an insurer but as a matter of law they have been paid by W. Even if the court recognised the insurers’ involvement the payment has still been made by W because the insurance proceeds are an asset of his. Once hire charges are recovered by W he holds them for the benefit of the underwriters and will have to account for them on settled insurance principles, by virtue of clause 3.7.15 of the policy and by the commitment he accepted by letter when making his claim. If the underlying hire agreements are unenforceable that would make no impact on the duty to account as it arises from the insurance contract which is not subject to the Regulations. It is because of this duty to account that there can be no double recovery.– see Arab Bank v John D Wood Commercial Limited [2000] 1 WLR 857 (CA).
2. Mr Butcher argues that the only remaining question is whether it was reasonable for the claimant to pay Accident Exchange. Can the defendant show that W’s duty to mitigate required him to dispute his hire car debt by relying on the Regulations? The duty to mitigate loss is limited. The position was restated by the Court of Appeal in Wilding v British Telecom [2002] 1 ICR 1079 [55]:

“… *the principle [is] set out by Lord Macmillan in Banco de Portugal v Waterlow [1932] AC 452, 506:*

 *The law is satisfied if the party placed in a difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.*

*In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact there if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed. “*

1. Mr Butcher argues that the claimant’s duty to mitigate does not require him to refuse to perform a contract he has entered into with a third party to the detriment of that third party even if it is certain that that contract is unenforceable. A claimant cannot act unreasonably in paying for a service that he has enjoyed regardless of whether that is an outcome to which he could have been legally compelled. In this case the claimant has not only received the benefit of the service but the case on the Regulations is disputed on substantial grounds and it is obviously reasonable for W to avoid that dispute. He relies upon an observation of Longmore LJ in Copley v Lawn [2010] 1 All ER (Comm) 890 [6].

”*judges should… be reluctant to become too readily involved in complicated mitigation arguments since the major protection for the defendant and his insurers is that the claimant can only recover the ‘spot’ or market rate of hire as explained in Dimond v Lovell. … I would, therefore, look with some scepticism on arguments that an innocent claimant should take further steps (over and above ensuring that he is not hiring a replacement car for more than the market rate) by way of mitigating his own loss or protecting the tortfeasor’s position. “*

1. He relies on 3 cases to support W’s position:-

 - King v Victoria Insurance Co [1896] AC 250 (PC) 254-5: the claimant insurer settled a claim for a lost cargo, and on assignment of the cause of action sued the party responsible. The latter argued that the claimant should not have paid under the policy, as the claim was strictly outside its terms. It was held that this point was not available to the tortfeasor.

 *-* London v Scottish Building Society v Stone [1983] 1 WLR 1242 (CA): the claimant was the mortgagee of a property which suffered serious subsidence, and sued the defendant surveyor. The claimant had the legal right to pass part of its losses on to the borrowers under the mortgage deed. It refused to do so, believing that this would be unfair. The court held that it was entitled to waive its rights against the borrowers, and that this was not a failure to mitigate loss. See in particular the judgment of Stephenson LJ.

 *-*Forde v Birmingham CC [2009] 1 WLR 2732 (QB) [111]-[116]: a claim for costs was made under an arguably voidable CFA. The claimant had not, however, voided the CFA, and the court held that this was reasonable. Christopher Clarke J stated, at [106], that the claimant’s desire to take no point against her solicitors was ‘readily accounted for “by the ordinary motives of ordinary persons”’ and that in circumstances where they had provided her with a valuable service ‘it would be entirely understandable for her not to seek to rely on the unattractive contention that [the solicitors] should get nothing at all for what they had done.’ He added, *loc cit*, ‘Many people would regard it as unacceptable that [the solicitors] should get nothing for their work. The ordinary motives of ordinary persons do not exclude doing the decent thing, even if some persons would not be minded to do so.’

1. Mr Butcher therefore submits that the claimant did not act unreasonably in paying the hire charges irrespective of the enforceability of the hire agreements. W had enjoyed the hire of an extremely valuable car for a period of over 4 months during which its value had no doubt depreciated. He cannot have had a duty to refuse to pay the hire company.

**Already Paid -Defendant’s Submissions**

1. Mr Prynne and Mr Cottrell contest this approach on numerous grounds.
2. Their primary contention is that the claimant cannot prove on balance that there was a relevant policy of indemnity insurance in place or that the liability has been discharged under that policy. Their attack on the existence of the insurance occupies nine pages of their skeleton argument but was not a prominent aspect of their case at trial. This is no doubt a result of the documents which the claimant put forward or clarified relatively late. As I have already indicated I do not propose to address these points in detail. The form, language and nature of the policy apparently entered into and between Accident Exchange and W mark it as a contract of insurance. The parties considered that they had entered into a contract of insurance. The purpose was understood by W from the outset. A premium is recorded as having been paid. W did not pay a separate premium himself but that is a feature of “free” insurance offered daily to millions by banks and other traders. The claim was made and paid, albeit within two different arms of Accident Exchange. Both IGI and Accident Exchange are authorised insurance entities subject to regulation by the FSA. Informality is a characteristic of many insurance arrangements that come before this court. The fact that payment was made without a demand on W but following submission of a claim form is not a reason to question the validity of the transaction. The surprising aspect is that the policy should have paid out over £138,000 when there was an indemnity limit of £100,000 and I shall return to that aspect. I consider that there was a valid insurance policy.
3. Secondly the defendant submits that since the claim was made under Section 3.6 which gives underwriters discretion to discharge all liabilities to the claimant by paying a sum equal to that claim that discretion is exercised outside the policy. The payment is not made under the policy and does not meet the requirements of Section two and its two conditions precedent. It is not a fruit of insurance and as a voluntary payment cannot be an exception to the rule against double recovery. As I see it that point misreads the policy. The power under Section 3.6 to discharge all liabilities is to do this under the policy. Payments under 3.6 discharge liabilities under the policy of insurance and therefore are indeed a fruit of it. Section 3.6 is however *“subject always to that sum not exceeding the limit of indemnity”*. Mr Prynne says that the only purpose of paying more than the limit was to permit Accident Exchange to avoid the Regulations by making a payment that was in truth voluntary.
4. Thirdly the defendant argues that Accident Exchange seeks to avoid the effect of the Regulations by paying itself and in doing so resurrecting a liability that did not exist before payment. The relevant contractual right to subrogation is that under the insurance contract not the hire agreements. The fact that the claimant’s hire charges may have been paid by the insurer cannot alter the unenforceable nature of the contract. Mr Prynne draws a distinction between the position of a claimant who does not have insurance and who on these facts would therefore have suffered no loss, assuming that the defendant’s case on the Regulations is made out, and that of a claimant with insurance protection who would suffer a loss. It is suggested that this absurd result indicates that the claimant’s case in this regard is misconceived. Mr Butcher responds, as I see it correctly, that the distinction is not between those who are insured and those who are not but between those who have paid and those who have not.
5. Fourthly the defendant argues that the payment made is in truth gratuitous. It is an ex gratia payment and there can be no valid subrogation. Gratuitous payments of this kind that are neither charitable nor the fruits of insurance do not come with any recognised exception to the rule against double recovery (Parry v Cleaver [1970] AC 1). Mr Prynne says that King was a case where there was clear liability on behalf of the claimant whereas in this case it is clear that two conditions precedent to indemnity set out in Section 2, a demand for payment and a payment of premium, have not been fulfilled. King deals with a payment honestly purporting to be in satisfaction of potential liability under a policy with the result that a defendant cannot be allowed to allege that the payment was not strictly within the terms of that policy. The defendant relies on Simpson v Thompson (1877) 3 App Cas 279. In that case the underwriter could not recover the value of damage to a ship where the assured owned both vessels involved in a collision. As the owner had no cause of action against himself the insurer could be in no better position than the assured. This, Mr Prynne argues, supports the proposition that an underwriter may fail in a subrogated claim where payment has been made if the assured could not have made a claim on the same facts. Mr Butcher’s response is that his client is not saying that the insurer has a claim not open to the assured, simply that payment having been made by on behalf of the claimant the underwriters are subrogated to his right to sue the party at fault for what he has paid out. The position is no different from that which would have arisen if W had paid the hire charges and then been indemnified. In that event insurers would obviously have been subrogated to W’s rights.
6. Fifthly Mr Prynne argues that the insurer cannot and never will be able to exercise a right of subrogation in respect of the hire charges. He relies upon a passage in McGillivray on Insurance Law (11th edition) and Page v Scottish Insurance Corporation (1929) [140] LT 571 for the proposition that where an insurer is liable under the policy for different types of loss he must pay for all types of damage put forward before it can be subrogated to any particular right of the insured. Further the right of subrogation had not arisen as at the date when proceedings were issued and the proceedings were not properly constituted. However Page was an unusual case where an action was brought in the name of the assured but not with his authority. I do not read this decision as support for a claim that the insurer cannot exercise a right of subrogation in respect of the hire charges; nor is it support for a claim that the action has not been properly constituted because the right of subrogation had not arisen as at the date when proceedings were issued. I accept the submissions made by Mr Williams in his helpful supplemental note about Page.
7. Sixthly Mr Prynne argues that the claimant either suffered a loss or he did not. It cannot be right that had the court assessed the claimant’s damages on 8 September the day before payment was made it would have found that the payment between the claimant and accident exchange was unenforceable and that the defendant had suffered no loss yet the very next day, simply because “payment” had been made the position was reversed. He relies on decisions of the Court of Appeal in McMillan Williams v Range [2004] 1 WLR 1858 and Garrett v Halton [2007] 1WLR 554. These are put forward to support the proposition that a contract must be capable of interpretation at the point when it is made, its enforceability or otherwise does not depend on future events such as the decision to claim on a policy of insurance. That may be but, as Mr Butcher contends, the issue is whether a loss was established by the payment not what the meaning of a contract was at the time it was made. There is no reason to disregard events such as the payment just because they arise, as damages often do, after the cause of action has accrued.
8. The defendant also contends that the courts should have in mind the rationale that underpins the exceptions to the rule against double recovery. The exception for charitable benevolence exists so that those that contribute to charitable schemes for accident victims should not suffer the outrage of seeing their contributions reducing the liability of the tortfeasor. The rationale for the insurance exception (see for example Dyson LJ in Gaca v Pirelli [2006] 1 WLR 2683 at 2697) is that the claimant has prudently chosen to pay for insurance and it would be wrong for this prudence to reduce the liability of the tortfeasor.
9. Mr Butcher responded to this by citing a series of cases to support the proposition that the tortfeasor was not entitled to the benefit of money paid to the assured ex gratia if it was intended by the donor to benefit the assured to the exclusion of the insurer. He relies first on Colonia Versicherung v Amoco Oil [1997] 1 Lloyd’s Rep 261 which decides precisely that point. He refers to a decision of Mr Denis Henry QC in Nahhas v Pier House [1984] EGLR 161. The judge accepted that a payment by a third party insurance broker to the daughter of a valued client made for benevolent and commercial reasons did not reduce the claim on the tortfeasor a position which, he held, would also, should it have been necessary, have been justified by the ordinary principles of subrogation. Mr Butcher also relied upon two decisions of Steyn J. In Merrett v Capitol Indemnity Corporation [1991] 1 Lloyd’s Rep 169 a gift made by brokers to the client insured was nevertheless recoverable from insurers. It was a question of fact in each case whether a gift had or had not been paid in diminution of the loss. If it was established that the payment was intended solely for the benefit of the assured it had not been paid in diminution of the loss and must be disregarded in assessing the assured’s recoverable loss. In The Mathew [1990] 2 Lloyd’s Rep 323 time charterers argued that in respect of the voyage expenses, which under the head charter they were obliged to pay, they could take advantage of the fact that a third party funded the payment subject to an obligation by the owners to repay the sum to the third party if it was recovered. In other words it was the time charterers’ position that because of the intercession of cargo interests who funded the payment they had successfully secured a windfall. The judge rejected that submission. Mr Butcher relied upon these cases to show that even if, contrary to his submissions, there had been no subrogation in this case a payment by a party to a victim of a wrong with the intention of not reducing that victim’s claim against a defendant is left out of account in the victim’s claim against the defendant. In the present case by clause 3.7.15 of the policy W was in any event obliged to pay over whatever he received to Accident Exchange at once.
10. Finally on this aspect of the case Mr Prynne submits that Mr Butcher’s argument has already been expressly rejected by the Court of Appeal in Burdis. In one sense he is correct. In that case it was argued that one of the claimants, Dr Sen, could take advantage of payments by insurers on his behalf that were found to have been made. At paragraphs 56 to 58, in passages expressly obiter, Aldous LJ, giving the judgment of the court, rejected the contention that the payment of hire charges by an insurer would render the hire charges recoverable against a third party defendant and said that such payment would not alter the fact that it would still amount to double recovery where the hire agreements were found to be unenforceable. The court does not explain why once payment has been made there would still be double recovery.
11. As to mitigation Mr Prynne accepts that it is difficult to criticise the conduct of W alone and that until recently that is all that the court would have been concerned with. He submits however that it is now clear that the court must look at the true commercial picture and the position of the insurer and the hire company as well as that of the claimant. He relies upon Copley v Lawn and upon the following two passages in particular,

*[15] In fact the record shows (pages 73-76) that Captain Maden’s evidence was that he had sent KGM’s letter to his own brokers or insurers (described as SAGA). That was never challenged by counsel for Mr Haller and his insurers and it is a bit of a mystery why the District Judge held that Captain Maden ignored it. The answer must be that, like Deputy District Judge Reed in the case of Mrs Copley and her solicitor, he was conflating the position of Captain Maden and his brokers and the question is whether that was the right approach.*

*[16] The answer is that in most cases that will be the right approach because the natural assumption will be that any individual driver will send any letter similar to KGM’s letter to his own agents whether they be his solicitor or his brokers or his insurers. It is therefore appropriate to consider the combined position of the claimants and their advisers and, if that is what the judges below did, they were right to do so.*

1. In this judgment, with which Waller and Jacob LJJ agreed, Longmore LJ was concerned with appeals in two cases where claimants had rejected offers of “free” cars from defendant’s insurers. At paragraph 12 he says this, *“at this stage it may become important to decide the extent to which (if at all) it is right to take account of the fact that both parties are insured. The traditional English view is that insurance is left out of account in ascertaining the parties’ rights. That is why, although these appeals are in truth disputes between insurers the formal position is that it is only the insureds who are parties to the actions before the courts.”* He goes on to state that on the *“traditional view of the matter”* one would look only at the personal position of the individual parties. Mr Prynne submits that when the position is combined it was unreasonable for Accident Exchange to pay on 9 September 2009 when it was clear that the enforceability of the agreement was in serious dispute. Payment was at that point clearly unreasonable when it was known that the County Court’s decision in Chen Wei was about to be handed down. At this point Accident Exchange was, by paying, potentially saddling its underwriter principal with a liability that it would not otherwise have to meet. It was also causing Accident Exchange in its insurer capacity to pay or settle a claim before it had been fully investigated. The only motive for Accident Exchange’s decision to pay in September 2010 must have been a desire to escape the effect of the Regulations rather than meet insurance liabilities. In this case, the cause of any “loss”, the payment attributable to W, was the gratuitous act of the insurer not the accident. The chain of causation had been broken.

**Already Paid- Decision of the Court**

1. The hire charges represent the cost of the claimant hiring another car while his was off the road. In hiring a car he is mitigating what would otherwise be a claim for loss of use. (Dimond- Lord Hobhouse at 406 G to H) The hire charges are recoverable as damages.
2. W has paid the hire charges. Whether or not the claimant has incurred a liability to pay those charges (an issue dealt with later in this judgment) they have now been paid to Accident Exchange by the claimant. They have not been paid by W personally but by his insurers following submission of a claim. Innumerable payments are made in this way, through insurers, by claimants. They are invariably treated as having been made by the claimant even when insurers sign the cheque.
3. In Dimond the claimant could only have recovered if a new exception had been created to the rule against double recovery (Lord Hoffmann at 400). In this case the Claimant has paid and there will be no double recovery. Where there is a contract of indemnity insurance subrogation prevents any question of double recovery arising. This is clear from the judgment, with which his colleagues agreed, of Mance LJ, as he then was in Arab Bank and at paragraphs 95 and 101 in particular.

*“95. The need for such reasoning in a case of subrogation has been questioned by Chadwick J in the* Bristol and West BS *case, at pages 223-8 in a penetrating analysis to which I am indebted.* Parry v Cleaver *itself was a case of contingency not indemnity insurance. The principle it recognised was formulated in response to an objection that the claimant would be making a double recovery. It was formulated without specific reference to cases of subrogation, and does not depend upon the existence of any rights of subrogation: see eg* Hunt v Severs *[1994] 2 AC 350, [1994] 2 All ER 385, at 358A-B of the former report per Lord Bridge. Where, under the contractual bargain between the parties, indemnity insurance is to be taken out for the benefit of one party only, then, upon payment under the insurance, insurers will normally acquire subrogated rights to pursue the other party. Where there is subrogation, the insured will not make double recovery. In such circumstances it is irrelevant who actually disburses the premium under the contractual bargain, and it is unnecessary to seek to identify differences in kind between the insurance proceeds and the damages claimed. Moreover, in a context where the broad principles of subrogation regard the damages as diminishing the insured loss, it would be incongruous if the relevance or irrelevance of insurance did depend upon supposed differences of such a nature. I accept unhesitatingly that the court's underlying concern, in all cases whether involving subrogation or not, is, using Lord Reid's words in* Parry v Cleaver*, to give effect to considerations of:*

*“justice, reasonableness and public policy.”*

*But cases of indemnity insurance where rights of subrogation exist fall in my view into a special category, with which* Parry v Cleaver *was not directly concerned.*

*101. … As Chadwick J's comprehensive examination of relevant principles (albeit in relation to differently structured MIG insurances covering building societies) in the* Bristol and West BS *case indicates, this analysis makes irrelevant the topic much reviewed in the other first instance authorities cited above - that is the application of the 'insurance exception' to the principle of double recovery identified in* Parry v Cleaver *[1970] AC 1. The doctrine of subrogation prevents any question of double recovery arising.”*

1. Bristol and West was not cited at the trial but the passage referred to by Mance LJ contains this ; *“I would add, with diffidence, that the 'exception' for which justification is required on those grounds of 'justice, reasonableness and public policy' is only a true exception to the rule against double recovery in those cases (which Lord Bridge recognised could exist—see* Hunt v Severs *[1994] 2 All ER 385 at 389, [1994] 2 AC 350 at 358) where there was no right in the insurer to be subrogated to the insured's claim. In those cases in which the insurer has a right of subrogation, the decision of the House of Lords in* Napier v Hunter *[1993] 1 All ER 385, [1993] AC 713 leads me to the view that the reason why the insurance moneys can be ignored in assessing damages is not by way of exception to the rule against double recovery, but because the rule is not violated in those circumstances.”*
2. Where a claimant has already paid the hire charges there is no risk of double recovery. The risk of a windfall to a claimant who obtains payment from the defendant but then declines to pay the hire car provider on legal grounds falls away. The insurer is subrogated to the position of the claimant both as a matter of contract and of the general law.
3. I do not accept the other objections of the defendant for reasons which I have largely given already. There is a valid policy of insurance in place. Payment was made under that policy albeit expressly under Section 3.6. Payment by Accident Exchange to itself in a distinct legal capacity does not “create or resurrect a liability that did not exist before the payment was made”. The situation is far removed from Simpson as insurers are not bringing a claim not open to the insured. They are pursuing a subrogated claim against the defendant arising only from the fact that the assured has been paid. It is the same claim the assured would have had if he had paid from his own funds. Page comes into play nowadays only if an insurer seeks to bring proceedings in the assured’s name without his or her consent, which did not happen here. I am not bound by Burdis on this point because, as I read this case, the issue is not directly addressed. As I see it the McMillan and Garrett cases are not pertinent.
4. Claimants have a duty to mitigate their damage. W has done so by hiring a car and becoming liable to hire charges and then paying them. Defendants have to show that claimants have failed to discharge that obligation, which is not heavy. A claimant who pays a charge for goods or services which he has enjoyed is not failing to mitigate even if it is likely or even probable that he will not have to pay if he takes the matter to court. These are basic and long established principles of law as the cases referred to make clear. It is in effect conceded that if W’s position is looked at on its own, without considering that of insurers, Veolia could not show a failure to mitigate. In Copley the position of the assured and of his brokers was “conflated” because the court held that it was appropriate to examine the combined position of the claimant and his advisers to determine whether or not the claimant was acting reasonably. But the conflation involved considering the existence and extent of legal and other advice because in most cases a driver will send any letter similar to those sent on behalf of the defendants to their own agents. That informed the reasonableness or otherwise of the claimant’s position, it did not substitute for the claimant the position of brokers or insurers. The claimant’s position was being seen in the round not being replaced by that of the insurer. The Court of Appeal in Copley included two judges with particular experience and expertise in insurance matters. If the court had intended to make as fundamental a change to the law of mitigation as would be required for Mr Prynne’s submissions to succeed the matter would have been addressed explicitly and at a greater length. Such a step would also be a major change from the approach of the Court of Appeal and of Longmore LJ not long before in Bee v Jenson [2007] 4 All ER 791

[9] So far in deference to the Appellant's skeleton argument, I have referred to Mr Bee and his insurers interchangeably as if they were both making the claim for the recovery of the hire charges. In fact this is inaccurate. In English law the claim is only made and can only be made by Mr Bee, see MacGillivray, Insurance Law 10th edition paras 22-44 to 22-47. His insurance arrangements would normally be said to be irrelevant to the tortfeasor's liability. They are as is sometimes said “behind the curtain”. The reality is nevertheless that the claim for the hire charges is a subrogated claim brought by Mr Bee for the benefit of his insurers. The insured himself, although the actual Claimant, has not himself paid the repair bill for his car nor has he paid the hire charges; nor indeed has he paid the cost of litigating against Mr Jenson but it is no defence for Mr Jenson (or his insurers) to say that Mr Bee, because he has been compensated by his insurers, has himself suffered no loss. Ever since Bradburn v Great Western Railway (1973) 57 Cr App Rep 948, [1973] Crim LR 705 Defendants have had to accept that a Claimant's insurance arrangements are irrelevant and cannot be prayed in aid to reduce their liabilities. A corollary of the rule that only the insured can sue in respect of the loss is that a Defendant can only discharge his liability by paying the insured. If, however, the insured has already been indemnified by his insurers, he will hold his recovery on trust for his insurers. These provisions of common law are all reflected in Note 6 to s H of Mr Bee's policy.

I would also have expected a decision that so affected the insurance ecostructure to have received further attention in case law since. In any event it is not as I see it a step which a judge at first instance should take

1. There are layers of artificiality in the arguments of each side. The defendant’s reliance upon the Regulations arises not from a new and unexpected concern for the rights of consumers but from a search for weapons in a continuing battle with those behind the claimant. The decision by insurers to pay immediately after the issue of Regulations was raised in the litigation was similarly tactical and part of what Mr Butcher describes as “meeting fire with fire”. These considerations and the motives behind them do not in themselves invalidate the points taken or transactions entered into. But there is a limit. I have concluded that the arrangements between W and AEL involved genuine contracts of insurance (and in evidence he so regarded them). But insurers paid more than £138,000 under a policy whose limit was £100,000. It is true, as Mr Butcher submits that parties to a contract can vary their arrangements. However insurers were under no contractual liability to pay out more than £100,000. Insurers are understandably cautious about paying any claims given their duties to shareholders and their responsibilities to other payers of premiums. Cheerful, prompt and knowing overpayment of claims by insurers is unheard of it, at least in this Court. It would be extraordinary for insurers to pay out almost 40% more than the limit under the policy except in unusual ex gratia circumstances which certainly do not apply here. While recognising that the transactions in this case amount to a valid contract of insurance I will not treat anything above £100,000 as being a good faith payment of a claim made under the policy. Apart from that I accept the Claimant’s case on this point. (In practice this does not affect the overall result because the entire £100,000 can be allocated to the first hire agreement given the position on the second one- see Para 55 below.)

**The Regulations**

1. The 2008 Regulations give consumers a right to cancel regulated contracts and the defendants rely in particular on Regulations 5 and 7:-

*“5. These Regulations apply to a contract, including a consumer credit agreement, between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made -*

*(a) during a visit by the trader to the consumer’s home or place of work, or to the home of another individual;*

*(b) during an excursion organised by the trader away from his business premises; or*

 *(c) after an offer made by the consumer during such a visit or excursion*

 *7. – (1) A consumer has the right to cancel a contract to which these Regulations apply within the cancellation period.*

 *(2) The trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made except in the case of a contract to which regulation 5(c) applies in which case the notice must be given at the time the offer is made by the consumer.*

 *(3) The notice must –*

 *(a) be dated;*

 *(b) indicate the right of the consumer to cancel the contract within the cancellation period;*

 *(c) be easily legible;*

 *(d) contain –*

 *(i) the information set out in Part I of Schedule 4; and*

 *(ii) a cancellation form in the form set out in Part II of that Schedule provided as a detachable slip and completed by or on behalf of the trader in accordance with the notes; and*

 *(e) indicate if applicable -*

 *(i) that the consumer may be required to pay for the goods or services supplied if the performance of the contract has begun with his written agreement before the end of the cancellation period;*

 *(ii) that a related credit agreement will be automatically cancelled if the contract for goods or services is cancelled.*

 *(4) Where the contract is wholly or partly in writing the notice must be incorporated in the same document.*

 *(5) If incorporated in the contract or another document the notice of the right to cancel must –*

 *(a) be set out in a separate box with the heading “Notice of the Right to Cancel”; and*

 *(b) have as much prominence as any other information in the contract or document apart from the heading and the names of the parties to the contract and any information inserted in handwriting.*

 *(6) A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right to cancel and the information required in accordance with this regulation.*

1. Regulation 2 provides*: - “trader means a person who, in making a contract to which these Regulations apply is acting in his commercial or professional capacity and anyone acting in the name or on behalf of the trader.”*
2. Regulation 17 imposes criminal sanctions for breach.
3. In Chen Wei the judge helpfully summarised the background to the Regulations as follows;

*“The Regulations are derived from the EEC Council Directive 85/577/EEC of 20 December 1985, which recites that measures need to be taken against “unfair commercial practices in respect of doorstep selling”, and that “the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not accept...[and] the consumer is often unable to compare the quality and price of the offer with other offers.” The proposed solution is a seven-day cancellation period “in order to enable the consumer to assess the obligations arising under the contract.” The Directive specifically provides that the rights it confers on the consumer cannot be waived (Article 6).*

*“The Directive was first embodied in English law by the 1987 Regulations (S. I. 1987/2117) which did render such contracts unenforceable unless a written 7-day cancellation notice was given, but did not apply to most contracts made following a solicited visit. (In the experience of the court, most contracts for credit hire made or at least signed at the consumer's home will arise from what are likely to be solicited visits, since there will have been prior conversations leading to an arrangement for the credit hire companies representative to visit the home, probably bringing the hire car.) Section 59 of the Consumers, Estate Agents and Redress Act 2007 empowered the Secretary of State to make regulations in respect of “protected contracts” concluded during a solicited visit, and the 2008 Regulations were made pursuant to that Act.”*

**The Regulations – Parties’ Submissions**

1. Mr Prynne submits as follows, the claimant signed the documentation at his home and business address when this was brought in by the Accident Exchange driver. The effect of this, confirmed by the entire agreement clause at 7.8 of the hire agreement which provides that prior negotiations are to be without legal effect is that the two hire contracts were made during a visit by the trader to the consumer’s home or place of work within Regulation 5(a). No notice was provided by Regulation 7(2) and as a result by Regulation 7(6) the contracts are not enforceable against the consumer, W being a consumer and Accident Exchange being a “trader” in whose name and on behalf of which the driver acted. It follows that Accident Exchange cannot recover the hire charges from W as these are not “enforceable”. Hence W’s claim must fail just like that of the claimant in Dimond. This submission is supported by the decision of Judge Maloney QC in Chen Wei. I will refer to the judge’s reasons when addressing the claimant’s submissions on this point.
2. Mr Butcher rejects the defendant’s case for several reasons. First he argues that the claimant has waived any rights he has under the Regulations because he has decided to perform the contract despite the fact that he was not informed of his right to withdraw. The claimant not only used the car under the first agreement but then voluntarily entered into a second one on the same terms. Although by Regulation 15 the parties cannot contract out it is a matter for the individual consumer to decide whether to invoke those rights. W has affirmed the contracts so there would be no issue of double recovery even if the hire company had not been paid.
3. Mr Butcher also relies upon a decision of the European Court, as did Counsel for the claimant in Chen Wei. I set out Judge Maloney’s analysis of this point as I agree with it for the reasons he gives:-

*“16. In support of this contention he relied on the ECJ’s decision in Martin v. EDP Editores [2010] 2 CMLR 27, delivered 17 December 2009. That decision was based on the 1985 Directive and a Spanish law, No. 26/1991, transposing the Directive into national law. The Claimant referred me in particular to para. AG76, part of the Advocate General’s Opinion prefacing the judgment of the Court, in which the AG states:*

*“Just as the consumer must have the possibility of exercising personally his right to cancel the contract, he must also have the possibility of deciding for himself whether or not he will maintain in force the contract negotiated in the absence of such information. There is the possibility of course, that he will seek to maintain the contract in force even though he was not informed of his right of cancellation.”*

*17. The actual judgment of the ECJ neither accepts nor rejects this proposition. This is not surprising, because the question before the ECJ was a procedural one, namely whether it had been open to the Spanish courts hearing the trader’s claim against the consumer for non-payment to take the point that no cancellation notice had been served, when the consumer had not herself put forward a plea to that effect. At para. 20 the ECJ referred to its own case law establishing that in a civil suit it is for the parties to take the initiative, and that the court should act of its own motion “only in exceptional cases where the public interest requires its intervention”. But at para 28, having recited the policy considerations behind the Directive, the ECJ concluded that in such cases the public interest justified a positive intervention by the national court to compensate for the imbalance between consumer and trader in this context. Insofar as it is relevant to this case, Martin would therefore appear to justify a proactive approach by national courts in favour of the consumer, even going beyond the consumer’s own chosen position.*

*18. But further, it is important to note that the Spanish law considered in Martin differed from the present UK Regulations in two major respects:*

*i. it did not provide that the contract was unenforceable if no cancellation notice was served, but merely gave the consumer a right to cancel it at his own request;*

*ii. it did not, so far as one can tell from the ECJ report, make the trader’s failure to serve a cancellation notice a criminal offence.*

*These differences seems to me to be a clear indication that the public policy behind the present UK Regulations is even stronger in favour of the consumer than that affirmed by the ECJ in Martin, and furthermore that the UK Regulations are intended to have a deterrent effect, that is, to encourage traders to comply generally with the Regulations by imposing on them drastic civil and criminal sanctions in those individual cases in which their breaches may come to light. (It is worth emphasising here that of course a failure to notify the consumer of his rights is particularly pernicious, since in many cases that failure will itself operate to protect the trader from sanction by preventing the consumer from relying on rights of which by definition he is unaware.)*

*19. Bearing this in mind, I conclude:*

*i. that if, in an action brought by a credit hire firm against a consumer in respect of a contract made at home, the hirer did not himself take the Regulations point, it would be the court’s duty as a matter of public policy to take the point itself, in the interests not only of that consumer but of consumers generally.*

*ii. and that in such a case it would not be open to the credit hire firm to argue that the consumer had affected the contract by accepting the vehicle and complying with his other apparent obligations under the agreement. As to any such purported affirmation by conduct made before the consumer was informed of his right to cancel, it would plainly not be an effective affirmation at all, since it would be done in ignorance of a vital matter, and further that ignorance would be the direct result of the credit hire firm’s own unlawful act or omission. Typically, as in this case, the first the consumer would know of his right to cancel, and the culpable failure to give him notice of it, would be after proceedings were commenced and the point was taken in the Defence; by then it would in any case be too late for subsequent conduct by the consumer to cure the defect.*

*In short, the “affirmation” argument would, if accepted, enable traders to drive a coach and horses through the Regulations; but on analysis it is no more than an attempt to take improper advantage of the consequences of their own breach.”*

1. Mr Butcher criticises the suggestion by Judge Maloney that it would be the Court’s duty as a matter of public policy to take the Regulations point. While that duty might be described in terms other than those of public policy it is nonetheless one that would be widely recognised by all those who sit in the county courts. Mr Butcher’s laissez faire approach works fine with contracts between substantial companies but it is not appropriate when considering unrepresented consumers whom Parliament has decided to protect. For substantially the reasons given by Judge Maloney I reject this submission.
2. Secondly Mr Butcher argues that questions of compliance with the Regulations are collateral to the present case and so irrelevant. In contrast to the position under the Consumer Credit Act successfully relied upon in Dimond, under the Regulations it is up to the consumer whether to agree to perform the contract. The tortfeasor has no interest in this question and so the claimant’s right to resist enforcement should have no bearing on liability. The right to resist enforcement is wholly collateral to the defendant’s tort, it is an independent consequence of the Regulations. I do not deal in any detail with these and Mr Butcher’s related arguments because, as he appeared to recognise, a conclusion that the unenforceability of the hire agreements is collateral would be inconsistent with the outcome in Dimond. Mr Butcher responds by saying that none of the points which he now raises were taken in Dimond and the courts now have the benefit of a decade’s experience of the limited erosion of the res inter alios acta principle which that decision entailed. He also submits that the law has moved on since Dimond in important respects. That is as maybe. There is as I see it no reason to approach breaches of the Regulations differently from the points that arose under the Consumer Credit Act in Dimond. It is true that under the Act the very document that the claimant needed to place in evidence was unenforceable on its face but that distinction does not seem to me to be material as Judge Maloney concluded at paragraph 24 of Chen Wei.
3. Thirdly Mr Butcher argues that the 2008 Regulations do not apply, on their true construction, to the mere delivery of goods or services which had been prearranged over the telephone where, irrespective of whether a contract has formally come into existence, an order has been placed for the supply in question. He relies upon principles of legislation that provisions which may be expropriatory of contractual rights or impose criminal sanctions should not be expansively construed. He says it is clear from the travaux préparatoires that the Regulations are directed at visits to consumers by sales representatives not at people like the driver who arrived at W’s home to deliver a car and incidentally to hand him papers to sign. Mr Butcher says that where a consumer has prearranged a supply of goods or services a contract should not be taken as having been made by a trader simply because it is formally concluded or executed there. If the Regulations are read literally then they will unfairly affect ordinary transactions such as where a trades person is asked to come to a home to fix a leak, unblock a drain or repair an appliance. Mr Butcher relies, should this be necessary, on the principle of *“reading down”* mandated by Section 3 of the Human Rights Act 1998 and the court’s obligations pursuant to Sections 6(1) & 6(3) not to act inconsistently with a party’s Convention rights unless compelled to do so by primary legislation. Mr Prynne responds that the court is concerned with the law as stated. It would have been open to Parliament to exclude credit hire companies or to restrict the definition of “trader” to door-to-door sales persons but it did not. He also submits that the allegedly penal aspect of the Regulations vanishes if a company carries out the very straightforward task of getting its paperwork right and of instructing its employees to comply with legal requirements.
4. Parliament has chosen to make the Regulations pursuant to the relevant European Directive and to do so in a particular way following the lengthy consultation to which Mr Butcher has drawn attention. This was no doubt to reflect what Parliament saw as the extent of the need to protect consumers. The Regulations render agreements that do not comply ‘unenforceable’, a word that has a clear expression in consumer law, as one sees in Dimond, and create criminal sanctions in certain circumstances. They are not ambiguous. They may work harshly in some of the examples given by Mr Butcher. One can think of other examples- the bed ridden and mortally ill customer seeking a product to reduce suffering- going the other way. But they are not this case. There is no warrant to give these Regulations a meaning beyond that conveyed naturally by the words used.
5. Fourthly Mr Butcher uses similar arguments to submit that the 2008 Regulations should be given, to the extent necessary, a strained construction to avoid a breach of Accident Exchange’s Convention rights. He submits that the following ECHR principles are clear:
6. Article 1 of the 1st Protocol to the ECHR incorporated into English law by the 1998 Act limits the ability of the state to interfere with a person’s peaceful enjoyment of his possessions.
7. Any interference of the state in a party’s right to enjoyment of its possessions must be proportionate.
8. This protection extends to artificial persons such as companies.
9. Possessions include contractual rights and prospective rights which there is a legitimate expectation of acquiring: Stretch v United Kingdom [2004] LGR 401 (ECtHR).

He points to Wilson v First County Trust (No 2) [2004] 1 AC 816 (HL) where the House of Lords decided, albeit *obiter*, that the Court of Appeal had been wrong to find that the unenforceability sanctions in the Consumer Credit Act 1974 were a disproportionate interference in lenders’ contractual rights, and were therefore unlawful. The House found that the measures were proportionate, given the overall scheme and context of that legislation. Mr Butcher submits that while the result is, as it were, against him an inflexible unenforceability sanction might still in other contexts be objectionable in Human Rights Act terms.

* 1. Mr Butcher argues that if interpretation of the Regulations is to be that given by Judge Moloney and now by me then the unenforceability sanction is disproportionate and unlawful. Whatever arguments might be made on a different set of facts I see nothing potentially disproportionate or unlawful in the circumstances of this case, given that the unenforceability would arise only from a failure by Accident Exchange to provide notice to the consumer as clearly required by the Regulations.

**Regulations – decision of the Court**

1. For the reasons I have given I prefer the argument of Mr Prynne. The effect of the Regulations is that Accident Exchange cannot enforce its first hire contract against W, Dimond applies as much to the Regulations as it did to the Consumer Credit Act. Subject to the ‘already paid’ point, a claim for these charges would fail against the defendant.
2. W’s evidence, which I accept, is that the second hire agreement was sent to him in the post and that he signed and returned it without any further visit by a representative of Accident Exchange. At the end of the trial Mr Prynne rightly abandoned his argument that the second agreement was made *“after an offer made by the consumer during such a visit…”* under Regulation 5(c). It follows that the defendant cannot rely on the Regulations for the second hire agreement.

**Rate**

1. As I have decided that hire charges are in principle recoverable the next question is “How Much”. When W obtained the hire car he was mitigating his loss of use. See for example the judgment of Lord Hoffmann in *Dimond* (p401-402) and that of Lord Hobhouse who referred to the *“cost of mitigating the loss of use of her car”.*
2. The undisputed effect of the case law is that in the ordinary way the claimant can only recover the true hire charge element of what he has to pay the company which provides the car. But in Lagden the majority of the House of Lords held that if a claimant was impecunious so that he could not afford or reasonably afford to have paid for the hire of a car upfront or commit his credit card to a certain amount in advance then he would be taken not to have had any choice in the matter. So the full hire rate is recoverable. The process is described by Lord Hope at paragraph 34.
	1. As to what being impecunious entails, Lord Hope went on to say this in para. 42:

*“The Court of Appeal [2003] QB 36 was alive to this issue. In its judgment, at p 83, para 128, the court said:*

*“We realise that in some cases it will be necessary to consider the financial ability of a claimant to pay car hire charges. However we do not anticipate that district and county court judges will not be able to arrive at a just result without putting the parties to great expense.”*

*That seems to me to be a fair assessment. In practice the dividing line is likely to lie between those who have, and those who do no have, the benefit of a recognised credit or debit card. It ought to be possible to identify those cases where the selection has been made on grounds of convenience only without much difficulty.*

*I recognise that, if an exception is to be made in favour of the car owner who is impecunious, there may be some cases where motor insurers will feel that they have no alternative but to take the case to court in order to resolve the question of fact as to whether the claimant had no choice but to use the services of a credit hire company. This may lead to an increase in contested small claims. I do not think that we are in a position to assess the scale of that increase. But motor insurers will be as anxious as anybody to keep these cases out of court with a view to keeping costs to a minimum. This suggests that the better course is to leave it to the insurance market to find its own solution to this problem. We must bear in mind, too, that the object of the law of damages is to put the injured party into the same position as he was before the accident. It would defeat this object if we were to arrive at a decision on policy grounds that would deprive the impecunious motorist of the opportunity of minimising his loss of use while his car is being repaired by obtaining the hire of an alternative vehicle.”*

And Lord Nicholls put it thus:

*“There remains the difficult point of what is meant by “impecunious” in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make. I am full conscious of the open-ended nature of this test. But fears that this will lead to increased litigation in small claims courts seem to me exaggerated. It is in the interests of all concerned to avoid litigation with its attendant costs and delay. Motor insurers and credit hire companies should be able to agree on standard enquiries, or some other means, which in practice can most readily give effect to this test of impecuniosity.”*

1. That confidence is not shared by the minority – see for example Lord Scott at paragraph 75 who identifies potential difficulties with the “credit card” test which have, it seems, become real and extremely frequent ones in litigation in the courts.
2. Does the evidence show that the claimant was *“impecunious*” so that he “*had no choice”* but to take the credit hire car because he could not afford to pay the spot rate of £485 per day? The burden of showing a lack of impecuniosity may rest upon the defendant but this is a matter peculiarly within the knowledge of the claimant. In practice it is not necessary to determine the matter by reference to burdens of proof since, as I see it, the position is clear.
3. W’s finances are or were in a bit of a mess. As I have pointed out he had difficulty with credit cards at the time of the hire and these would not have withstood anything like the spot rate for more than a very brief period. It also seems to me that the “credit card” test has to be seen in the context of the relatively small sums in play in other cases. I have found that he reasonably needs his limited capital for his old age. He has some interest in a flat and a house but these are not readily realisable assets. The exercise is rather unreal. Just as it is unlikely that W would have hired, with his own resources, a Bentley of the quality and nature of the one being repaired it is unimaginable that he would have hired a replacement car as new and valuable as the one supplied. Mr Prynne makes the fair point that the impecuniosity exception was not designed for the drivers of Bentleys but in this case the claimant had a very old Bentley worth no more than a modest modern car. The anomaly lies in the defendant’s generous concessions not in the conclusion which I reach that, in the context of these facts and given the legal test, W was impecunious and had no choice but to take the credit hire car since he could not have been expected to pay the spot rate.

**Conclusion**

1. I therefore conclude that the claimant is entitled to recover the credit hire charges in their entirety. He succeeds on the “already paid” point, would have failed on the first hire agreement on the Regulations point, and was “impecunious” at the time of that hire.
2. I shall be grateful if counsel will let me have, not less than 72 hours before the hand down of this judgment, a draft order and corrections of the usual kind, preferably both agreed, and a note of any points which the parties seek to raise at the next hearing.
3. I am most grateful to the counsel and solicitors in this case for the admirable way in which it has been prepared and presented.