TRANSCRIPT OF PROCEEDINGS

Ref. A70YP147

IN THE COUNTY COURT AT SLOUGH
Sitting at Oxford Combined Court Centre

St Aldates
Oxford

Before DISTRICT JUDGE R R MATTHEWS

IN THE MATTER OF

ALAN MESSENGER (Claimant)

- v -

ZENITH INSURANCE PLC (Defendant)

MR M LANCHESTER appeared on behalf of the Claimant

MR O MOORE appeared on behalf of the Defendant

JUDGMENT
3rd JULY 2019, 11.39-12.36
(AS APPROVED)

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JUDGE MATTHEWS:

1. I have to rule on a preliminary issue in this very long, drawn out cost litigation, arising out of a credit hire claim on behalf of Mr Alan Messenger. I do not propose to rehearse the sorry history which has led to such a lengthy delay in this matter coming before me for judicial determination on the costs issue. Save to say that this case concluded with a Tomlin order, where the claimant accepted the defendant's offer to settle for £1,000, in respect of a multi-track credit hire claim which had sought damages of credit hire for in excess of £40,000. Insofar as the costs provision that was made by consent in the Tomlin order, this provided that the defendant shall pay the claimant's reasonable costs of this action, to be assessed if not agreed, on the standard basis. Importantly, the order added the following provision: neither party is prevented from raising any issues relating to conduct, if relevant, in the detailed assessment proceedings.

2. I should pause to add that, in addition to a credit hire claim, the claimant had pursued and had received a settlement sum in respect of a claim for damages for personal injury. I know not why the credit hire claim could not have been dealt with at the same time which would have avoided the necessity of this particular litigation and a second set of proceedings. But be that as it may, no point is taken that the claimant was entitled to at least try and pursue a claim for damages in the form of credit hire. The only issue that I have to resolve, it seems to me, that is directly relevant as a preliminary point is a question of conduct and it is, in this particular case, conduct which does have significant ramifications as to the amount of costs that are recoverable by the claimant following the Tomlin order.

3. The area concerned for determination as adverse conduct, and serious adverse conduct, is the question of an offer made in respect of the issue raised by the engineer's report that stated that temporary repairs could be completed by replacing a lamp at an approximate cost of £230 excluding VAT. In other words, the conduct relied upon is a classic assertion of a failure to mitigate loss raised by the defendant. I will come to a case which is helpful on this issue later in this ex tempore judgment. It is a case that went on appeal to the Court of Appeal, called *Opoku v Tintas* [2013] EWCA Civ 1299. 1 Oct 2013. There are several areas that I must go through before I consider an analysis of *Opoku v Tintas.*

4. First of all, I should set out the chronology and the chronology is not in dispute. It is set out in the document prepared by Mr Moore, who has appeared on behalf of the defendant, in his skeleton and - and it sets out at page 2, paragraph 2, the history. It is clear that the claimant suffered damage to his vehicle in a road traffic accident on the M3 on 16th May 2012. It is also clear that the claimant entered into, or at least signed, a contract for the hire of a replacement vehicle through Accident Exchange on the 21st May 2012. The claimant hired a vehicle for 337 days. The vehicle was not the same one throughout that period of time but there was a very extensive period of hire of almost 11 months which culminated in a bill for which the claimant remained personally liable of a credit hire charge based on the agreement entered into with Accident Exchange.

5. It is important that I turn to that agreement as an initial analysis because that sets out the contractual responsibilities of the claimant in respect of his hire of an alternative vehicle. It is a document at page 118 of the claimant's trial bundle and a document in customary format. It is a printed form with tick boxes and - and it sets out the rate of charge and - and the rates of charge are set out in the pleadings. It is a document which has terms and conditions on it and the terms and conditions are clear and unequivocal on page 119,

paragraph 2 and 3. And paragraph 3.1 reads: "You will pay hire charges to us for the rental of the vehicle. You shall pay the hire charges to us in full and by a single payment immediately upon the expiry of the credit period. It is your duty to ascertain in advance the amount which is due". At 3.4: "You must take reasonable steps to keep the rental period to a minimum".

6. So inter alia these are the terms and conditions that are relevant to the issue of the possibility or otherwise of the claimant undertaking temporary repairs to make the vehicle driveable again. Within a matter of hours of the accident, the claimant, and there is no criticism of course, took appropriate steps to try and have an alternative vehicle. The vehicle was inspected promptly on 23rd May 2012 and an engineer's report, the following day, was prepared which said that temporary repairs could be completed by replacing the lamp at an approximate cost of £230 excluding VAT. What did the claimant do when faced with that common sense way of getting his vehicle back on the road for a very modest sum?

7. He has provided witness statements which are in the trial bundle, which I will turn to in a moment, but he has said according to the contemporaneous emails that were passing around and it is on page 6 of the defendant's part of the trial bundle and an email from Accident Exchange. I pause there because Accident Exchange are parties to the contract for hire and they are parties to the terms and conditions set out in the agreement, which includes the provision I have mentioned. "You must take reasonable steps to keep the rental period to a minimum." So, both Accident Exchange and the claimant are bound by those terms and conditions. They are terms of the written contract. I know not whether that provision was in the forefront of the mind of the claimant or indeed of Accident Exchange, but it was a clear and unequivocal term of the contract.

8. In an email of the 30th May 2012, Accident Exchange write apparently to the defendant's insurers, although Mr Lanchester is quite happy to state that he cannot confirm that Team One is in fact the defendant's insurers but nevertheless, it does reflect what the claimant wanted at the time and it says, "Via Mr Sedgwick, our client is looking to pay for the temporary repair to his vehicle. However, the body shop will not let the vehicle go until the storage, admin and assessment charges have been paid. Can you please contact the body shop urgently on 01628777720 so they can be settled? The sooner you can do this, the lower the storage and hire charges will be". The long and short of it is that the claimant did not undertake the temporary repair as, apparently, he wanted to do, and so this long, extended period of hire continued throughout its 337 day period.

9. What was the amount, likely amount, insofar as one can assess of storage charges, if that be a genuine bar to the release of the vehicle? The answer is that the storage charges are of a very modest sum of £20 plus VAT per day. So as at the end of May 2012, at its highest, the storage charges would have been no more than in the region of £300. £20 a day plus VAT, possibly £350 including VAT or thereabouts but, by any view, a modest sum. The defendant's case is that this was realistically well within the financial resources of the claimant to have paid not only the costs of the temporary repair, for which he was quite willing to pay, but also an additional modest sum for storage charges.

10. The claimant's case is that he was impecunious, and his impecuniosity meant that he could not manage anything beyond the £230 plus VAT for the temporary repair, which he wanted. The duty to mitigate the loss is not in dispute. It is a well known principle of assessment of damages that a duty rests upon a party to take reasonable steps to mitigate their

loss and I have no need to refer to the expert text book of Dr McGregor, who in McGregor On Damages sets out the various provisions and approach, starting with *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 and taking one through to *Derbyshire v Warren* [1963] 1 WLR 1068 at 1075.

11. The reason for the duty or obligation to take reasonable steps to mitigate the loss is that a tortfeasor should not be exposed to an additional cost by reason of his victim not doing what he or she ought to have done as a reasonable person. And in *Burdis v Livsey* [2003] QB 36, [2002] EWCA Civ 510, the Court of Appeal in that well known case stated that what is reasonable and what is not, and whether loss is avoidable are questions of fact not law, which district and county court judges regularly decide. I am being asked to decide a matter which is a question of fact not law on an assessment of all the papers that are in the case and which have been brought to my attention, including the witness statements, the pleadings and in particular, a detailed analysis of the claimant's own comments, which are, in part, inconsistent and of his bank statements.

12. Before I go through the bank statements and the claimant's evidence, it is right that I record the help that both counsel have given to me on submissions as to the law and as to the correct approach and - and I have taken on board each and every submission that has been advanced, even if time prevents me from dealing with each one to the extent that I perhaps would wish. Mr Lanchester appears for the claimant and - and his submissions are helpfully summarised in his skeleton document, which provides as follows and I find it most help, at least a summary of the position, set out at paragraph 16.

13. It is right that Mr Lanchester makes the following concession: "It is accepted that a cost judge will disallow costs that have been unreasonably incurred and further that the cost judge will take into account in that process all the circumstances of the case. However, when assessing whether the costs were reasonably incurred, the court should consider what was known at the time and not apply hindsight". I accept entirely that observation. The court must assess the situation at the time and not apply hindsight and that is what I have attempted to do: consider the situation as it was known to the claimant, both as to the costs of repair and as to his own financial circumstances and his capacity to meet both the costs of repair and the storage charges.

14. Mr Lanchester, in summary, is saying that it is simply not realistic to test the question of the resources of the claimant to meet storage charges without a proper trial, without a cross-examination of the claimant in the witness box in reality and putting to him the inconsistencies in his evidence; putting to him no doubt various entries on his bank statements as to what they were and - and what the outgoings related to and no doubt, to consider also the general thrust of the claimant's overall asset base. Insofar as the claimant puts his case, it seems to me it can only at its highest be as he has sought to set out in his own witness statements because that is his evidence in chief. That is the evidence upon which he relies to prove his case. And those statements are endorsed with a statement of truth and have exhibited to them bank statements, both in respect of a joint account and in respect of an HSBC account.

15. So, Mr Lanchester is submitting that it simply would not be right and it would be a step too far to make a finding in the context of ability to pay for the storage charges without a proper testing of that evidence. Mr Moore, on the other hand, submits that a district judge, a cost judge, is more than able as part of the assessment process to consider conduct, whatever

conduct that might be. It could be a breach of a pre-action protocol. It could be exaggeration. It could be any of the various well known areas of conduct that are subject to detailed analysis in a costs assessment process. I am quite satisfied that the court is able, on the facts of this particular case and the papers that are available, to make a finding, notwithstanding Mr Lanchester's submission that the court should be reluctant or slow so to do. In fairness to Mr Lanchester, he does not submit that that possibility of making the finding of fact is not open to the court.

16. So, I will turn now to the bank statements and then to the witness statements. Bearing in mind that the bank statements should concentrate on the period prior to the accident and at the time of the accident, the court is able, in my judgment, to see how the claimant's position has shown itself or been represented in the bank statements. On page 147 of the trial bundle is the premier current account with Lloyds Bank and it shows that on the 28th February 2012, there was a credit entry of £2,000 and on the 29th February 2012, a credit entry from Took Us Long Limited of £6,693.62. I pause there because Took Us Long Limited are a regular provider of funds to the credit of this account, although I accept not to the extent of £6,693.62 per month.

17. But it is quite clear that as at 1st March, for example, or 29th February after all the entries had taken place on that day, the claimant's bank account showed a very healthy credit of £5,897.79. That figure included a further sum of £1,000 which was paid in also on 29th February 2012. The account then, with this healthy credit, reduced, and I note, for example, the claimant on 5th March 2012 paid out sums to Mortgage Express, which I can readily infer must relate to a mortgage. And similarly, on the 6th March and 7th March, there were direct debits to the Birmingham Midshires, who are a building society lender. The account then progressed through the month and - and became overdrawn but notwithstanding, monies continued to come in.

18. On 21st March 2012, there was a deposit of £1,000 and £210, which bought the account back into credit and on 30t March 2012, significant funds again were paid in from Took Us Long Limited; on 30 March, £2,107.06; from Barnes, EM rent, £330 and a deposit that presumably had been made at the Marlow branch, there was a credit of £1,000. So, the account was again in healthy credit and that remained the position until the mortgage went out to Mortgage Express o 5th April 2012 but it was met by a further deposit of £910 on the 5th April 2012 of £910. And regular funds were put into the account. For example, on 10th April 2012, £425; 16th April 2012, £300; 18th April 2012, £900 and so this pattern continued throughout April and again, on the last day of the month, Took Us Long Limited paid in £972.90. On 1st May 2012, there was also a credit to the account from Barnes, EM rent of £800 and on 1st May 2012, £1,200 was deposited.

19. So we are moving now towards the time of the accident. On 3rd May, £1,000 was paid in in Marlow. 8th May, £1,000. Further credit on the 9th May 2012 of £800. So even though the account was falling into overdraft, it was modest and by 22nd May 2012, a further sum was paid in of £1,000, which again brought the account into credit. By the end of the month again the account, having fallen into overdraft, was back into credit after the claimant received his funds from - again from Took Us Long Limited of £1,979.37. And as at 30th May 2012, when that statement on page 174 shows the account was, at that stage, in credit to £1,661.92. That appears to be the bank account which the claimant was using, his regular bank account, although he has provided, in fairness to him, an account with HSBC.

20. The details of that account begin at page 282 of the bundle and, again, it was an account which fluctuated between credit. At the end of January 2012, it was in credit to £870.86 after a payment. It fell into overdraft in part during March 2012. But at the end of February, funds were paid in of £900 in all and a further payment of £500 on 21st March 2012 and £500 on the 1st April 2012. And then, whilst again remaining in debt on the account, £700 was paid in on 2nd May and £750 on 1st June. So, it was what one might call a classic account which is in credit some of the time and is in modest overdraft or debt at other times during the period of the month.

21. The issue that I have to resolve is whether or not it was reasonable for the claimant to mitigate his loss by availing himself of the golden opportunity that he wanted of having a temporary repair, paying for it and the modest, and I stress modest, storage charges that had accumulated in the short period that had arisen since the date of the signing of the credit hire agreement and for a day or two before then when it went into storage. I said I would refer to the case of *Opoku* and I will do so now and it is summarised in a two page case notes summary but it is helpful to actually go through the judgment itself.

22. The case concerned a claim where Mr Opoku was incurring very significant hire charges over a lengthy period of time to Matrix Hire but where the costs of repair to his vehicle would have been £3,435.92. Of course, each case is dependent upon its facts as to whether a party has failed to mitigate their loss. There was an analysis in the case of the judge's findings at trial but the legal principles begin at paragraph 13 of the judgment and the discussion beginning at paragraph 14 and carrying on right the way through to the end at paragraph 33. And it is a judgment with which the Court of Appeal was unanimous and the leading judgment was provided by Beatson LJ. At paragraph 20, I read from the judgment as follows:

> "As to the wider submission, the claim of inconsistency between the conclusion that Mr Opoku was legally impecunious in relation to the car hire rates and the conclusion that, after a period of saving and with some borrowing, it was reasonable for him to fund repairs, I accept Mr Hough's submission that on a true analysis, there is no inconsistency. Before explaining why, I remind myself of the calls for careful scrutiny of claims in cases of this sort and the fact that underlying the application of the mitigation principles is the requirement that a person must take all reasonable steps to mitigate his loss but he is not obliged to make sacrifices he could not reasonably be expected to make. In respect of the particular item of damage claimed, it is a question of fact and evaluation as to whether Mr Opoku had no choice and whether what he did was reasonable or whether what was reasonable was for him to fund the repairs."

23. Beatson LJ agreed with the submission that reasonableness should not be applied with the benefit of hindsight and it is a matter of analysis of what was known at the time. At paragraph 23, Beatson LJ says:

> "It does not however follow that because a person is not able to pay a conventional hire rate for similar cars to be used as minicabs for an open-ended period that it was unreasonable for him to fund a total cost of some £3,200 to repair the car. The conventional hire rate on the evidence ranged from about £120 to £190 per day and that would have been incurred for an open-ended period."

24. I remind myself again that on the facts before me with Mr Messenger, that was an open-ended commitment for which he will remain personally liable. So in summary, it was held by the Court of Appeal that one should analyse the evidence and I am not considering the question of the claimant's capacity to pay the hire charges. I am dealing with a discreet and thoroughly distinct issue raised at an early stage that it was open to the claimant to get the vehicle back on the road at a recommendation of the engineer appointed on his behalf for £230 plus VAT plus storage charges.

25. What of the claimant's own evidence about this? He has provided statements, exhibiting those bank statements to which I have referred. He sets out at page 60 of the bundle, paragraph 4, the bank statements that he has disclosed and to which I have referred. Having set out the accounts, he is then asked about credit card statements. He says this: "I no longer have these in my possession and I have attempted to order these from the companies in question. As at May 2012, I had entered into a debt repayment plan and, as such, had no available credit facilities". Well, I pause there because at no stage have I seen or have I been referred to any debt repayment plan paperwork. It is simply unrealistic to think they cannot be produced, if this be the case, documents about a debt repayment plan that allegedly the claimant entered into. But no such documents have been supplied.

26. He is asked about evidence of earnings, if employed. He says, "I was self-employed at the time of the accident". He is asked for business accounts for the 12 month period to the prior period of hire. He says, "I do not have a limited company. I also do not have business accounts as I am under the tax threshold. I searched for tax returns in my possession but I cannot locate any. I made enquiries with the Inland Revenue. My accountant will see if I can obtain further copies of these but I am told no further copies are available". And again, it seems to me that surely an accountant would keep copies of accounts that are submitted to the Revenue and he refers to having an accountant so again, that suggests that more paperwork could have been provided if need be.

27. In his statement, he says that he would supply his documentation as to the debt repayment plan but, as I say, in my judgment to suggest that the claimant has not got copies of that himself, is surprising. There is however a - a further statement that I must look up which deals with part 18 responses and again, that is signed by the claimant with a statement of truth. He was asked about storage charges at paragraph 3. I refer to this purely for completeness' sake. He was asked about who paid for the storage charges of £4,906.20 and he says, "I have seen a copy provided by my solicitor and understand from Auto Techniques that storage charges were met via insurer Time Chaucer Insurance". I am not sure what the involvement of Copart UK Limited was.

28. Question 8 of the part 18 request. The question was, "Your vehicle was inspected on 23rd May, seven days after the accident. Your vehicle is stated to have been taken to storage on 21st May, resulting in the storage costs of £50, as at the time of the inspection. Please confirm why you would not have been able to make payment of £50 to Auto Techniques on 23rd May". Claimant's response: "I was not aware this was an option. However, I did not have the funds to meet my additional payments and to meet the cost of any repairs required to use the vehicle for work or otherwise".

29. Then at paragraph 9, he is asked a question, "Where you say you state you could not afford to have the temporary repairs carried to the rear near-side light of your vehicle. Please confirm the cost of the repairs". He said this: "I was not aware of the exact cost but I learnt it needed a replacement tail lamp and that it would fail an MOT". Well, first of all, the cost was set out, and secondly that was something that the claimant in the contemporaneous evidence and the email from Accident Exchange shows was something he wanted to do and - and the so-called difficulty was not the costs of the repair but the storage charges. He then goes on to say that he could not realistically afford the storage charges to release the vehicle and he said that he had a young family and a new baby and they were struggling with debt and trying their best to manage and he said he did not have any available credit facilities open to him.

30. I pause there because, quite clearly, he was using credit facilities and that is shown by the overdraft committed to or allowed over many months, both in respect of the Lloyds Bank premier account and in respect of the HSBC account. Just for completeness, I also refer to paragraph 37 and - and an earlier statement of the claimant, where - as to the issue of a temporary repair at paragraph 10, he does deal with it: "I was given the option of a temporary repair on my vehicle, which I confirmed I would be happy to do". He asserts that the vehicle would not be released without paying for the storage costs and he could not afford to pay this and so he could not organise any temporary repairs.

31. I am quite satisfied and find as fact, based on the documents to which I have been referred and which are in the claimant's trial bundle and which are attached to his own witness statements, that the claimant has failed to mitigate his loss by taking up the sensible option which he wanted of undertaking the temporary repair for £230 plus VAT and his failure also to pay the modest storage charges, which I am satisfied, looking at his bank statements, looking at the credit entries that were in that account each and every month, albeit of varying amounts, that it was a straightforward matter for him to have taken that option through to its logical conclusion. And bring to an end, as a consequence, his own personal liability to discharge a much higher obligation of credit hire charges, which were escalating at the rate pleaded in the particulars of claim and were, as far as I can recall, something in the region of £75 or so per day.

32. What is the consequence of that finding? A failure to mitigate the loss. A finding which is of adverse conduct and highly relevant conduct to the issue of costs. May I remind myself that my duty is to assess costs which are reasonably incurred and reasonable in amount and proportionate. I have considered, in addition to the submissions, the points raised in the points of dispute by the cost lawyers who prepared those documents, for which I am grateful. It seems to me clear beyond per adventure that had the claimant taken up that option, any claim for hire charges would have been well within the small claims track alternative regime. Yet this case progressed to a multi track cost budgeting, albeit agreed, CCMC and further protracted litigation.

33. In my judgment, it follows that, in general terms, all the costs that have been incurred relating to hire beyond the end of May 2012, in the sense of any obligation upon the claimant to pay, have been unreasonably incurred, because of his failure to mitigate this loss. The claimant was aware of his own circumstances. He was aware of his own finances and both he and Accident Exchange had entered into a contract which included the obligation upon the claimant, which I have described, of taking reasonable steps to keep the rental period to a minimum.

34. So in my judgment, the starting point for assessment of costs in this particular case must be that this costs here should be on the basis, at least as a starting point, of the small claims track costs provisions. But it is conceded by both counsel that it is open to me to look at particular items, if necessary, of expenditure which can perhaps satisfy the test of reasonableness and proportionality in the context of this particular case. So unless there is something that I have not covered in this judgment, that brings my ex tempore judgment to an end.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge