



Neutral Citation Number: [2023] EWHC 3314 (KB)

Appeal No: QA-2021-000275

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
On Appeal from Milton Keynes County Court
Order of Recorder Boyle dated 18 November 2021
Case Number: F37YY028

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 21/12/2023

Before :

MR JUSTICE COTTER

Between :

STEVEN PROBYN

Claimant/Respondent

- and -

SAHR NOORDIN

Defendant/Appellant

Stuart Nicol (instructed by **True Solicitors**) for the **Claimant/Respondent**
Kiril Waite (instructed by **Clyde & Co**) for the **Defendant/Appellant**

Hearing dates: 28 November 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE COTTER

Mr Justice Cotter :

Introduction

1. This is an appeal against the order of Recorder Boyle made on 18th November 2021 at the conclusion of a Fast Track personal injury trial in respect of a claim arising out of a personal injury accident.
2. Permission to appeal was granted in relation to three grounds on 26th June 2023 by Sir Stephen Stewart.

Facts

3. This case arises out of a road traffic accident on 16th December 2016. The collision was caused by the Appellant's negligent driving. Fault was admitted. The Respondent was travelling at high speed when his vehicle was struck. The damage caused to the vehicle (an Audi S3) was extensive, it was a wreck. For consistency purposes I shall refer to the Appellant as the Defendant and the Respondent as the Claimant.
4. The Claimant (who was aged 23 at the time) pursued a claim for personal injury. That claim (which was supported by expert medical evidence) was based upon the Claimant suffering headaches, severe pain in his left leg, left upper arm, and shoulder. He described also pain to his neck and lower back. In addition to physical symptoms, it was his case that he had some psychiatric problems in the form of travel anxiety and nervousness. He initially said that he did not take any time off work following the accident. Subsequently in his statement he stated that he took a week's holiday and that later he had to change the role that he undertook at work as a result of ongoing symptoms.
5. The Recorder dismissed the personal injury element of the claim due to concerns about the reliability and credibility of the Claimant's evidence (whom he found to be a "pretty poor historian") but he did not accept the Defendant's submission that he was fundamentally dishonest¹. It is not necessary to consider it in any further detail.
6. The Claimant also sought damages to reflect credit hire charges which totalled £16,686.62. The Recorder awarded that sum and also costs. The Defendant has appealed against these parts of the order.

¹ The Defendant's submissions had some force given the evidence. By way of example within the Claimant's medical reports, it was recorded that the Claimant stated that he had lost his job because of his injuries. This was untrue.

Pleadings and progress of the action

7. I will solely focus on the credit hire claim. The Particulars of Claim dated 16th March 2020 sought full recovery and did not assert/rely on impecuniosity. The Defence pleaded at paragraph 12 that:

“The Claimant must prove:- (a) The entitlement to hire a replacement car. (b) That he was unable to use an alternative car at no cost to himself or others. (c) That he was impecunious. (d) That the period of hire was reasonably necessary.”

8. The claim was allocated to the Fast Track. On 1st October 2020 Deputy District Judge Paggett ordered the Claimant was to be debarred from relying upon impecuniosity unless:

- i) by 4pm on 29 October 2020 the Claimant files and serves a Reply to Defence setting out all facts in support of any assertion that the Claimant was impecunious at the commencement of and during the hire of the vehicle in question; and
- ii) by 4pm on 12 November 2020 the Claimant serves copies of the following documents which are in his control:
 - 1) copies of the Claimant's wage slips or equivalent documentation evidencing the approximate level of available income to the Claimant for the period of three months pre-accident and covering the period of hire; and
 - 2) copy bank and credit card statements for a period of three months pre-accident and covering the period of hire.

9. Such unless orders are commonly made in the County Court where a credit hire claim is pursued.

10. The Reply was served on 5th November 2020² along with all the financial documentation relied upon by the Respondent. It stated at paragraph 1 that:

“As to paragraph 1 of the Defence, the Claimant will say that the vehicle he was driving at the time of the accident was owned by the Jardine Motor Group, but was loaned to the Claimant on a company benefit scheme, for which deductions were made from the Claimants monthly salary.”

And

² The Court of Appeal decision in **Drive v. Bojai** [2021] 1 WLR 1277 was handed down on 4th November 2020.

“8. With respect to paragraph 12 of the Defence, this will be dealt with in the Claimants witness evidence.”

11. No further detail was given. The Respondent disclosed his financial information in November 2020 including bank statements. However, the wage slips disclosed did not cover the relevant period.

12. Significantly there was no disclosure in relation to the company scheme under which the Claimant received a car. It was eventually explained at trial that the Claimant was working for the Jardine Motors Group at the time of the accident which was (he agreed with Defendant Counsel’s description of his employer);

“one of the largest automotive retailers in the UK as D well as selling new and used vehicles it provides customers with a wide range of services. The company supports the Motability scheme, runs a business fleet service....looking at their website it of course stocks models of Aston Martin, Audi, Ferrari, and, and, and so on.”

The Claimant also agreed that his employer:

“do offer leasing of vehicles to their colleagues.”

He explained in evidence that his employer provided a vehicle as a result of a “salary sacrifice” of £310 per month. This payment continued after the accident although he was not supplied with a car. Rather he was directed to a credit hire company. Eventually when the £310 deduction stopped, he was able to purchase a car within a matter of days.

13. The Claimant provided a witness statement in which he explained that he was 23 years of age at the time of the accident. At that time he was working as a vehicle technician and is now working for Milton Keynes Audi. He stated;

“121..Due to my own vehicle being damages, I hired a vehicle from Accident Exchange between 21st December 2016 and 14th February 2017.

122. This was arranged by a Manager at work.

123. The vehicle I hired was an Audi A5 Diesel Coupe registration number LV66 JXP.

124. The total cost of this was £16,686.62, which I seek to claim from the Defendant..

125. I required the use of a hire vehicle because I did not have access to any other vehicle at the time of the accident. It would

not have been convenient for me to use public transport whilst I was without my own vehicle.

126. When I signed for the hire vehicle I signed a mitigation statement of truth that stated "This was attached to the hire document."”

14. It is of some relevance that the updated counter schedule (20th January 2021) stated;

“Need

20. It is denied that the Claimant needed to hire vehicles for the whole or any part of any purported periods of hire. The need for replacement cars is not self-proving and the Claimant is put to strict proof he needed cars for the entire periods of hire. He is put to strict proof of his level of usage of the hire cars.

21. The Defendant puts the Claimant to strict proof that he had no other alternative vehicle available to him which might have alleviated his need to hire (which is not admitted), including, but not limited to; any other vehicle in his household or workplaces/businesses and any other vehicle that might be available to him.”

Trial

15. Prior to the start of trial, the Defendant raised the debaring order as a preliminary issue referring to **Dirive v Bojaj** [2021] 1 WLR 1277. It was submitted that the Claimant should not be able to raise impecuniosity.
16. The Recorder held that the Reply was wholly inadequate and that no wage slips had been filed, but he went on to say that the facts in **Dirive** were very different to the case before him. **Dirive** involved a minicab driver who had not given adequate disclosure of his financial documents. He held that, even if he had taken a different view of the judgment in **Dirive**, he would have granted relief from sanction under CPR 3.9, this despite there being no application and no evidence explaining the reasons for the Claimant's breach. During argument the Recorder stated:

“Recorder Boyle: Yes, well it, it may be that Mrs Hoile will accept that in the circumstances the limited material that the Claimant's put before the Court that the issue of impecuniosity has to be judged solely by reference to what we know about, about income, are they not? In other words her position can't get any better by referring to items of expenditure that haven't been canvassed in a reply dealt with in her client's witness statement

or otherwise. I mean that might be one way to proceed might it not?"

17. His Judgment was as follows;

“3. The trial bundle does contain bank statements covering the relevant period and on balance I accept Mrs Hoile's submission that although the order is expressed in terms of "and" rather than "and/or" that those bank statements can also be used to satisfy the first limb of the second part of the order to which I have referred, namely documentation giving details of the approximate level of income. That then leaves therefore the Reply. The Reply in this case is deficient and, in my judgment, non-compliant with the terms of DDJ Pagett's order...

4. It is by and large a noting of the Defence and a reference to the fact that it was reasonable to incur the hire charges. Mr Waite is right to say that no details of income or expenditure are contained in the reply. Mr Waite draws my attention to the comparatively recent decision of the Court of Appeal in *Diriye v Bojaj* [2021] 1 Weekly Law Reports at page 1277, and in particular to the judgment of Lord Justice Coulson in which it is emphasised that an inadequate reply is simply not enough in a case where an order of this kind has been made.

5. However; I do note from the facts of *Diriye* that the Court was there concerned with a self-employed individual where evidence as to even income was wholly lacking, and there do not appear to be any references in the judgment of the Court of Appeal to the disclosure that was available in that case. What is clear from paragraphs 52 and 53 of the judgment of Lord Justice Coulson is that the focus of the Court was the position that the Defendant found itself in in the light of the inadequate reply served in that case and the fact that the Defendant was not in a position to understand the way in which the impecuniosity submission was advanced in that case.

6. In my judgment, whilst the Reply in the present case is probably as inadequate as the Reply in *Diriye* there are distinguishing features to the present case. This is a Claimant who was in regular employment at the time of the accident who has, as I have already found, complied with the direction of the

Court in relation to his income. Insofar as the Claimant seeks to reply upon expenditure items over and beyond what can be seen in relation to income, the Claimant may well encounter practical difficulty but it seems to me that in that scenario the Court can confront the issue of impecuniosity on the basis of income and impecuniosity will probably stand or fall on the basis of the Court's assessment of income relative to the hire charges.

7. For the reasons I have given, insofar as this is a relief from sanction case, whilst this is a serious breach for which no good reason has been given at the third stage of Denton I am satisfied that in all the circumstances the Defendant can deal with this issue and that the Court can do justice to the parties in relation to the issue of impecuniosity.”

18. The Judge did not clarify what “may well encounter practical difficulty” meant in terms of evidence, beyond the face of the bank statements. This was obviously unsatisfactory as it left the parties uncertain as to the status of any oral evidence as to income and expenditure. As I have already set out the Claimant provided no evidence in his witness statement of his total monthly outgoings or any indication of what he had left after paying his living expenses. During cross-examination, he conceded that his car was in fact “on lease” from his employer and that it was a large nationwide dealership for the selling and leasing of Audi, BMW and other such vehicles. In cross-examination, the Claimant accepted that he had given no account in his witness statement or documents to explain what enquiries he made with his employer to obtain a replacement vehicle (given that the Audi S3 was written off) or indeed what other vehicle the Jardine Group could have provided him with. The Claimant then gave further evidence following re-examination and in answer to the Judge directly that he had made enquiries with his employer and that no other vehicle was available.

19. The following extracts from the transcript are particularly noteworthy:

“Mr Waite: £310 a month as against £16,000 for 56 days. There's no mention in your statement, and I don't know why, as to why, what efforts you made to speak to the Jardine E Motor Group and ask them whether they could replace your car. I mean it's clearly a write off, it was never going to be repaired. You're paying £310 a month. Will you continue paying £310 a month even though you haven't got a car?”

Mr Probyn: I did continue paying for two to three months into the 2020 which I can appreciate –

Mr Waite: Oh right.

Mr Probyn: The wage slip –

Mr Waite: So you could have used that money to hire a vehicle rather than just simply paying it for, for the leasing of a car that you –

Mr Probyn: I couldn't –

Mr Waite: No longer had?

Mr Probyn: I couldn't, I wasn't, I was still paying it, I, they were still taking it from my wages, I had no – Mr Waite: Right.

Mr Probyn: Option in the matter. I was, they were still taking £310 from my wages a few months in when I had the hire car. So how, how could I have afforded –

Mr Waite: If we had your wage slips we could see that, Mr Probyn, if we had your wage slips we could see that. But, but let's just assume that what you're saying is correct. They were deducting £310 a month from your account, well why on earth are they not providing you with another vehicle? Why have you, why has your manager got to put you into an expensive option where you're having to pay them £310 per month plus hire a, and incur a liability of £16,000 for 56 days. That seems to be monstrously unfair, doesn't it?

Mr Probyn: I do agree with that, yes.”

And

“Mr Probyn: No, because I feel like you're now saying I had control over this payment. I did not. They took it out of my wages, I had no control. I couldn't just tell them stop taking the money. They were still taking the money until this whole accident exchange problem was solved. So as far as I was --

Mr Probyn: Work could not produce me with another car, that's why I was put in touch with Accident Exchange.” (emphasis added).

And

“Mr Waite: Doesn't seem to make any sense is that you're saying that for those 56 days you are paying out a substantial sum of money for a vehicle that you were not being provided under a scheme in which you are effectively leasing a vehicle from your employer. Now I, I very much doubt that your employer doesn't

have another vehicle that they could have provided you with or replaced it for the one that was damaged in the accident. That's got to be right given the size of the Jardine Motor Group. That's got to be right, hasn't it?

Mr Probyn: Well –

Mr Waite: This can't have been the only vehicle that was available.

Mr Probyn: No, of course no. It, of course –

Mr Waite: No.”

And

“Mr Probyn: It won't be, but I was unaware of stock levels of the model I had. Obviously I was paying model, for a premium model I had.

...

Mr Waite: I'm talking about a temporary replacement car until you sort yourself out with a permanent car. I'm, I'm talking about –

Mr Probyn: Right.

Mr Waite: Something that you could drive rather than incurring £16,000's worth of car hire charges. And I'm sure –

Mr Probyn: Well it's not –

Mr Waite: That, and it's got to be right, hasn't it, that the Jardine Group could have provided you with a temporary replacement car rather than you having to be incurring at your own personal expenditure £16,000's worth of car hire charges. That's got to be right hasn't it?

Mr Probyn: Well no, because they can't just register a car for me at the snap of their fingers. It was convenient of –

Mr Waite: No, no, I'm not.

Mr Probyn: My manager approached me, I had no idea, he offered this saying like: "We can do this, this is who we use for internal accidents."

We get the car, they took a lot of the stress away especially as the month it was come, you know, coming up to Christmas, they took all the stress out, that's why I done it. Jardine can't, I,

whether or not the size of the group, they can't just at the snap of their fingers register a car and just give it to me. It, it just doesn't work like that. They can't just –”

And

“Mr Waite: Cross, no we're at cross-purposes because none of this is in your witness statement. This is all, this is all, you know, you understand when you were making this witness statement that you had to justify why you did what you did, right?

Mr Probyn: Yes.

Mr Waite: And you know full well what the, the, the, the purpose of, of you explaining what you say at paragraphs, sorry at pages 60 onwards under the hire charges, and you say, this is what you say: F "Due to my own vehicle being damaged I hired a vehicle from Accident Exchange" It's paragraph 121: G "From the 21St. This was arranged by my manager at work.....And you go on to say all of this stuff. But one of the things you don't talk about is the fact that you make no mention about what availability was there, part of the Jardine Group as, even if it's a temporary vehicle. Even if it's a vehicle that you can use for a week or two weeks, and they put you in touch with another one. And you don't make any mention of what enquiries you made with them. None of that is said here. Just simply fine, I'll take this.

Mr Probyn: Well.

Mr Waite: And this is all pitched against the background that you're still paying what you're saying allegedly £310 a month for a vehicle that you don't have.

Mr Probyn: Well in paragraph 25 I clearly state I did not have access to any other vehicle. Yes, I do agree I probably should have explained that better in the statement I can fully agree with that, but I did, it clearly states that I did not have access to any other vehicle, that's all I can say, I didn't. I had no access. They can't just, as I said –”

And

“Mr Waite: You, you, you, one thing is, is the need for you to hire from Accident Exchange rather than Jardine Group either providing you or you making enquiries with Jardine Group to provide you with a, with a hire vehicle or a temporary vehicle or, or to, to give you another, another lease vehicle. That's one thing.

Another thing is the period for which you're hiring. You're hiring for 56 days, and your statement makes absolutely no mention of why you needed it for 56 days and what happened after those 56 days. Why, why is there no mention of that in your statement?

Mr Probyn: I, I, I can purely put it down to it was just a failure for me to mention it. I can't give any better or any other answer than that."

And

"Mr Probyn: So, OK, so they were taking the money out of my account for two months, well taking it from my wages two months post-accident which is roughly when the hire vehicle got taken off me. And then I got a, when the car got picked up from me they come, Accident Exchange come and retrieve it from me, myself at work. I then went and got, picked up a new vehicle that I had sourced within I think it was that, it was either that day or the next day. I had picked up a new vehicle that I then bought on finance when I had the funds B released from paying that £310 a month. Because I wasn't paying that anymore so then I could afford another vehicle.

Mr Waite: So they credited you back the money that you were paying and you bought a new C vehicle rather than renting one -
- Mr Probyn: No I, I didn't get, sorry no, sorry maybe I've worded that wrong. I didn't get credited back anything, sorry I know I, I said it like that. I didn't get credited anything. It's D when they stopped taking the payments I then could afford another vehicle."

And

"Mr Probyn: On finance, yes. When the payments of £310 stopped yes I then could afford to go and get another car just regular finance, not through a scheme, yes. That's exactly what A I'm saying."

And, in re-examination (question by the Judge);

"Recorder Boyle: Thank you. And then you've obviously been asked questions about why you weren't able to secure an alternative vehicle via Jardine.

Mr Probyn: Yes. W Recorder Boyle: Was that not something you asked them about or, or tried to explore with them?

Mr Probyn: I mean well I, when I spoke to my manager at the time who sorted out the Accident Exchange obviously I did mention what happens with a car and he goes: "Well we can't do anything at the moment until this matter is settled." And he goes yeah, it's not a case of I can just get in another car, they can register one for me so no, another car wasn't available to me at the time when I briefly spoke to them about it.

Recorder Boyle: And was that your line manager or is that somebody more senior in the organisation? Mr Probyn: Yeah it was my, yeah my direct line manager.

Recorder Boyle: Yes, those were all the questions I had for Mr Probyn. Does anything arise out of those questions as far as you're concerned,

Mr Waite: No I, I, I'm, I mean I note that those are difference to the answers I got in cross-examination, but I also note your point about how you were going to be treating evidence that's come out orally in relation to the question of impecuniosity in respect of need and, and I think it'll be, probably best dealt with in submissions."

20. None of these assertions made by the Claimant (who the Recorder found to be "a poor historian") were covered in his witness statement or supported by any documents.
21. In closing it was submitted on behalf of the Defendant that the Claimant was pecunious or alternatively he could not establish that he was impecunious as;
 - (i) the Claimant had not covered the relevant matters in the pleadings or given disclosure of "all the facts" in support as he had been ordered to.
 - (ii) He gave evidence at trial of new matters central to the question of whether he had a choice not to hire (given that the Defendant could have taken steps to seek information directly from the employer).
 - (iii) There was no documentary or supporting evidence in respect of these new matters, especially on the crucial question of why he did not obtain a replacement lease vehicle from his employer or alternatively why he could not borrow a replacement vehicle as he was continuing to pay for the lease on the Audi S3. The period of hire (56 days) was also challenged given that there was evidence of loan and that he was still paying. All of this was new material.
22. The genesis of these issues lay in the failure to properly plead the issue of impecuniosity and then support it with evidence in a witness statement and disclosed documents. The cry was one of trial of this issue by ambush. Counsel stated that:

“Impecuniosity and that he has to be judged according to the, the evidence that he's filed. Your Honour, there's been much that's come out from him in his, in re-examination in terms of what, what he could have done and what he, he, he didn't do. What we don't have of course is, is, and this is what is of course fairly unconvincing, that this is a man who works for a large motor group in which there is no evidence at all other than something that was said in re-examination but not said during cross-examination that there were no other vehicles that were available even if it was for temporary use. I mean one thing is to be registered in another vehicle that's going to be his permanent vehicle, another thing is a temporary car for him to get around in, much in the same way that the Accident Exchange car was, was there. This is a case where of course the, the, the claim, even though it's not been formulated this way, is brought by him as effectively a bailee in possession because he's not the legal owner of the vehicle.”

And

“But the real issues in this case is whether there has, whether the Claimant has been able to satisfy you whether he's been full and frank with D his, given you a full and frank picture that would suffice for him to satisfy you that he was genuinely impecunious, and by impecunious of course we're concerned here with not being able to hire a vehicle full stop, as opposed to not being able to hire on credit. Clearly a man who can spend £310 a month for the hire of a vehicle could hire a run-around vehicle, whether that is at a, at a, at a, the basic hire rate or, or, or whether it's on an as you need basis. But in any event the evidence is lacking as to why there was no vehicles, there was no evidence from him until you asked him the question in re-examination about what enquiries he made. I asked him in cross-examination that there was, what enquiries he'd, he'd made and he, he didn't, he said there were no enquiries that he had made in terms of a, of a, of a run-around vehicle that he could use. And –”

23. The closing submissions of Counsel for the Claimant highlighted the difficulty faced by the Judge's decision to allow impecuniosity to be advanced without it having been properly pleaded or covered in a witness statement or disclosure. Rather than be restricted to the content of the bank statements on their face she submitted that the Judge could not disregard the oral evidence and she then proceeded to build on it with speculation;

“You, you can't disregard the oral evidence that's been given by the, the Claimant today. It's not right that there must be all the

ins and outs fully documented within his witness statement and as explained the, his expenses and expenditure are clearly there to be seen. He clearly did not have the funds to have gone out and hired a vehicle even for the lowest figure which is contended for by the Defendant, which was, just refresh myself, a minimum of £3,500. And it's quite clear he didn't have anything near that sum. He has also given you very clear oral evidence that he knew how much, and this is also within his witness statement, how much he was paying for that vehicle that his employers were providing for him, some £300 a month, and he's also very clearly explained why it was he didn't look to replace his vehicle any earlier because his employer was still deducting that £310 directly from his wages and his explanation was that, that, that that was going on until all this was sorted out essentially. And that was also his response when he was asked why his employers couldn't provide him with another vehicle either temporary or otherwise. He said "I spoke to my manager about the car, they couldn't do anything until A this matter was settled." They're taking money contractually from him on a monthly basis."

And

"He wouldn't be able to be put in another lease one, as we know because he was still paying for this other vehicle, and he did give a sufficient explanation. He can't, his employer can't just start registering and taxing new vehicles for him to use. They don't know whether it's going to be for a week, for a month. They are in the business of selling vehicles. They can't just take one of those and give it to an employee for an unspecified amount of time. If these are new vehicles then surely there's going to have an effect on the value of that vehicle if it's used they want to be selling brand new vehicles. It, firstly it's a matter of commercial sense and secondly I say they the evidence was there to, to explain why that is simply not an option."

Despite his earlier ruling that the question of impecuniosity would be confined to the documents disclosed, the Recorder accepted the Claimant's answers in re-examination and found him to be impecunious.

Judgment

24. The Recorder allowed the entirety of the claim for credit hire. He stated in his Judgment:

"16. So far as the claim for hire charges is concerned the witness statement deals with this quite briefly. It explains that the

Claimant hired a vehicle from Accident Exchange between 21 December 2016 and 14 February 2017 and this was arranged by a manager at his work. He says that the vehicle he hired was an Audi A5 Diesel Coupe and that the total cost was some £16,686.62. He said that he required the use of a hire vehicle because he did not have access to any other vehicle at the time of the accident. He says it would not have been convenient for him to use public transport whilst he was without the use of his own vehicle.

....

17. He exhibited the rental agreement to his witness statement. He explained that due to financial obligations he could not afford the cost of a hire vehicle himself and that is why he needed a hire car. He says it was also particularly convenient because the vehicle was delivered to him and so he was not inconvenienced to any great extent in that respect.

...

23. Mr Probyn was asked as to what happened after the 56 days of hire. He said that after the period of hire he had a payment in of some £3,500 from a loan that he had applied for and that he used this subsequently to help to buy another vehicle. He explained that he continued paying his £310 a month from his salary at Jardine. He said: "They were still taking it from my wages; I had no option in the matter.

....

24. He denied that his work could have produced another car on equivalent terms, and it was on that basis at the suggestion of his manager that he got in contact with Accident Exchange. Asked about by Jardine could not simply have provided a replacement car he said: "I was unaware of stock levels of the premium models that I had. They can't just register a car for me at the snap of fingers, it doesn't work like that."

...

25. He explained that the period of hire as far as he was aware came to an end when the payments of £310 a month concluded and matters were all sorted out, as he put it. He explained that he went for a personal finance option on the new vehicle that he purchased from a garage. He did not return to the work rental scheme. He said that he could afford to buy a car on such finance when the payments of £310 being deducted from his salary stopped."

And

“32. In re-examination the Claimant was able to pinpoint the loan payment coming into his account and also the start of the private credit facility for the purchase of the vehicle about a month or so later. He explained that he was not on holiday at the time of the accident, and he thought that that holiday was due to start on Christmas Eve.”

And

“48. That then leaves only the claim for credit hire charges between 21 December 2016 and 14 February 2017. This was a 56 day period of hire during which the Claimant hired an Audi A5 in place of the Audi S3 that he had been renting via his employers at the time of the accident. As I have already indicated the hire charges over that period are in excess of £16,000. It is accepted by Mr Waite on behalf of the Defendant that in principle the Claimant would be entitled to pursue a claim for hire charges as bailee in possession as opposed to owner of the damaged vehicle.

49. No serious challenge has been made either to the need for a vehicle as such or indeed in relation to the enforceability of the hire agreement in this case. The remaining issues therefore are impecuniosity, the period of hire, and potentially the rate of hire. In relation to the issue of impecuniosity I accept the Claimant's evidence. It is apparent from bank statements which he disclosed pursuant to the Directions Order, and which had been included within the trial bundle, that he was taking home approximately £1,300 per month at around the time of the period of hire.

50. It is apparent from his bank statements, which I am told and there has been no challenge, is his only bank account, that he was running small credit and small debit balances during the relevant period. In those circumstances I am quite satisfied that the Claimant would not have been able to afford the sums which he in fact incurred by hiring the credit hire vehicle. Indeed, in my judgment it is unlikely he would have been able to afford to pay even the basic hire rates, and my attention was drawn to the fact that the Defendant's case on basic hire rates entailed expenditure over the relevant period in excess of £3,500.

51 I am satisfied that it was reasonable for the Claimant to hire a credit hire vehicle. I am not satisfied that there is evidence before me that his employers could simply have supplied an alternative vehicle either on the basis of the existing hire agreement or some other basis. So far as the period of hire is concerned I am satisfied on balance that the period of 56 days was a reasonable one. In this respect I again accept the Claimant's evidence. I also of

course have the benefit of the witness statement from Mr Latif as to the conduct by the Claimant's employer's insurers following the accident.”

25. In relying upon the Claimant’s evidence as to:

- (a) The requirement to pay £310 notwithstanding he was not provided with a car and that he had “no option” contractually to do otherwise (in this regard it is important to note that once he did not have to face this deduction he could, on his own evidence, afford an alternative vehicle).
- (b) That his employer; a large car dealership, could not provide or were not contractually obliged to provide, an alternative vehicle for the £310 payment.

The Judge took the path urged on him by the Claimant’s Counsel and went beyond the content of the pleaded case, documentary evidence or matters set out in the witness statement; notwithstanding his earlier indication.

Grounds of Appeal

26. The three grounds before this Court can be summarised as follows;

1. The Recorder erred in law in failing to debar the Claimant from asserting his alleged impecuniosity.
2. The Recorder erred in his finding that that the Claimant was impecunious. Contrary to his earlier ruling that he would confine the question of impecuniousness to only the documents disclosed. The judge instead accepted evidence that came out late in re-examination without any supporting or corroborating evidence.
3. The Recorder erred in not giving reasons why he would have rejected the Defendant's extensive BHR evidence, had he not found the Claimant to have been impecunious.

I will consider the grounds in turn.

Ground 1

27. It is argued that the Recorder was plainly wrong in his refusal to follow the guidance given in **Dirive** given that the wording and form of the debarring order was the same in that. Coulson LJ gave the following reasons as to why it was unacceptable for a Claimant to be permitted to continue to contend his impecuniosity when in breach of the debarring order:

“52. I consider that there are a number of fundamental errors in that submission. The first is that it seeks to get around the clear wording of the unless order, which required the pleading of “all facts in support of any assertion” of impecuniosity. On this issue, therefore, there was no room for any gap between the pleading and the statement. Secondly, the submission seemed to be based on the incorrect notion that a claimant was entitled to advance a rubbishy case in stages, from pleading to witness statement to trial, presumably in the hope that, by the time the trial came on, there was a commercial imperative on the part of the respondents to settle the case.

53. Thirdly, Mr Peter's approach ignored the respondents' position. They are entitled to know the case they have to meet. They should not be expected to have to prepare for a trial where the critical item of claim depends on a one line assertion, and hoping that, as a result of the cross-examination of the appellant, the judge will reject the claim. That is not how civil litigation is supposed to work post- CPR . And fourthly, the argument was unsupported on the facts. I have already set out the one line assertion in the reply (para 48 above) and the equally unrevealing evidence in the witness statement (para 49 above). So the reply did not in fact herald a witness statement with more detailed support for the impecuniosity claim.

54. Accordingly, I consider that, even if the reply had been served on time, the document itself failed to comply with the substance of the unless order. Even if it is taken together with the witness statement, the reply created precisely the situation that the unless order was designed to avoid: a simple assertion of impecuniosity, with no facts set out to support it. The breach of the unless order was therefore serious and significant.”

28. In the present case the Judge found that the Reply filed was in no way compliant with the direction, yet he did not apply the above passages cited to him during argument. The Judge's error was compounded by his comment that had he not found Dirive to be distinguishable, he would have granted relief in the absence of any application or evidence as to why the information was not forthcoming. It was submitted that the Recorder's error exposed the Defendant to the very mischief that Coulson LJ sought to put a stop to.

Ground 2

29. Assuming that he had reached his conclusion on whether to debar or not on the basis that the Claimant was limited to the face of the documents; here the bank statements ; the Recorder breached that injunction and did not confine himself to the evidence disclosed. He accepted the Claimant's oral evidence that he made enquiries with his employer (which was also the leasing company and a nationwide provider of vehicles) as to the availability of other vehicles and they told him that there were no vehicles available. He then made a finding as to contractual entitlement without sight of the contract.

Ground 3

30. I shall return to this ground in due course. It concerned the Recorder's failure to address the arguments as to basic hire rates.

Respondent's submissions

31. In his skeleton argument Mr Nicol submitted that an Appellate court must have well in mind that a Judge's case management powers are not to be lightly interfered with, see generally **Chartwell Estate Agents Ltd v. Fergies Properties SA** [2014] EWCA 506. He conceded that the Recorder accepted that the Reply served was akin to that served in **Dirive** but submitted that he was entitled to rule that this should not prevent the Respondent from pursuing his plea of impecunity at trial where the Appellant "could deal with the issue". In relation to the issue of whether wage slips had been supplied in compliance with the directions order the Recorder again quite properly decided that the Court could establish what the Respondent's income was at the material time from an examination of his bank statements.
32. Mr Nicol further submitted that, the Respondent had provided his full financial picture at an early stage of proceedings as he had made full disclosure of his only bank account statements on 5th November 2020. Any point that the Respondent had not set out the full facts of his impecunity fell away as his disclosure ultimately demonstrated the reality of his financial status. As a result it was an unattractive and weak submission to suggest the Appellant was in the dark as to the Respondent's finances.
33. This was not a case where the Defendant was ambushed at trial with fresh evidence but rather a case where the Recorder took a reasonable approach that the issue could be fairly assessed by reference to the financial information before the Court. Overarching the Recorder's decision was that he was entitled to utilise his case management powers to permit a party relief from sanction and allow them to put forward a case based on

impecuniosity. The courts in considering applications under CPR 3.9 do not have and should not have as their sole objective a display of judicial musculature.

34. During oral submissions Mr Nicol argued that the nature and extent of the salary sacrifice went (in so far as it was relevant) to need for a replacement vehicle and not to the issue of impecuniosity which solely turned on the figures shown in the bank statements.
35. In respect of ground 2 Mr Nicol made a submission which relied on the settled principle that a finding of fact which had regard to “the whole of the sea of evidence” should not be the subject of interference by an appellate Court unless it is compelled to do so (although the issue on appeal is whether the finding of fact was made after an unfair trial which denied a party the proper opportunity to explore an issue.)
36. Mr Nicol submitted that, in any event, the answers supplied during re-examination were evidence that the Recorder was entitled to take into account and also that the limited evidence that did come out during re-examination was not of the quality or nature that could allow this Court to interfere with a trial Judge’s findings on the evidence before him.

Analysis

37. The first issue is whether the Judge fell into error in permitting the Claimant to rely upon the issue of impecuniosity at trial.
38. As Coulson LJ stated in **Diriye**

“It is well-established that a claimant in an RTA claim is entitled to recover the reasonable cost of hiring a replacement vehicle: see *Lagden v O’Connor* [2014] 1 AC 1067. Reasonableness will be assessed by reference to need, rate and duration: see *Zurich Insurance PLC v Umerji* [2014] EWCA Civ 357. A claim to recover the significantly higher credit hire rates (as opposed to basic hire rates) will usually depend on the claimant demonstrating that he or she was not in a position to pay the ordinary rates upfront; that the claimant was, in the jargon used in the cases, “impecunious” (see *Lagden*, and *Zurich* at paragraph 9(3)). Although there had been some debate as to the whereabouts of the burden of proof in such a situation, Underhill

LJ was clear at paragraph 37 of Zurich that “in this kind of case it is clearly right that a claimant who needs to rely on his impecuniousness in order to justify the amount of his claim should plead and prove it”. If a claim for credit hire charges fails, a claimant can still recover basic hire rates (what are sometimes referred to in the authorities as ‘spot rates’).”

39. The obligation, if it is to be relied upon, is to plead and (then) prove impecuniosity. It is an overarching principle that pleading a case remains a condition precedent to advancing it. As I stated in **Charles Russell Speechlys LLP-v- Beneficial House (Birmingham) Regeneration LLP** [2021] EWHC 3458, pleadings are meant to set matters out clearly; they should not contain hidden arguments within generalised averments. Pleadings frame the limits of the action. They identify the issues and the extent of the dispute between the parties.
40. Despite the clear wording of the order of 1st October 2020 the Reply gave no detail of the Claimant’s case as to impecuniosity. The witness statement gave little more. There was a clear breach of the order.
41. At trial the oral evidence given by the Claimant that his employer was:

“one of the largest automotive retailers in the UK as well as selling new and used vehicles it provides customers with a wide range of services. The company supports the Motability scheme, runs a business fleet service...looking at their website it of course stocks models of Aston Martin, Audi, Ferrari, and, and, and so on.”
42. The Claimant also agreed that his employer did “offer leasing of vehicles to their colleagues”. He explained in evidence that his employer provided a vehicle as a result of a “salary sacrifice “of £310 per month under some form of agreement. Despite the obvious relevance of this agreement with his employer it had not been disclosed (and has never been disclosed).
43. Neither the Reply nor the statement covered the issue of whether (and if so why) the Claimant had a contractual obligation to continue paying £310 per month under the agreement with his employer without any replacement vehicle being provided. The Claimant’s Counsel speculated about a number of issues; but there should have been no scope for speculation and the Claimant’s case should have been clear and transparent, confirmed with a statement of truth and tested against relevant documentation. I reject Mr Nicol’s submission that the agreement went only to need and was not a fact relevant to impecuniosity. The respective contractual duties on the Claimant and his employer under the salary sacrifice scheme were obviously important facts relating to alleged impecuniosity for two reasons;
 - (a) The Claimant’s case was that he could not afford to replace an item that on the face of the documents he was still paying for so was entitled to receive. The

starting point should be that he did not need to pay twice for a vehicle. This case was different to the vast majority of cases in that it was not the owner of the vehicle bringing the claim, but a person who had an agreement with the owner (a large scale supplier of cars), the terms of which have never been disclosed.

- (b) If the Claimant was not contractually obliged to continue to pay £310 a month then, as he stated in evidence, he was able to afford to buy a car (and this is what happened).
44. The Recorder was correct to find that the reply was deficient and there had been a breach of the order; resulting in the Claimant being debarred from advancing an impecuniosity argument unless there was a successful application for relief from sanctions. However, in then allowing impecuniosity to be run despite an obvious breach of the order despite there being no adequate attempt to remedy it the Recorder allowed the very mischief identified by Coulson LJ to prevail. The Defendant had to face an emerging and changing case during the Claimant's oral evidence. That it is entirely contrary to the aims of the civil procedure rules.
45. It does not appear to me that the Recorder did in fact rule that evidence of impecuniosity would be restricted to evidence of income as disclosed on bank statements. He made a suggestion to this effect during argument and also stated within his judgment that the Claimant potentially might encounter "practical difficulty" if he sought to reply upon expenditure items over and beyond what can be seen in relation to income; however this left the position unclear and was an unsatisfactory state of affairs. In any event he did not hold the Claimant to such an injunction and consideration was given to matters which were neither pleaded or contained (or even foreshadowed) in the witness evidence.
46. The Recorder's analysis was flawed for the reasons which I have already set out as for there to be full disclosure of all facts relied upon for impecuniosity it was necessary to deal with the salary sacrifice scheme which provided the very benefit which was in issue. It would be nonsensical for the Court to solely consider whether a Claimant could afford to hire a car on a net salary figure which was net of a contractual obligation to provide a car.
47. In my judgment, faced as he was with the breach of the order, the Recorder had the option of refusing relief from sanctions; so the issue could not be raised or, alternatively granting relief and proceeding in a fashion which allowed the trial to proceed fairly. What he could not properly do was simply allow the case to proceed with the breach unremedied on the basis that the Claimant's case would become clear during his oral evidence.
48. As I set out in **Charles Russell Speechlys LLP-v- Beneficial House**:
- “61. When faced with an inadequate pleading, the available options are ordinarily as follows:
- i) If the other party takes no point, the court may proceed to consider the case beyond or outside the pleaded case. As Lord

Phillips observed in *Loveridge & Loveridge v Healey* [2004] EWCA Civ 173 at [23] :

"Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point."

ii) If an application to amend is made, it must be determined on its merits;

iii) If a point is taken that the pleading does not cover the case to be advanced, and no application to amend is made, the court should consider what the issues are in the case are and specifically whether the issue said not to be covered is one that falls for determination. This is necessary so that the parties know where they stand. To do so, it is first necessary to determine whether and to what extent the departure may cause prejudice. As Lord Phillips further observed in *Loveridge*:

Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.

62. As Richards LJ observed in **UK Learning Academy Ltd v Secretary of State for Education** [2020] EWCA Civ 370, a Judge may in appropriate circumstances allow a party to depart from its pleaded case where it is just to do so, although it is always good practice to amend pleadings, even at trial. However, I accept Mr Barclay's submission, set out above, that the prejudice threshold is a low one and a party need only show that a departure from the pleaded case "might" cause prejudice before an application to amend is required. If that threshold is met, it would ordinarily not be just to allow a party to depart from the pleaded case advanced up to trial. Context is important. A party who has prepared for trial not anticipating that a particular point will arise may not have the ability at the outset of the trial to fully assess the implications of a point, whether evidential or in terms of applicable law, without time, something that an adequately pleaded case would have afforded him. What Mummery LJ referred to as the orderly progress of the case in **Boake Allen** has been disrupted and to require more than the potential for prejudice would be unfair.

49. So drawing the strands together despite an order requiring the Claimant to plead his case on impecuniosity and provide disclosure the Defendant was faced with averments providing no detail, and referring to a witness statement which provided little more against a backcloth of inadequate disclosure. There was no excuse given for the breach and an oral relief from sanctions application was advanced (with no adequate structured approach to the Denton issues) which relied on the disclosure of bank statements; arguing that (in effect) income and expenditure could be seen and no more was necessary. It was a hopelessly inadequate submission as the references to the net salary ignored that the salary sacrifice which provided the provision of a car. There was no proper attempt to remedy the admitted breach; specifically no application to amend.
50. In so far as the Judge proceeded to exercise his discretion to grant relief from sanctions on the basis that;
- (a) no amendment to the pleading and/or further witness statement (with a statement of truth) together with consequential disclosure was necessary to cover all facts relied upon for impecuniosity i.e. the order need not be complied with and/or
 - (b) bank statements, without more, were adequate to comply with the spirit of the order.

He fell into error. I well recognise the generous discretion afforded to a Judge when considering relief from sanctions but the decision to proceed as he did lay outside it. The Recorder's decision could not and did not work so as to allow a fair trial. This issue was one that Counsel for the Defendant had to try and explore during cross-examination. Even after cross-examination the Claimant gave a different answer to the Judge on an important aspect of the issue. In this regard the fact that the Claimant's credibility and reliability were such that the significant personal injury claim was dismissed in its entirety adds some weight to the Defendant's sense of unfairness. Adequately forewarned of the Claimant's case matters may have been investigated which placed the Claimant's evidence about any continuing liability to pay under the scheme and/or his conversation with his manager in a different light. The employer's justification for refusing to provide a vehicle and yet still taking the money, which was stated by the Claimant to be that they were waiting "until this whole accident exchange problem was solved", and that the manager referred the Claimant to the credit hire company stating: "We can do this, this is who we use for internal accidents" could have been properly explored.

51. When finding, as the Recorder did, that;

"51 I am satisfied that it was reasonable for the Claimant to hire a credit hire vehicle. I am not satisfied that there is evidence before me that his employers could simply have supplied an alternative vehicle either on the basis of the existing hire agreement or some other basis." (underlining added)

He highlighted the unfairness that he had created. The only evidence was the Claimant's oral evidence given without compliance with a debarring order, any forewarning in a witness statement or even adequate disclosure.

52. As a result, Ground 1 succeeds. The Claimant should not have been permitted to advance an impecuniosity argument.
53. As it turned out the majority of the appeal hearing then concerned the consequences of the Defendant succeeding on Grounds 1 and/or 2. This brought into play Ground 3 of the appeal.
54. It was Mr Waite's submission that should Grounds 1 and/or 2 succeed the order made by the Recorder should be set aside and replaced with one for damages of a total of £1,754.20; reflecting a 28 days period at a basic hire rate ("BHR") of £ 62.65 a day. This was based on a concession that he made at the trial, from which he did not seek to resile, that if the Claimant was not found to be impecunious this should be sum awarded. He submitted that it was a generous concession and that on the facts the Court could properly award a significantly shorter period on the basic hire rate, as when he sought to do so, the Claimant was able to source a car and finance to purchase it "in a matter of days".
55. Mr Nicol submitted that the Recorder had rightly rejected the basic hire rates advanced by the Defendant at trial and as a result the Claimant was entitled to the credit hire rate. As for the relevant period given that the accident was in the run up to Christmas, the need to arrange finance and source a vehicle, and the ongoing insurance picture, the period of 56 days was reasonable. No argument was advanced before the Recorder that a lesser vehicle would have been appropriate. So the Recorder's order should stand.
56. Neither party submitted that the matter should be remitted to the County Court for a rehearing of the issues remaining to be determined once the claim of impecuniosity was taken out of the picture.
57. The Recorder had evidence and heard submissions from both counsel on the issue of the BHR evidence. I should briefly set out the important aspects.
58. The accident occurred on 16th December 2016. The Claimant's vehicle was an Audi S3 Quattro S-A motor vehicle. The vehicle which the Claimant subsequently hired via Credithire was an Audi A5 Diesel 2 Door, 2.0 Litre, automatic Coupe. The aggregate cost of the hire was invoiced at £16,686.62 inclusive of VAT, equating to an average cost of £297.98 per day. The period of hire ended on 14th February 2017. Payment in respect of the vehicle involved in the accident was received on 7th February and it appears the same day collection of the hire vehicle was arranged for 14th February 2017³
59. As regards evidence on this issue of obtaining a replacement vehicle the Claimant stated.

...And then I got a, when the car got picked up from me they come, Accident Exchange come and retrieve it from me, myself at work. I then went and got, picked up a new vehicle that I had

³ Statement of Mr Latif paragraph 27

sourced within I think it was that, it was either that day or the next day. I had picked up a new vehicle that I then bought on finance when I had the funds released from paying that £310 a month. Because I wasn't paying that anymore so then I could afford another vehicle.”

60. He explained that he had obtained the vehicle at a garage with personal finance. and that

“.....you could pay a deposit, you're not going to pay finance on the day of you pick up the car your first monthly instalment.

.....

Mr Waite: When, when did you buy it? Mr Probyn: I believe it was the day Accident Exchange well, I, I might have bought it a few days before. I know I was looking at the car I, again, I can't recall because this was early 2017, sorry. I can't recall, but yeah I bought the vehicle as soon as I knew I was getting, as soon as I knew I was not having £310 out of my pocket.”

61. There was no evidence before the Recorder to indicate that if impecuniosity was not an issue the Claimant would have found it difficult to source a car or arrange finance; it took him no more than “a few days”. Mr Waite had conceded liability for a period of 28 days of basic rate hire. He made no divisible/freestanding concession as to how long which could simply be applied to credit hire rates i.e. his concession was as to a sum of money.

62. The Defendant relied upon the evidence of Mr Bowley who set out BHR rates for the Claimant's vehicle. His report stated:

“8.6 Rates take into account the known age of 23 years and declared driving history of the driver included on the Credit Hire Agreement.”

63. In respect of basic hire rates the replacement vehicle suggested (BHR P1 or higher) was through Thrifty at a total cost of £3,508.88 with excess re-imburement insurance included.

64. The Claimant relied upon the statement of Mr John an internal analyst, who stated that since March 2015, his employer APU Ltd has been engaged in collecting, on a daily basis, weekly vehicle rental headline prices. He stated that:

“On 08.04.2020, I searched APU's database of mainstream suppliers, namely Alamo, Avis, Budget, Europcar, Enterprise, Hertz, National, and Sixt. In my search for a vehicle equivalent to that hired by the Claimant, I was unable to locate an equivalent vehicle available to a person such as the Claimant's available for a hire commencing 21.12.2016; the date the Claimant commenced hire. I note that the Claimant was 23 years of age at the time of the commencement of hire. In my search I noted that

of the companies searched that could provide an equivalent vehicle imposed a minimum age of between 25 and 30 years. Therefore, none of these companies could provide an equivalent vehicle to the Claimant at the time of the commencement of hire.”

65. So the Claimant produced no detail of alternative hire rates for an equivalent vehicle. It appears to me likely that the two searches were different in nature. Mr Bowley looked at a broader classification of vehicle than that considered by Mr John. This should have thrown focus back on the specification of the vehicle to be hired.

66. Mr Waite submitted:

“Clearly a man who can spend £310 a month for the hire of a vehicle could hire a run-around E vehicle, whether that is at a, at a, at a, the basic hire rate or, or, or whether it's on an as you need basis.”

67. During submissions Ms Hoile stated:

“I would suggest the reason the Defendant hasn't been able to, to find any rates evidence for a, a properly comparable vehicle is because, as the Claimant's rates author says age would have been a bar to hiring a vehicle of D that nature. Now I accept the Court of Appeal has said that vehicles in a, of a broadly equivalent nature are, are, are evidentially satisfactory, but you can see from that own table that there's, there's a vast difference between the vehicle that the Defendant is putting forward rates for to the E one the Claimant had. And whilst a, a Claimant might be able to make do for a few days or a week or so this is quite a long period, this is an extensive period of 56 days. It is a vehicle for which the Claimant is paying for a not inconsiderable amount a month, over £300 per month, to have a particularly nice vehicle.”

68. The Recorder did not deal with the Defendant's BHR evidence in his judgment. He did not say what rate, if any, he would have applied and for what period (and upon what basis) he would have applied it, had he not found the Claimant to be impecunious.

69. When refusing permission to appeal the Recorder stated:

“I am satisfied that I have applied the relevant legal principles to the evidence and although it is not necessary for me to have dealt with the other point raised by Mrs Hoile in closing D submissions, that is to say whether even had this Claimant not been impecunious whether the Defendant's case would have got off the ground on the basis of the spot hire rates, in my judgment it is very unlikely that it would have been able to do so for the reasons that she gave in her closing submissions, namely that this was a young Claimant and had I been forced to I would have

preferred the hire rates evidence from Mr John as to the lack of availability of a vehicle at basic hire rates.”

70. Ground 3 of the current appeal was that this comment did not constitute a sound judgment or adequate reasons given a conflict between the evidence of Mr Bowley and Mr John; see generally **English v Emery Reimbold & Strick Ltd** [2002] 1 W.L.R. 249 CA. In any event, given his findings as to impecuniosity, the Recorder made no specific findings as to what a reasonable person would have done, no finding of the need for a particular type of vehicle or in respect of any relevant time period.
71. In his written submission for this appeal Mr Nicol argued that the Recorder had clear and cogent evidence before him that the Respondent would not have been able to hire a comparable vehicle to the one actually hired because of his age at the time of hire. He did not address the statement within Mr Bowley’s report that this factor was taken into account. He also submitted that the Defendant failed to discharge the burden on her to prove that the Respondent could have actually hired a comparable vehicle in compliance with *Bent v. Highways and Utilities Construction* [2011] EWCA Civ 1384.

Analysis

72. The Recorder did not make any finding (or indeed express comment) about the appropriate period of hire had he not found the Claimant to impecunious. As I have set out above the only evidence before him was that it took the Claimant “a few days” to obtain a replacement vehicle. It is for the Claimant to establish the need for a vehicle and Counsel for the Claimant conceded that had the period been “for a few days or a week” the Claimant might have been able to “make do” with the type of vehicle suggested Mr Bowley. However, it was not appropriate for the extensive period of 56 days.
73. In my judgment given that the need absent impecuniosity was, on the basis of the evidence, only “for a few days”; the basic hire rate set out by Mr Bowley was appropriate. Mr Waite very properly has argued the case on appeal cognisant of the concession which he made before the Recorder and I see no reason (in the absence of any Respondent’s notice) not to similarly confine the Claimant to the concessions made before the Judge by his counsel. As a result, the concession made by Mr Waite could indeed be considered a generous one and cannot be bettered by the Claimant. Accordingly, that it the figure which I order should be substituted.
74. I leave it to the parties to agree and prepare a draft order.