Case No: E47YJ407
E82YM832

IN THE COUNTY COURT AT CARDIFF

21st August 2020

Before :

HIS HONOUR JUDGE HARRISON

- -

Between :

HIGHWAYS ENGLAND COMPANY LTD **Claimant**

- and -

TESCO UNDERWRITING LTD **Defendant**

HIGHWAYS ENGLAND COMPANY LTD

Claimant

-and-

MR JONATHAN MARTYN BOOTH

Defendant

- -

- -

Mr Joseph Edwards (instructed by **Shakespeare Martineau**) for the **Claimant**
Mr Timothy Killen (instructed by **BLM**) for the **Defendants**

Hearing dates: 19th, 20th May 2020 and 16th July 2020

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APPROVED JUDGMENT

HHJ Harrison :

1. These claims comprise two of a cohort of relatively low value cases arriving in the courts of South Wales concerning accidents on the highways of England in which damage has been caused to highway furniture, primarily crash barriers.

2. The trial was conducted remotely due to the current public health emergency.

3. The claims are superficially very simple and are for a value less than £10,000. The Claimant is a company wholly owned by the Secretary of State for Transport and by an order made under s.1 of the Infrastructure Act 2015, was appointed as a "strategic highways company". As such they effectively own the strategic highway network in England. In each case a motorist has collided with highway furniture and caused damage. Generally, the motorist is clearly at fault and since Highways England (Highways England Company Limited) own the damaged furniture they can obviously bring claims for damages against the motorist whose insurers then provide an indemnity. The value of any claim ordinarily being assessed by reference to the diminution in value of the damaged property.

4. However, this seemingly simple position is complicated by the contractual arrangements entered into by Highways England to provide repair and maintenance for the highway network. Put shortly the network is divided into 13 active areas. Each area enters into an Asset Support Contract (ASC) with a contractor to provide repair and maintenance services. In evidence it was suggested that these 13 areas are serviced by 7 different contractors.

5. The claims before me have concerned accidents in area 6/8 (Norfolk) "the Tesco action" and area 3 (Hampshire) "the Booth action". In each of these areas the relevant contractor was Kier Highways Limited ("Kier").

6. In ways to which I shall return, the purported contracts between Kier and Highways England differ between the two relevant areas. However, the general principles of the respective contracts are virtually identical and can be summarised thus:

    i) A monthly lump sum payment is negotiated between Kier and Highways England for a particular area to undertake repair and maintenance work.

    ii) A distinction is drawn between repairs valued in excess of £10,000 and those less than £10,000.

    iii) Repairs valued at less than £10,000 fall within "lump sum duties" are not the subject of charge by Kier.

    iv) For repairs valued in excess of £10,000 Highways England are charged by Kier using contractually agreed rates.

    v) The contracts provide for claims to be made against third parties, eg negligent motorists. For claims that fall within "lump sum duties" ie below £10,000, the contracts purport to allow Kier to bring a claim in the name of Highways England against the third party in respect of the damage caused. For claims above £10,000 the expectation is that Highways England would pursue any claim themselves.

7. The claims before me have concerned Kier bringing claims in the name of Highways England in respect of claims worth less than £10,000. In so doing they have claimed the diminution in value of the chattel owned by Highways England and have valued that diminution by reference to rates other than those agreed between themselves and Highways England for repairs in excess of £10,000.

8. In each contract the clause relied upon by Kier as providing authority to bring the respective claims is clause 87.2. The clauses differ between areas.

9. Area 3 Clause 87 provides:

> **87 Claims against third parties**
>
> *87.1 The Provider in accordance with this contract*
>
> *repairs defects in the Area Network caused by a fault in the work of Others (including an Outgoing Provider) and*
>
> *repairs and replaces loss or damage to the Area Network and any Materials and Equipment caused by the act or default of Others.*
>
> *87.2 Where the repair or replacement falls within the Lump Sum Duties, the Provider may pursue a claim against any third party to recover the costs involved in the name of the Employer. The Provider bears and indemnifies the Employer against any costs and liabilities incurred in pursuing the claim. Any sums recovered by the Provider as a result of the claim and received by the Employer (other than sums recovered in respect of the repair or replacement of which belong to the Employer) are held on trust for the Provider and are paid by the Employer to the Provider in accordance with this contract. Any sums received by the Provider in respect of the repair or replacement of Stocks are held on trust for the Employer and are paid by the Provider to the Employer in accordance with this contract. Alternatively the Provider may agree with the third party that the third party will carry out the necessary works at no cost to the Employer.*

10. Area 6/8 is governed by the Area 9 contract. It provides at clause 87

> **87 Claims against third parties**
>
> *87.1 The Provider in accordance with this contract*
>
> *repairs defects in the Area Network caused by a fault in the work of Others (including an Outgoing Provider) and*
>
> *repairs and replaces loss or damage to the Area Network and any Materials and Equipment caused by the act or default of Others.*
>
> *87.2 Where the repair or replacement falls within the Lump Sum Duties, the Provider may pursue a claim against any third party to recover the costs involved in the name of the Employer. The amount the Provider claims is no more than*

the actual Third Party Claims Defined Cost for repair or replacement work already done,

the forecast Third Party Claims Defined Cost for repair or replacement work not yet done and

the resulting Third Party Claims Overhead.

11. **Deed of variation**

The claimant also relies upon a deed of variation made on 3rd Feb 2020. The deed of variation relates to area 9 and consequently it is contended that it applies to areas 6 and 8. The deed of variation proposes to remove the concept of Third Party defined costs and the Third Party Claims Overhead from the conditions of contract. It replaces clause 87(3) and provides as follows:

Where the repair or replacement falls within the Lump Sum Duties the provider may pursue a claim against any third party to recover the costs involved in the name of the employer. The amount the provider claims is:

The reasonable cost for repair or replacement work already done,

The forecast reasonable cost for repair or replacement work not yet done.

The deed of variation provides that the effective date of the amendment is 7th January 2019.

12. The claimant submits that the deed of variation is important since notwithstanding that the damage relevant to the claims before the court occurred before the date of variation, the claimant has continued with the claim thereafter, thereby providing strong evidence that they specifically agree Kier's approach to the litigation.

13. The defendants submission is that the deed of variation is irrelevant. Leaving aside the fact that the variation is said to take effect after damage was caused in this case and indeed after proceedings were commenced, they point to the evidence given on behalf of the claimant Mr Cairns. In cross examination he

volunteered that Kier's contract for area 6/8 ended in November 2019. Consequently, when the variation was signed in relation to area 9, there was no area 6/8 contract in existence to be varied.

14. Case management of this and other cohort cases identified common and generic issues to be determined by the court. They are as follows:

1. Is Kier Highways Limited entitled to bring a claim for damages for negligence on behalf of Highways England?
2. In cases involving damage caused to by negligent defendants to the strategic road network owned by Highways England, is Highways England entitled to claim damages where the diminution in value to the strategic road network has been restored by works being carried out to the network by its contractor under a contract awarded for a fixed contract sum?
3. In such cases, may the diminution in value be established by reference to the reasonable costs of repair work carried out under a contract let by the claimant (Highways England) to the claimant's contractor, Kier Highways Ltd, following a competitive tender procedure?
4. What is the true cost of the repair?
5. How is the damage to be assessed?

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15. These issues having been identified at case management, it is right to point out that these issues developed at trial and expanded and varied in their remit. I have therefore attempted to deal with all issues raised in as comprehensive way as I can.

Factual issue in the Tesco Action

16. Before returning to the generic issues there is a specific and somewhat surprising factual issue that arises in relation to the claimant's claim against Tesco Underwriting Ltd, "The Tesco Claim". The defendants contend that in relation to this claim, the claimant has failed to discharge the burden of

proving the most basic element of the claim namely the relationship between the repairs contended for and the accident involving their insured motorist.

17. Specifically the defendants point to different descriptions of the accident locations in various documents disclosed. Certainly an element of confusion has been generated by reference to different repair locations. The claimant's case is that the accident relevant to the damage in the Tesco case occurred "under a bridge west of Terrington St John". The Cost Breakdown Document (tb 114) refers to repairs "near East Dereham" which was the location originally included in Mr Cairns' witness statement adduced for the purposes of the litigation and which he subsequently confirmed in evidence was incorrect. The daily allocation sheet, again relied upon for the calculation of the works undertaken (tb 88) identifies another location on the A47 at Wisbech.

18. In response to this confusion, it is submitted on behalf of the claimant that the court can nevertheless be satisfied of the connection between the repairs set out in the various documents and the occurrence of the accident involving Tesco's insured. In summary they contend:

    i) It is admitted that a Vauxhall Vectra motor vehicle, index no AB08 TPY was negligently driven by their insured into collision with the barrier on the A47 on 16th June 2020.

    ii) The incident management form (tb 54 to 55) refers to the presence of that motor vehicle in a ditch about 200m away from the damage to the barrier beneath bridge A47/3590. The incident management form describes that bridge as being east bound "prior Terrington".

iii) The same incident management form bears the identification number 01797 and this number is reflected in the works documents produced to establish what repairs were undertaken.

19. Consequently when these factors are combined it is submitted that the court should conclude on the balance of probability that the claimant has discharged the burden upon them.

20. I confess that the lack of consistency in the documentation produced on behalf of the claimant has troubled me. Mr Edwards has sought to explain the same by way of clerical error and perhaps by way of referring to areas where, for example, marshalling of vehicles was undertaken rather than the specific site of the repair. For my part I can quite understand why the differences have caused an insurer's eyebrow to be raised. Nevertheless, in the end I am persuaded by the arguments set out above that the claimant has discharged the burden. In my judgment to conclude otherwise would ignore that which has been admitted by the defendants and the trail that some of the documents at least establish. I find that the in the "Tesco Case" the insured's vehicle damaged the barrier at the A47 Overbridge 3590 near Terrington St John.

21. **Generic Issue 1**

Is Kier Highways Limited entitled to bring a claim for damages for negligence on behalf of Highways England?

22. On the submissions made in this case this question itself can be divided into the following 3 separate issues:

i) Has it been established that Kier have authority (contractual) to bring a claim in the name of Highways England?

ii) If so, what is the scope of that authority?

iii) Irrespective of the above, are the claims nevertheless champertous and thereby an abuse of process that should not be permitted to proceed?

23. ***Has Kier established authority to bring a claim****?*

The first issue arises since, extraordinarily, no signed version of the contract relied upon by the claimant has been produced. The evidence relied upon by the claimant amounts to this. Mr Cairns who was employed by Kier and who effectively gave evidence on their behalf, is concerned with the day to day implementation of the contractual relationship between Kier and Highways England. His evidence was that the relevant contractual documents covering the relationship between Highway's England and Kier were uploaded onto a shared drive where they could be accessed by himself and others when required. Notwithstanding the fact that the documents were unsigned and in part contained the words "draft", "tender draft contract" and "tender issue revision" he said that these were the only documents he used in the course of his work and as such they were the documentary basis for the contractual relationship.

24. Again I find the claimant's position somewhat surprising bearing in mind the size and sophistication of the respective organisations.

25. However, notwithstanding this seemingly amateur state of affairs, I have no reason to doubt Mr Cairn's evidence on this issue. These terms, he said,

applied at the material time and I am persuaded by his account. There is, in my judgment no evidence contrary to this and Mr Cairns clearly regarded the documents on the shared drive as being the source of contractual terms that he relied upon in the course of his work. On balance I am satisfied that these documents detail the relevant terms that governed the contractual relationship between Kier and Highways England. Specifically, within clauses 87 in each contract I am satisfied that they represent the basis for the contractual authority for Kier to bring a claim.

26. ***The scope of that authority.***

I have already set out above the terms of Clause 87 in each agreement. They are different in a material way. The claimant submits that any difficulty arising from such divergence is avoided by way of the deed of variation. They contend that, notwithstanding the date of the variation, it remains directly relevant to the scope of the authority to bring a claim, in the claims have persisted thereafter, ie it is to be considered in some way as a continuing act.

27. This point is particularly relevant when it comes to the authority provisions of the Area 6/8 contract. Without variation the authority provided under clause 87.2 contains the "limitation" set out above namely to recover "*no more than the actual Third Party Claims defined cost for repair or replacement work already done*" and "*the resulting third party claims overhead"*. With the variation the reference to third party claims overheads etc is removed.

28. Mr Edwards submits that the date of the variation and the purported effective date is irrelevant. What is important is that the claims have persisted post execution of the deed. However, even if this is correct, the difficulty for his

position is the cancellation or termination of the area 6/8 contract in November 2019. I agree with the defendants that at the time of the deed of variation there was no area 6/8 contract to vary and so the scope of any authority to bring a claim must be read by reference to the contract that persisted before variation.

29. Even without the termination of the area 6/8 contract I struggle to accept the concept of varying the limitation on the extent of the authority to recover so long after the event and only some 3 months prior to trial. It seems to me that the unvaried Area 6/8 contract is specific in its provision for authority and such authority should be construed strictly.

30. In its unvaried form the Area 9 (governing Area 6/8) contract purports to set a limitation on Kier's authority. Notwithstanding the fact that it was ultimately decided to remove these restrictions, Mr Edwards submits that in reality the variation makes little difference to Kier's authority to claim.

31. The Third Party Claims Defined Costs (TPCDC) are defined within Clause 11 (131) of the contract thus:

"Third Party Defined Cost is the defined as the Defined cost of items (a) (b) and (c) specified in paragraph 2 of Appendix A to Annexe 23 of the Service Information"

32. Appendix A to Annexe 23 limits Kier's recovery to;

a) Repair of damage including supervision and management.

b) Traffic management during repair.

c) Initial Response to the incident, clear up and make safe.

33. "Defined cost" is defined at Clause 11(31) as follows:

"The amount of payments due to subcontractors for work which is subcontracted without taking account of amounts deducted for

- *Payments to others and*
- *The supply of equipment, supplies and services included in the charge for overhead costs incurred within the working areas in this contract and*

The cost of components in Schedule 1 for other work.."

34. *Schedule 1* sets out costs components which include.

- The cost associated with employing or otherwise engaging operatives,
- Equipment and temporary accommodation
- The cost of purchasing, delivery of and removal of packaging for Materials.

35. The issue that arises to be determined is whether on a correct analysis of these contractual terms Mr Edwards can establish to the court's satisfaction that it is within the limitation of Kier's authority to bring a claim based upon a "defined cost" definition that includes "uplifts" to reflect for example an element of profit.

36. I have formed a view, that I express later on in this judgment, as to the limited value of using the ASC pricing figures to calculate the reasonable cost of repair. However, that is a different question to the issue of contractual authority. Furthermore, for the purposes of assessing the extent of Kier's authority within Area 9 (Area 6/8) the court cannot ignore the evidence given on behalf of the claimant by Mr Cairns. In summary, on this issue his evidence

was to the effect that the costs calculated for the purposes of the claim did include uplifts for which he was unable to find authority within the contract.

37. Consequently, whilst in re examination Mr Cairns explained the limitations of the ASC rates (and I accept those limitations), I agree with the submissions of Mr Killen that, for the limited purpose of assessing the limitation of authority given to Kier, it is the lower rates that are relevant. In my judgment it is this interpretation that is most readily consistent with the terms of Schedule 1.

38. It follows that in assessing the extent of the authority I am not satisfied that the claimant establishes that the various uplifts should be included. I do however accept that, in accordance with the terms of the contract the Third Party Claims Overhead can be added. In argument I was assured that such calculation could readily be made by the parties. If an issue arises then I can hear brief submissions.

39. The relevance of this conclusion is that in relation to the "Tesco action" any recovery is limited to the extent of this authority. If the exercise upon which I embark below produces a higher figure, then it is the lower figure that is recoverable.

40. The Area 3 contract ("the Booth action") is in similar terms to that which was considered by HHJ Godsmark QC in *Highways England Ltd v Hughes 2018 WL 01935957*. He concluded that the clause authorised the contractor to pursue a claim in the name of Highways England for the sum which Highways England could recover from the tortfeasor.

41. The defendants remind me that I am not bound by such a decision and submit that it is far from clear what was specifically argued in *Hughes.* Leaving aside the question of champerty (which I propose to deal with below) they contend that the specific wording of clause 87.2 in the Area 3 contract should be read as limiting Kier's authority to bring a claim. Specifically, they refer to the express provision within clause 87.2 that provides for any sum recovered by Kier, but received by Highways England to be held on trust for Kier, and then paid to Kier *"in accordance with the contract"*. The argument is that this must be referring to sums paid to Kier as part of the lump sum. In other words, it cannot exceed the lump sum payments. If this is correct then, it is argued, the claims made by Kier are not "*in accordance with the contract*" and made without effective authority.

42. The claimant's response to this argument is simple. The purpose of the term is simply to make provision for the circumstance where monies recovered are paid directly to Highways England. It should not be read as having a greater degree of significance. In this respect I prefer the claimant's argument. If this phrase is read as part of the clause as a whole, as in my view it must, then, even with a strict construction, it seems to me that the claimant's interpretation is correct.

43. Like HHJ Godsmark in *Hughes* I am satisfied that in the case of the Area 3 contract it provides authority to bring a claim in the way envisaged by the claimant.

44. **Champerty**

The issue of champerty was not specifically pleaded in either of the cases before me. Interestingly it was not argued in the *Hughes* case either. Nevertheless, since this series of cases is intended to try to limit the points of contention between the parties in related claims, I have allowed the same to be argued and I have received extensive submissions on the same.

45. Irrespective of the conclusions set out above regarding the apparent authority provided by the contractual terms, the defendants contend that the claims pursued on behalf of the claimants are champertous and should be stayed as an abuse of process. The Defendant's characterise champerty thus. Champerty is a label given to the legal rule that a party cannot pursue a claim in the name of another without authority and where it has no legitimate interest in the claim.

46. In *Giles v Thompson (1994*) 1 AC 142, an early credit hire case, Lord Mustill identified the "test" for champerty by reference to the decision of Fletcher Moulton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* (1908) 1KB 1006. In particular he referred to the:

"wanton and officious intermeddling with the disputes of others where the meddler has no interest whatsoever, and where the assistance he renders to one or other party is without justification or excuse."

47. In looking at the decision in more detail Mr Killen pointed to the mischief identified to the House of Lords in *Giles*, namely that claims might be exaggerated or inflated in circumstances whereby defendant insurers might be unable to mount an effective challenge. Ultimately this argument failed, but in dismissing the contention Lord Mustill referred to the fact that shrewd and experienced insurers will be well equipped with information about local tariffs

for the hire of cars of the same type as the motorists' damaged vehicles, with which they can expose any exaggeration.

48. Mr Killen says this is important. He contends that contrary to the position in *Giles* which concerned damage to a vehicle and hire charges, in highway repair cases it is not easy for defendants to obtain evidence of the reasonable cost of repair. This difficulty he says arises in part out of the "monopoly" of this type of work operated by the relatively few companies who have contracts with Highways England for the various Areas.

49. For my part I have difficulty with this submission. Firstly, HHJ Godsmark in *Hughes* had no difficulty with the concept of what was meant by the reasonable cost of repair. As he put it at paragraphs 33 of his judgment:

> *"It should not be forgotten that the figure being sought is diminution in value by reference to the reasonable cost of repair. This does not mean that there is only one possible figure for diminution in value, there may be a range of reasonable repair costs all within a reasonable bracket. I have come to the conclusion that while CECA Dayworks may not be a perfect fit for this type of repair they are a reasonable fit. The rates are accepted as reasonable within the civil engineering industry for unanticipated works."*

50. Secondly, simply as a matter of common sense, the idea that insurance companies, faced with many of these claims, don't have some idea of the sort of expenditure likely to be incurred in replacing a section highway of barrier would be surprising to say the least. If they do not know enough already to identify when a claim is surprisingly high or (to borrow from *Coles v Hetherton* see below) "*clearly excessive*", then they can readily avail themselves of sufficient general evidence to do so. As Mr Edwards put it in his skeleton argument, subject to certain limits the cost of a Quantity Surveyor can be recovered even on the small claims track.

51. In my view the relationship between Kier and Highways England was a genuine commercial contractual relationship. The terms of the contract set out circumstances in which Kier could seek to recover damages from a tortfeasor and the negotiation of the terms of that contract reflected that authority. The relationship, in my judgment, is far removed from the position in *Trendtex Trading Corporation v Credit Suisse* (1982) AC 679 that the House of Lords found objectionable. In *Trendtex* it was the selling on of the cause of action with the potential for profit to be made *"out of the cause of action"* that Lord Wilberforce considered "*the vice*".

52. Standing back I remind myself of Lord Mustill's words in *Giles* at page 164:

> "*The law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants."*

Whilst I would not perhaps go so far as suggested by Mr Edwards and conclude that there is a positive public interest in promoting this kind of contractual relationship, I am certainly unable to conclude that it should be regarded as contrary to public policy.

53. In my judgment looking at the transaction as a whole, Kier has a genuine commercial interest in enforcing the cause of action.

54. **Generic issue 2**

In cases involving damage caused by negligent defendant(s) to parts of the strategic road network owned by Highways England, is Highways England

entitled to claim damages where the diminution in value to its strategic road network has been restored by works carried out to the network by its contractor under a contract awarded for a fixed contract sum."

55. On this narrow issue there appears to be agreement. The answer is yes. The claimant is entitled to claim damages notwithstanding the fact that the repair work might already have been carried out pursuant to that part of the agreement between Kier and Highways England covered by the monthly lump sum. As Mr Edwards submits and I agree, the claimant's right to bring a claim arises from the fact that their property has been damaged. It is not dependent upon the claimant paying for the cost of that repair. The right to damages arises from the fact of the damage to his property rather than the fact that the claimant has been put to expense.

56. Mr Edwards reminds me of the passage in *Jones v Stroud DC 1986 1 WLR 1141*. In *Stroud*, remedial works to the claimant's private residence had been undertaken by a company wholly owned by the claimant and he was unable to prove that he had actually paid for the work.

57. At 1150 the Court of Appeal observed:

"if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property has been or will be repaired I do not consider that the court is further concerned with the question whether the owner has to pay for the repairs out of his own pocket or whether the funds have come from some other source."

58. In *Hughes* HHJ Godsmark QC answered an almost identical question to that posed as Issue 2 in this case. At paragraph 20 of his judgment he said:

"Is the position any different because the cost of attendance and repair are included in the lump sum paid by Highways England to BBMM (Balfour

Beatty Mott Macdonald) meaning that this repair involves no additional cost to Highways England? In my judgment this aspect of the case makes no difference to the quantification of loss, not least because it is not the actual cost of repair to Highways England that is important, it is the reasonable cost of repair."

59. I agree. Furthermore, just as was the case with Balfour Beatty in *Hughes*, Kier and Highways England negotiated a monthly lump sum payment on the basis that in addition to that sum Kier were given authority to recover against identified tortfeasors sums related to the barrier damage. Put simply, the granting of the authority to Kier on top of the monthly lump sum is part and parcel of Highway England's "payment" for the service provided.

60. **Generic Issue 3**

In such cases, may the diminution in value be established by reference to the reasonable costs of repair work carried out under a contract let by the claimant (Highways England) to the claimant's contractor, Kier Highways Ltd, following a competitive tender procedure?

Generic Issue 4

What is the true cost of the repair?

Generic Issue 5

How is the damage to be assessed?

61. Notwithstanding the way in which issues 3,4 and 5 have been drafted. It is clear that the real issue that separates the parties in this case is how the court should approach the principles identified by the Court of Appeal in *Coles v Hetherton (2015) 1WLR 160*. Both parties say that the authority supports their

analysis of the case and Mr Edwards for the claimant describes it as the crux of the dispute. It is therefore worthwhile setting it out in a little detail.

62. In *Coles* the Court of Appeal confirmed diminution in value as being the proper measure of damage in any case involving damage to a chattel. They went on to identify that the most practical method of assessing diminution in value is by reference to the reasonable cost of repair. At paragraph 27 the Court of Appeal said:

> *"Generally the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer."*

63. Thus, in general terms, the relevant measure of damage is diminution in value and the reasonable cost of repairing that damage to Highways England is, as a matter of convenient practice, the practical way to calculate the diminution in value. In *Hughes* HHJ Godsmark underlined the distinction between actual cost and reasonable cost.

64. Further at paragraph 27 of the judgement in *Coles,* Aikens LJ referred to the basic principles identified by Lord Hobhouse in his speech in *Dimond v Lovell* (2002) 1 AC 384. When these are combined with statements made in other cases then the principles can be described thus:-

> *"(1) Where a chattel is damaged by the negligence of another that loss (the direct loss) is suffered as soon as the chattel is damaged.*
>
> *(2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. This follows the general principle in awarding damages, i e that of restitution: see Livingstone*

v Rawyards Coal Co (1880) 5 App Cas 25, 39, per Lord Blackburn. In Lord Hobhouses phrase, "this can be expressed as a capital account loss."

(3) If the chattel can be economically repaired, the claimant is entitled to have it repaired at the cost of the wrongdoer, although the claimant is not obliged to repair the chattel to recover the direct loss suffered.

(4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages: see Burdis v Livsey [2003] QB 36, para 95. Thus, subsequent destruction of the chattel , or a decision to delay repairs (The Kingsway [1918] P 344), or an ability to have the repairs done at less than cost (Jones v Stroud District Council [1986] 1 WLR 1141) or for nothing (The Endeavour (1890) 6 Asp MC 511; Burdis v Livsey [2003] QB 36, where no sum was payable because the repairs were carried out under an unenforceable credit agreement) will not prevent the claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor.

65. At paragraph 28 the Court of Appeal approved the reasoning at first instance thus:

"As Cooke J pointed out in his judgment at para 7, the correct jurisprudential analysis of a claim for diminution in value, even if it is measured by the reasonable cost of repairs, is that it is a claim for general damages, not one for special damages. The diminution in value claim should therefore be pleaded as a claim for general damages. Documents such as an invoice for the cost of the repairs undertaken are no more than evidence of the diminution in value suffered by the chattel as a result of the negligence of the wrongdoer which can be used to make good the claim. Strictly speaking, the cost of the repairs is not itself the loss suffered."

66. For completeness sake I set out paragraphs 44 and 45 in their entirety:

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

have had to pay if he had organised the repairs, to ensure that that sum represents the "reasonable cost" of repairs that the claimant would have had to pay. It will then compare that figure (stripped, if necessary, of any "unreasonable" elements) with the total sum representing the actual cost to the insurer, which will be the sum claimed by the claimant.

Para 45

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

67. The defendants submit that the crucial point to be taken from *Coles* in resolving this case is the emphasis placed upon the relevant cost being the cost "*to the claimant"*. In *Hughes* HHJ Godsmark had relied upon this to justify the inclusion in his assessment of the reasonable cost of repair the element of profit charged by the contractor. Thus, it is submitted, just as the defendant in *Coles* could not look to the commercial benefit enjoyed by the insurer, so in this case the court must look at the claimant's particular position. The defendant submits that Highways England have negotiated a contract from which it is possible to calculate the actual cost being charged to them by Kier for all works including those which fall within the lump sum payment. This is the exercise that has been undertaken by their expert Mr Taylor following disclosure of the extensive contractual documentation.

68. In *Hughes* the court had been faced with a similar but not identical argument, namely that the court should assess the reasonable cost of repair using the

rates specified in Balfour Beatty's contract with Highways England for work valued in excess of £10,000, i.e. non lump sum work. Balfour Beatty in bringing the claim on behalf of Highways England had submitted that Civil Engineering Contract Association "CECA" rates should apply. In rejecting the defendants' argument, and in a passage following on from that cited at paragraph 50 above, the court expressed the following view;

> *"In order to reject the use of CECA Dayworks rates in pricing this repair I would have to have some alternative measure to apply. The only one suggested is the £10,000+ repair regime rates and I have already accepted that they are artificial in that they are partially subsidised by the lump sum. No one can suggest anything else."*

69. In the cases before me the defendants argue that this lack of an alternative measure is remedied by the expert evidence of Mr Taylor and his analysis of the disclosure given by the claimant following application. Thus, it is submitted, that whilst in *Hughes* the court rejected the defendant's argument, here we have better evidence of what should be regarded as "*the actual cost to Highways England*". Thus, they submit, it is the calculation made by Mr Taylor and reflected at paragraphs 4.16 to 4.32 of his report should be the basis of assessment of the reasonable cost of repair. Consequently they submit that if the court were to ask itself "what is the cost of repair that the claimant can obtain on the open market?", then it is Mr Taylor's analysis of the "ASC" rates that provides the answer that fits best. The defendants submit that this is particularly important in circumstances where the market is limited to a few providers/contractors and where the open market is limited.

70. Conversely on this point of principle, the claimant submits that a calculation based on these figures is not a good evidential basis to assess diminution in

value. They contend that to extract these figures from a complex contractual relationship is wholly artificial and does not represent the "open market rate for the repairs to be carried out." It is submitted that, just as HHJ Godsmark identified that the lower rates for works in excess of £10,000 were not the proper starting point because they could not be sensibly separated from the commercial reality of the situation, so should the court reject Mr Taylor's analysis. Put shortly the figures used by Mr Taylor reflect the wide-ranging terms of the contract which themselves reflect a complex commercial relationship. Furthermore, just as the court in *Jones v Stroud* (see above) was not concerned with the cost, if any, that the Claimant would actually pay for the work, so should the court in this case focus on the reasonable cost of the repair work if the Claimant had to buy in the service outside of the contractual arrangement reached with Kier.

71. Resolution of this central point in my view begins with recognition of what the court is actually required to do in assessing damages in a case of this sort. As can be seen from the extracts from *Coles* set out at length above, the court is not awarding special damages based upon the actual cost of repair, rather it is awarding general damages for the diminution in value of the chattel. The reasonable cost of repair is only an evidential tool, albeit an important one, used to make such an assessment.

72. It is for this reason that the actual sum paid is not strictly relevant. If a claimant is able to have work done at a reduced cost or at no cost at all that does not mean that he has a reduced claim or no claim. In either case he would

be entitled to general damages, the amount of which would be informed by the reasonable cost of repair.

73. In most cases the assessment of the reasonable cost of repair will be assessed on the basis of what the repairs would cost on the open market. Whilst the defendants are correct that there are a limited number of contractors working in this area and that consequently the open market is somewhat limited, the actual works being undertaken are Civil Engineering works. Valuation of the Civil Engineering work is a function of time, materials and equipment. It is not the sort of work that is particularly difficult to estimate in terms of cost.

74. The defendants' arguments suggest that the source of the best figures for calculating the reasonable cost of repair are figures produced by a contractor such as Kier at the time of the tender process and used to set the lump sum payment. The context of these figures of course is a much larger commercial agreement. If the defendants' submissions were correct, then it would mean that the reasonable cost of repair would depend upon the terms of the negotiated contract between Kier and Highways England in relation to which they played only a part. Different contractors might approach such negotiations and pricing in different ways. As a consequence the general damages to be awarded for identical sections of highway furniture in different contract Areas could be different, even if the sections were adjacent to each other, depending on who negotiated the contract and what emphasis they placed on different parts of the agreement. This is the so called "Tipner Bridge" argument advanced by Mr Edwards in his written submissions, and in my judgment it illustrates why Mr Taylor's calculation using the disclosed

contractual documentation is not to be considered reliable evidence upon which to make an assessment of the diminution in value of the claimant's chattel. Consequently, in my judgment the so-called ASC rate calculation made by Mr Taylor is of limited evidential value in assessing the diminution in value.

75. I am bolstered in this view by standing back and looking at the type of hourly rate that Mr Taylor's ASC calculation produces. By way of example, whilst the ASC calculation for the Booth case produces a rate of £18.47 for a Watchman, the rate contended for by the claimant is £63.29 and perhaps more importantly, the blended rate (see below) provided by Mr Taylor is £54.80. I am satisfied that the ASC calculation is significantly out of line.

76. As heralded above, Mr Taylor's "ASC" assessment is not the only calculation that he carried out. Key to his alternative approach was his identification of what can be termed "blended rates". In the body of his report Mr Taylor explained that he has used his knowledge of other similar cases to settle upon what he considered to be a reasonable average of rates. These rates were noticeably lower than those pleaded on behalf of the claimant but significantly higher than the ASC calculated rates.

77. Secondly in terms of reassessment, Mr Taylor looked at the number of hours. For example, in the Booth case, he reduced the number of hours allowed for planning from 9.5hrs to 3.75.

78. Thirdly he cast doubt over the use of additional traffic management for each repair. Whilst he conceded such management was necessary, he did not accept

the cost of an additional TM gang (in the Booth case this amounted to £122.86 for the vehicle and £274.10 for the operative).

79. Fourthly, Mr Taylor took issue with the use of multiples or labour uplifts to produce a final hourly rate. In particular he contended that highway repair work of the sort undertaken in this case is by its very nature conducted at antisocial times and that consequently no uplift on hourly rate should be made to reflect weekend or night time working. Having said that, in answer to a question I posed, Mr Taylor seemed to accept that some uplift would be consistent with industry norms albeit perhaps 1.25 or 1.5.

80. Lastly, he pointed to the cost of materials claimed. I propose to deal with his argument in summary form. There are really two points to be made. In general terms and in relation to both claims Mr Taylor considered that the amounts claimed for materials have not been properly substantiated. He explained that in such circumstances it was ordinarily the case that a quantity surveyor would make a reduction across the board of 5% in order to reach a figure that he was comfortable in advising was reasonable. That 5% reduction in material costs was applied to the figure claimed for materials across the board in the Tesco action.

81. In the Booth action, Mr Taylor's evidence went further. In his view the cost associated with the "ABC Anchor Kit" namely £3050.67 was such a proportion of the materials cost and was sufficiently high that an overall reduction of material costs of 15% was justified. In cross examination he seemed to accept that the reasonable cost for the Anchor Kit was between £2500 and £3000. There was an additional issue raised concerning the scrap

value of the replaced barrier although Mr Taylor did not seem to make any assessment as to how this should be calculated.

82. In the Tesco action Mr Taylor also pointed to an apparent anomaly in the costs charged for concrete. The invoice appearing at TB 110 suggested 5.6 cubic metres of concrete at a cost of 105.73 per cubic metre plus an out of hours surcharge of £570 and a total cost of £1162.09. Mr Taylor thought the volume of concrete allowed was excessive and reduced it by 40%. (ie to £733.18).

83. Before going on to analyse the submissions made by the claimant in reply, it is perhaps useful to set out where the various contentions made by the defendant leave the calculations of the reasonable cost of repair.

In the Tesco case the following are the relevant figures.

i) Pleaded Case £7287.59

ii) Mr Taylor's calculation taking into account the arguments set out above but using blended rates and not ASC rates. £3922.91

In the Booth case

i) Pleaded Case £7869.36

ii) Mr Taylor's calculation taking into account the arguments set out above but using blended rates and not ASC rates. £5288.33

84. In response the claimant relies upon the expert opinion of Mr White who carried out his own assessment of the reasonable cost of repair. He also made reductions from the amounts claimed when reaching a figure. Specifically, Mr White reduced the allowance for planning costs for each repair job (£510.90 to

£383.18 in the Tesco case £434.51 to £368.85 in the Booth case). In addition, he agreed with Mr Taylor that to a significant degree material costs were unsubstantiated and that industry practice might suggest a reduction in the region of 5%. He did not think a further reduction in the Booth case was appropriate since as Mr Taylor seemed to agree the reasonable cost of the Anchor Kit was £2500 to £3000 and this represented between about 80% and 98% of the sum actually charged. In his view a 5% reduction was adequate.

85. Mr White agreed with Mr Taylor that the amount of concrete used in the Tesco case was surprising. However, rather than a 40% reduction he stuck to his 5% estimate.

86. Otherwise Mr White broadly supported the calculation of the claimant's pleaded claim. In particular he concluded that the figures for the hourly rate to be charged were within reasonable boundaries and that the labour uplifts (1.5 in the Tesco case and 2 in the Booth case) were consistent with industry antisocial hours rates.

87. The result of Mr White's deliberations was to suggest that the reasonable cost of repair was as follows:

In the Tesco case £6756.21.

In the Booth case £7257.24.

88. In my view the expert evidence identifies 3 matters of general principle that require resolution namely;

i) Hourly rates

ii) Any Labour uplift for antisocial hours.

iii) Any general reduction for unsubstantiated costs.

89. In addition to these general points the following are points that are specific to the individual claims namely;

i) The appropriate allowance to be made for planning.

ii) The reasonableness of the number of hours claimed for the individual tasks.

iii) The extent of allowance to be made for traffic management.

iv) Whether the reduction in Booth for materials should be 15%

v) The extent of any allowance that should be made for the cost of concrete in the Tesco case.

90. Before going on to make specific findings in respect of these matters, it is right that I deal at the outset with the submission made by Mr Edwards to the effect that the court should be slow to embark upon a detailed analysis of the cost of repair in circumstances where the amounts claimed are broadly reasonable. In other words, if the court were to come to the view that the sums claimed were "about right" for this sort of claim then it should stop there. How the figures are calculated is irrelevant as long as they are not unreasonable. I have some sympathy with this submission and it is consistent with the passages in *Coles* set out above. Certainly, I would not expect the courts generally to be invited to engage in the sort of detailed analysis that it has in

this case. I repeat, the reasonable costs of repair are to be regarded as evidence of the diminution in value in respect of which general damages are awarded.

91. There are however three reasons why I have gone on to consider this issue in more detail in this case. Firstly, the court cannot ignore the fact that the claimant's own quantity surveyor came to a conclusion that the sums claimed were too high. Secondly, there are a number of points of principle raised that might usefully be resolved one way or another, and thirdly simply allowing claimants to set their own market for cases of this sort might be regarded as undesirable.

Hourly Rates.

92. I have already concluded that Mr Taylor's ASC rates are not particularly helpful in assessing the reasonable cost of repair. That said there remains a conflict between Mr Taylor's blended figures and the sums claimed and accepted by Mr White.

93. In resolving this issue I accept that Mr Taylor has undertaken the analysis that he says that he did. I readily accept the claimant's criticism that it cannot be seen as entirely scientific and is to some extent unattributable. The defendants themselves would point to the fact that these rates might simply reflect the rates applied by the small number of contractors in this market and as such might be too high. However, in my judgment it is the blended rate that represents the best evidence I have in assessing the general cost of this work. Mr Edwards points to the wide range of hourly rates identified by the defendant's expert and submits that as long as the claimant's rates fall within of close to these then they should be regarded as reasonable and not interfered

with. For the reasons set out above I think that approach is not appropriate in this case. Having heard the evidence, it is Mr Taylor's blended hourly rates I prefer as against Mr White's acceptance of the claimant's claimed rates without analysis from any other source.

Labour Uplift for Antisocial Hours

94. The thrust of the defendants' submission is that in assessing the reasonable cost of this work no additional uplift should be applied for out of hours work. Put simply the defendants contend that an out of hours uplift is inappropriate for highway workers who generally have to work antisocial hours. There is in my judgment some force in the suggestion that any uplift should be limited, but I am unable to accept that in assessing the reasonable cost of repair I should disregard the fact that the work was undertaken outside of normal working hours or at the weekend. Mr Taylor himself accepted that an uplift of between 1.25 and 1.5 is to be regarded as industry standard. Overall, I take the view that for the purposes of my assessment it is reasonable to apply 1.25 as a appropriate out of hours uplift for a highway worker of the sort engaged in these cases. The approach is a little broad brush, but I am satisfied that it is a basis for a reasonable assessment.

A general reduction for unsubstantiated materials

95. The argument for a reduction in the claimant's claim arises from the involvement of the expert evidence from the Quantity Surveyors instructed by each party. The experts agree that the documentation produced by Kier to substantiate the claim made by the claimant was deficient (see paragraph 3.20 of the expert's joint statement). There also appeared to be a measure of

agreement that in such circumstances it was industry practice for a Quantity Surveyor to make a general reduction of about 5%. The question for the court is whether in the light of such evidence it should make a reduction to repair costs when assessing the reasonable cost of repair and the consequent diminution in value. In my view it should. Whilst not directly on point I am mindful of the comments made by the experts at paragraph 3.21 of the joint statement namely:

"We agree that we are likely to be failing in our duty to the court if we are unable to have substantiation upon which to express our opinion"

96. In my view and in accordance the standard practice of Quantity Surveyors tasked with assessing the value of works, if substantiation is absent then a 5% discount is reasonable. I shall deal with the question of any further discount in the Booth case below.

Allowances for the planning element in the specific cases.

97. Claims for £510.90 and £434.40 have been made in the Tesco and Booth cases respectively. Mr White and Mr Taylor agree that this would appear to be too much. Specifically, they agree that in so far as the price is based upon the attendance of two AIW teams then it is excessive. At paragraph 3.15 of the joint statement they say:

"We agree that the number of staff alleged to have been involved was unlikely to have been correct, where only notional allocations and no substantiation has been provided."

98. My assessment of the appropriate allowance to be made must take into account my conclusion on blended hours. If this is applied to the approach to Mr White's calculations, then the gap between the two experts' estimates

narrows further. In my view, in estimating the reasonable costs of repair the court should use Mr Taylor's calculation with blended not ASC rates. I allow £174.40 and £155.35 respectively.

The reasonableness of the time claimed for individual tasks.

99. I propose to deal with this element of the claim in relatively short order. The differences between the parties as to the number of hours required for the repair work is relatively modest. Bearing in mind that I am being asked to assess the reasonable cost of repair, and bearing in mind that there is some documentation to support the number of hours claimed, then I do not propose to alter the number of hours claimed for the operatives or the vehicles involved in the repair work.

The extent of the allowance made for traffic management

100. In each case the defendants have sought to challenge the reasonableness of the cost of traffic management measures undertaken. In particular they argue that the cost associated with the attendance of an additional vehicle and operative are unreasonable. In the Tesco action this amounts to some £688.50 and in the Booth case it amounts to £288.20 if blended rates are used. Mr White's argument was that on a fast-flowing section of highway such safety measures are reasonable. The defendants submit that the attendance of one vehicle was sufficient. Mr Taylor contends that on the facts of each of these repairs the additional cost was unnecessary. In my view the starting point is one of safety. In my judgment it is difficult to conclude that the sort of cost set out above should be considered as unreasonable when the purpose is to provide safety.

Whilst it might have been possible to do it with less, it was not unreasonable to have two. I would allow this element of the claim at the blended rate.

A reduction of 15% for materials in the Booth case.

101. In relation to the general principle of the application of a discount for inadequately documented claims for materials, I have already accepted that the same can be made. However, in the Booth case Mr Killen, through the evidence of Mr Taylor, invites the court to go further. Whereas he would ordinarily propose a reduction of 5%, in Booth the discount should be 15% to reflect the fact that one element, the anchor kit, represented 40% of the material costs. In my judgment having regard to Mr Taylor's acceptance in cross examination as to the reasonable cost of the anchor being between £2500 and £3000 as against a claim of £3050.60 then there is no basis for a further discount over and above 5%.

The cost of concrete in the Tesco case.

102. At paragraph 3.26 of the joint statement the experts agree

" that (the) quantity of concrete claimed appears excessive compared with the quantity reasonably required for the repair works and it is not clear why such volume was claimed."

103. It follows that in assessing the reasonable cost of repair some reduction is appropriate. Mr Taylor's reduction by 40% appears somewhat arbitrary. Equally Mr White's reduction seems light when seen against an acceptance by him that the quantity seems excessive. I would allow the sum of £900 for concrete.

Conclusions on Damages

104. What do these findings mean in terms of the reasonable cost of repair.

In the Tesco' case my calculations are as follows:

i)	Initial Incident	£247.02
ii)	Planning	£174.40
iii)	Repair (using, hours as pleaded, blended rates, 1.25 uplift instead of 1.5)	£3352.71.
iv)	Materials excluding concrete total £848.06 less 5%	£805.65
v)	Concrete	£900
TOTAL		**£5479.78**

105. In the Booth case the calculation becomes:

i)	Initial incident	£304.06
ii)	Planning	£155.35
iii)	Repair (using hours as pleaded, blended rates, 1.25 uplift instead of 2)	£2467.88
iv)	Materials £3600 less 5%	£3420
TOTAL		**£6437.29**

106. Having conducted the exercise set out above I am satisfied that these figures represent a reasonable basis upon which to assess the diminution in value of the section of highway furniture damaged in the respective incidents. In so far as this exceeds the limitation of the authority that I have concluded applies in the Tesco case then it is the lower figure that applies (I was reassured in argument that this could be calculated by the parties).

107. Otherwise damages are awarded for diminution in value based upon my calculation.

108. In passing I reiterate my view that I would not ordinarily expect a court to undertake a similarly detailed exercise in order to establish the basis for an award. This particular branch of the law must ordinarily represent a sensible balance, subject of course to the sort of checks and balances that I have identified in these deliberations.

109. The parties shall have 14 days to file an agreed order. In the absence of agreement and/or in the event that there is a need to deal with consequential orders then the case shall be listed for a further consequential order hearing.