Neutral Citation Number: [2022] EWHC 2934 (Comm)

CLAIM No. CC-2021-MAN-000045

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 18 November 2022

Before:

His Honour Judge Pearce

- -

Between:

AMT VEHICLE RENTAL LIMITED	**Claimant**
- and –	
VOLKSWAGEN GROUP UNITED KINGDOM LIMITED	**Defendant**

- -
- -

Mr Asa Tolson (instructed by **Glaisyers Solicitors LLP**) for the **Claimant**

Mr Lloyd Maynard (instructed by **Shoosmiths LLP**) for the **Defendant**

Hearing dates: 3 and 4 October 2022

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JUDGMENT

This judgment was handed down in private at 9.30am on 18 November 2022. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. The Claimant is a company involved in the business of supplying hire vehicles to corporate customers. The Defendant, which imports vehicles from the Volkswagen Group[1] into the United Kingdom. and sells them to independent albeit franchised motor dealers, has a demand for replacement vehicles. On 19 August 2016, the Claimant and the Defendant entered into a written contract ("the Contract") for the supply of hire vehicles to the Defendant to replace customers' vehicles when they were unable to be used because of breakdown or other need for investigation and/or repair.

2. By letter dated 5 September 2019, the Defendant gave notice to terminate the contract. It is agreed that such notice was effective from 7 March 2020 (the end of the next successive period at least 3 months from the date of receipt of the notice). However, from 10 October 2019, the Defendant ceased to allow the Claimant access to its spreadsheet that was used to inform suppliers of the Defendant's demand for vehicles ("the Booking Master Sheet") and did not otherwise inform the Claimant of its needs for replacement vehicles.

3. The Claimant contends that the Defendant's actions in ceasing to allow it access to the Booking Master Sheet and/or ceasing to inform the Claimant of its needs for replacement vehicles was a breach of the terms of the Contract. It claims damages by way of lost profits for the hires that it says the Defendant would have made from it but for the breach. The Defendant denies the alleged contractual terms.

4. The Claimant originally claimed other losses that it said were due to it under the Contract. Those claims were compromised by the parties before trial and therefore played no part in the issues before the court. However, as noted below, the positions adopted by the parties on those other issues is of relevance to one of the arguments advanced by the Defendant at trial.

THE TRIAL

5. The matter came for trial before me on 3 and 4 October 2022. I heard evidence from:

    5.1. Mr Neil McGawley, the Claimant's Managing Director;

    5.2. Mr Shaun Kelly, the Claimant's head of reservations, sales and operations; and

    5.3. Mr Alex Weston, Group Mobility Manager, for the Defendant.

6. The Defendant had also served a witness statement dated 27 July 2022 from Ms Amanda Krebs, the Defendant's former Customer Services Centre Development Manager. Ms Krebs did not attend trial, but the Defendant sought to rely on her evidence under the Civil Evidence Act 1972. The Claimant, which itself wanted to rely on parts of Ms Krebs' statement, did not object to this

[1] The Volkswagen Group includes, as well as Volkswagen vehicles themselves, vehicles with the Audi, Skoda and SEAT marques.

course of action but argued that limited weight should be attributed to her statement in so far as it was not supported by or consistent with other evidence.

7. Both Mr McGawley and Ms Krebs had provided witness statements for the purpose of an application by the Defendant for Summary Judgment. Mr McGawley verified his earlier statement in his trial witness statement. Ms Krebs did not do similarly with her previous statement and of course could not verify it at trial as she did not attend.

8. The factual issues relating to liability are very narrow in this case. Most matters are not in dispute and their relevance to the issue of contractual interpretation is limited to the factual matrix in which the contract was negotiated and executed. However, there are significant issues on quantum to which the evidence of Mr McGawley in particular is highly relevant.

THE RELATIONSHIP OF THE PARTIES PRIOR TO THE CONTRACT

9. The circumstances in which the Defendant might wish to obtain replacement hire vehicles are referred to at paragraph 10 of Ms Krebs' statement of 20 July 2022. It is common ground between the parties that the Claimant had been one of the companies supplying hire vehicles to the Defendant to meet that need prior to the parties executing the Contract. On the whole, the Claimant supplied vehicles more from the upper end of the market.

10. This supply took place via a company, Landar Limited, which sourced vehicle hires and managed the booking process. Landar itself had a contract with the Defendant to source vehicles from various companies of which the Claimant was one. Prior to the execution of the Contract, Landar made ad hoc requests for rentals from companies including the Claimant. If the Claimant supplied a vehicle, it would invoice Landar for the hire and Landar would in turn invoice the Defendant.

11. According to Mr Kelly[2], requests for vehicles were made by Landar using either email or an Excel spreadsheet. At some point this practice changed to the use of a Google form although this did not prove entirely reliable. He puts the introduction of this form, which is the document referred to as the Booking Master Sheet, as being in 2017, albeit that he says the change came about before the Claimant and the Defendant entered into the Contract (which was of course executed during the previous year). In contrast, Ms Krebs' statement at paragraphs 15 and 16 seems to indicate that the Booking Master Sheet was not introduced until 2018. It is not necessary to determine which of these is correct since nothing turns on the point – suffice it to say that, from the time of entering into the Contract, the parties had an arrangement by which the Defendant's need for vehicles was notified to the Claimant from time to time.

[2] See paragraphs 25 to 29 of his statement.

12. In 2016, both parties wanted to put their relationship on a more formal basis. This led to negotiations in which the Defendant provided a standard form of supplier contract to the Claimant. This was largely agreeable to the Claimant and the Contract was executed on 19 August 2016.

13. The most obvious change brought about by the parties entering into the Contract was that vehicle hires were now made pursuant to a direct contractual relationship between the Claimant and the Defendant rather than contracts between the Claimant and Landar on the one hand and Landar and the Defendant on the other. Whilst Landar continued to administer the booking process for the Defendant, once a vehicle booking was agreed, the price was set by the Contract (at a rate which reduced if the hire period was longer). Thus, there was no need to negotiate rates on a case-by-case basis.

THE CONTRACT IN GREATER DETAIL

14. The contract is dated 19 August 2016. It names as parties the Claimant (who is called the Provider) and the Defendant, abbreviated to VWG.

15. It sets out the following by way of background:

"(A) The Provider is in business on its own account as a Vehicle Hire supplier and has certain skills and abilities which may be useful to VWG.

(B) The Provider is an independent business willing to provide services to VWG as set out in this Agreement.

(C) VWG wishes to appoint the Provider to provide VWG customers replacement hire vehicles on the Terms and Conditions of this Agreement."

16. Part 2 of the Contract is headed "*Engagement".* By clause 2.1, the Contract provides that:

"*With effect from the Commencement Date*[3]*, VWG engages the Provider to provide the Services to VWG and the Provider agrees to provide the Services to VWG upon the terms and conditions set out in this Agreement."*

17. The "*Services*" are defined at clause 1.1.44 to mean, "*the services to be delivered by or on behalf of the Provider under this Agreement as set out in Schedule 1 and the Exit Services and any services incidental thereto (such incidental Services to be agreed between the Parties), and "Service" means any of the Services (or any part of any of them).*"

18. Schedule 1 to the Contract begins:

"Car Hire

[3] "*Commencement Date*" is defined in Clause 1.1.12 as 8 June 2016.

The Provider has been appointed to supply hire vehicles to VWG as replacements for VWG customer vehicles that are off the road. The Provider's objectives are to provide a replacement VWG vehicle on a like-for-like basis or better.

1. Replacement Vehicle Process

In the event of a replacement vehicle being required VWG's CMMT[4] *will request, for the customer, a like-for-like replacement vehicle or better or a suitable vehicle as specified and agreed.*

2. Contact Handling

a. The Provider will, within the hours set out below, supply the Services to VWG.

…

b. VWG shall communicate reservation requests via it's (sic) CMMT via the telephone, using Mobex[5] *to manage the request or in the event of a systems failure, supported by fax/e-mail confirmation.*

c. The Provider will use reasonable endeavours to confirm all bookings to the CMMT within 5 minutes of the initial hire request.

d. The Provider will, subject to availability, supply replacement vehicles to the VWG customer within the agreed timescale agreed with the CMMT."

The Schedule goes on to deal with various features of the car hire relationship, imposing various obligations on the Claimant and the Defendant as to the provision of individual hire cars and more generally regulating their relationships, including a requirement of the Claimant to provide what is described as "*management information*" on the 15th day of each month.

19. Schedule 2 to the Contract contains a list of Volkswagen and Audi models. Some, but by no means all, have charges listed next to them. These are the hire rates as specified in the contract, payable by the Defendant to the Claimant in the event that a particular hire of a particular vehicle type takes place.

20. Part 7 of the Contract deals with Charges.

    20.1. Clause 7.1 states, "*In consideration of and subject to the provision of the Services by the Provider, VWG shall pay the Provider the Charges arising out of the provision of the Services. The amount charged to VWG shall be in accordance with the rates and charges set out in Schedule 2 (The Charges*)." Schedule 2 sets out various charges for identified vehicles. All are either Volkswagen or Audi vehicles and not all vehicles of

[4] CMMT is defined at clause 1.1.11 as "*VWG's Customer Mobility Management Team."*
[5] Mobex is defined at clause 1.1.34 as "*the VWG IT platform known as "Mobex" or such other system as VWG may use in its place (whether called Mobex" or not").*

either marque have a charge entered next to them. This is significant to an argument raised by the Defendant at trial.

20.2. The Contract anticipated at clause 7.7 that the Claimant would receive 2,620 annual vehicle reservations for the Audi Brand and contained terms at clause 7.8 dealing with a review of rates (if the anticipated numbers were not achieved) and a reduction of rental rate (if the anticipated numbers were exceeded). Nevertheless, clause 7.8 expressly states that *"nothing in this Clause … or elsewhere in this Agreement shall give rise to or imply any commitment on the part of VWG or any other member of the VWG Group to purchase a committed or guaranteed amount* (sic) *of reservations from the Provider (and the Anticipated Reservations is given as a guide only)."*

21. As to commencement, duration and termination:

21.1. Clause 4 provides:

"This Agreement shall come into force on the Commencement Date and (subject to early termination in accordance with the provisions of this Agreement) shall continue in full force and effect for a period of 12 months ("Initial Term") and shall continue thereafter for further periods of 3 months ("Successive Periods") unless or until terminated by either Party on not less than 3 months' written notice, such notice to expire at the end of the Initial Term or at the end of the Successive Period (as the case may be)."

21.2. Clause 18 deals with termination, providing certain circumstances in which the parties may be entitled to terminate the Contract without notice. None of those apply here.

21.3. Clause 19 goes on to deal with the consequences of expiry and termination. Clause 19.1 provides:

"*Following the service of any notice of termination for any reason, the Provider shall continue to provide the Services, and where applicable, to the required Service Levels, and shall ensure that there is no degradation in the standards of the Services until the expiry of the notice period*."

22. Part 17 of the Contract, headed "*Limits on Liability"* states:

"*The Charges are determined on the basis of the exclusions from and limitations of liability contained in this Agreement, and the Parties agree that these exclusions and limitations are reasonable.*

17.1.1 Subject to Clause 17.1.3, 17.1.4 and where expressly stated to the contrary in Schedule 1 neither Party will be liable to the other whether based on a claim in contract, tort (including negligence), breach of statutory duty or otherwise arising out of, or in relation to,

this Agreement, for any indirect or consequential losses except to the extent expressly set out in this Agreement.

17.1.2 Subject to Clause 17.1.3 and 17.1.4:

a) VWG's total aggregate liability to the Provider; and

b) the Provider's total aggregate liability to VWG

whether based on an action or claim in contract, tort (including negligence), breach of statutory duty or otherwise arising out of, or in relation to this Agreement, will be limited to the greater of, the aggregate amounts paid and/or payable to the Provider pursuant to this Agreement in the preceding 12 months or two million pounds Sterling (£2,000,000) per contract year.

17.1.3 Nothing in this Agreement shall be construed as limiting or excluding the liability of either Party in respect of:

a) a breach by a Party of Clauses 23, 27 or 31;

b) any fraudulent act or omission of a Party;

c) any indemnity obligations set out at clauses 10 (Employment Indemnity), 23 (Corruption and Anti-Bribery), 26 (Data Security), 27 (Data Protection) in this Agreement;

d) fraudulent misrepresentation or misstatement;

e) Wilful Abandonment of this Agreement;

f) deliberate or Wilful Act or Wilful Breach of this Agreement;

g) death or personal injury caused by its negligence or that of its employees or authorised representatives; or

h) any liability that may not otherwise be limited or excluded by law.

17.1.4 Subject to Clause 17.1.3 above the Provider's total aggregate liability to VWG in respect of damage to, loss or destruction of real property or tangible personal property shall be £5,000,000."

23. The terms Wilful Abandonment, Wilful Act and Wilful Breach are each defined in Part 1 of the Contract:

"1.1.57 "Wilful Abandonment" means a conscious decision by a Party to repudiate its contractual obligations under this Agreement;

1.1.58 "Wilful Act" means either Party undertaking acts or omissions intending to cause harm to the other Party; and

1.1.59 "Wilful Breach" means a conscious decision by a Party to materially breach its contractual obligations under this Agreement."

24. The Defendant draws particular attention to clauses 15 and 19.2.2 as to the use of the word "*engaged*" in the Contract.

"*15. REVIEW MEETINGS*

"The Provider shall ensure that any of its employees, directors, consultants, agents and/or sub-contractors who are engaged in the provision of the Services, if required by VWG, attend meetings at such time, date and location as may be agreed between the Parties from time to time.

19. CONSEQUENCES OF EXPIRY AND TERMINATION

…

19.2.2 during the notice period of termination … the Provider shall provide VWG with all reasonable cooperation and assistance in transferring the provision of the Services to a Replacement Provider … including providing access, during normal working hours, to VWG and/or the Replacement Provider, to such members of the Provider Personnel as have been involved in the provision of the Services and who are still employed by the Provider."

PERFORMANCE OF THE CONTRACT

25. As mentioned above, under the Contract, Landar continued to manage the Defendant's booking of hire vehicles. Details of the type of vehicle required would be notified on the document called the Booking Master Sheet[6]. A potential supplier such as the Claimant would receive a link to the Booking Master Sheet every morning. This would show the Defendant's demand for vehicles. If the supplier in the position of the Claimant thought it could match a particular need, it would enter its proposed vehicle. If Landar intended to use that particular match, it would accept the offer and the relevant entry on the Booking Master Sheet would turn green, whereupon the Claimant or other supplier would receive the customer's contact details.

26. As Mr Kelly states at paragraph 32 of his statement, the key to the Claimant's success in having its offers accepted was the speed of response and the closeness of the vehicle match to the request. However, as Mr McGawley readily recognised in cross examination, there was no guarantee that any particular offer made by the Claimant would be accepted by the Defendant, nor that there would be any minimum number of hires under the Contract.

27. The exact level of supplies by the Claimant to the Defendant pursuant to the Contract is unclear.

[6] It would appear that sometimes this document would be referred to as "Mobex," the booking system referred to at paragraph 2(b) of Schedule 1 of the Contract and defined at clause 1.1.34 as noted above. In fact, the Booking Master Sheet was not part of the Mobex system, but rather was a discrete document, probably (if Mr Kelly is correct), a Google form.

27.1. In its skeleton argument, the Defendant referred to an average of 17,421 hires per year from the Claimant over the 5-year period to 30 April 2021. The Defendant asserted (through the statement of Ms Krebs for the summary judgement application which, as noted above, was not verified for the purpose of the trial) that the total annual demand was around 129,000 vehicles – thus the Claimant played a relatively small part of the fulfilment of the Defendant's need for hire vehicles.

27.2. The Claimant's quantification of the case, based on the dealing which it says took place between the parties in the year to September 2019 can be seen from the schedule attached to the witness statement of Mr McGawley at B1216 and the spreadsheet that follows[7]. However, since that document does not distinguish which charges are hire charges and which relate to other costs such as parking fines, it is difficult to make any meaningful calculation from it. In a revised spreadsheet produced during the trial to strip out charges that did not relate directly to the hire itself, the Claimant produced a document with about 68 entries per page over 89 pages, suggesting a total number of hires of around 6,000.

27.3. It will be recalled that clause 7.7 of the Contract referred to the anticipation that the Claimant would receive 2,620 annual vehicle reservations for the Audi Brand.

28. Whilst these figures are therefore not consistent and their accuracy is questionable, it seems that they give a reasonable approximation of the scale of the Claimant's business with the Defendant pursuant to the Contract.

29. In terms of the vehicles supplied by the Claimant to the Defendant, Mr McGawley said that these were predominantly, though not exclusively, Volkswagens and Audis but that the vehicles supplied included other makes and models from the Volkswagen group than are set out in Schedule 2 to the Contract and models listed in the Schedule for which no price is given. In particular, he said that the initial dealings related to Volkswagen and Audi vehicles, but later in the contract Skoda and Seat vehicles were provided by the Claimant. Further, Mr McGawley said that the prices charged for hires as set out in Schedule 2 were revised during the period of the Contract.

30. As to the cost of supplying the hires during the currency of the Contract, the Claimant concedes that fuel costs incurred in delivering and collecting cars to customers should be discounted since these would have been necessary to deliver the hires pursuant to the Contract but were avoided because of the termination. These are factored into the losses claimed as set out below. The

[7] It is significant to note that here, as in other documents in the trial bundle, vehicle marques can be identified from the fifth and sixth figures of a 12 figure reference code – so for example, on B1222: "2019CV003166" is a reference to a Commercial Vehicle; "2019SE001034", a reference to a SEAT; "2019SK001326", a reference to a Skoda; "2019VW003235", a reference to a Volkswagen; and "2109AU006509" a reference to an Audi (underlining in each case is mine).

Claimant further concedes the possibility that, by reason of fewer deliveries of vehicles being necessary, the Claimant saved on the costs of employing drivers. It does not concede that any particular employment costs can be directly linked to the contract with the Defendant, but it concedes the argument that the overall reduction in costs can be calculated and taken into account.

31. The Claimant does not however concede any other costs. This is subject to criticism from the Defendant as set out below.

32. During his evidence, Mr McGawley was asked whether other savings were made whether by using the vehicles that would have been hired out to the Defendant in order to achieve other profits or by reducing the size of its fleet beyond that which it would have been had the Defendant continued to engage the Claimant in the manner that the Claimant contends it was obliged to do. On the first point, Mr McGawley said that it could have been the case that vehicles that would have been supplied to meet the Defendant's needs were redirected to other hires. However, this would only have led to another vehicle being left unutilised. It was not possible to increase the number of hires to other customers, leaving the Claimant's vehicles unused.

33. The Claimant's utilisation figures for the period following the breach of the contract are said to demonstrate a fall in the overall number of hires because of the Defendant's breach. On Mr McGawley's evidence, the utilisation fell from typical figures around 75% to as low as 60% after the Defendant ceased to notify the Claimant of its hire needs through the Booking Master Sheet, and an overall figure of 68% in the year end 30 April 2020, the year covering the period of the Defendant's alleged breach of contract. Whilst the Claimant's financial statement for this period says that this figure was affected by COVID-19, it is fair to say that this would only have affected the very end of the period and it is in my judgment quite plausible that the failure of the Defendant to offer the opportunity to the Claimant to provide vehicles caused a decrease in the utilisation figure.

34. As to the argument that the Claimant would have saved in vehicle costs because, once it became apparent that the Defendant was not going to engage in any more hires, the Claimant must have realised that its needs for hire vehicles were falling, Mr McGawley did not accept that there was any basis for concluding that vehicle costs could have been or were saved. He was asked about costs relating to the acquisition of vehicles for hires such as those that the Claimant provided for the Defendant. He said that cars were ordered 6 months in advance. In the case of cars from Volkswagen, they would typically be taken by the Claimant on a 3 year lease.

35. His attention was drawn to an email dated 5 September 2019 from Mr Roy Langley, the Claimant's Group Purchasing Director at that time, to the Defendant, stating amongst other things:

"*Please see the attached list of order that we need to cancel.*

This is a result of a significant fall off of hires from our customer base including VW Mobility in the sectors these vehicles sit in. Given conversations with our client base they don't see the position changing in the near future. Therefore we will be effected in our utilisation in a very negative way unless we take this immediate action.

There have been many factors that have caused this which we can discuss when we meet.

Given the reduced allocation you have been working with I would hope you can find homes for these cars with other companies in your portfolio

We are not looking to reduce our 2020 forecast and allocation request as we are now looking to accelerate our sales activity to expand our customer base. We have recently recruited Dave Hinchcliffe ex Enterprise Rental. He is setting up a new sales team to support this growth plan."

36. This email seems to support the argument that the Claimant realised a reduced need for vehicles which it reflected in reducing its orders for new vehicles. Mr McGawley explained that the email was not referring to vehicles already on the Claimant's fleet, but rather was a reference to future purchases. Whilst, given the terms of the email, this is no doubt correct, it does not explain what would appear to be the natural reading of the email, namely that the Claimant was anticipating a forthcoming downturn in its demand for vehicles and adjusting its fleet accordingly. The rather more difficult question is whether the same reduction in need would have been communicated if the Defendant had continued to engage the Claimant pending expiry of the notice of termination of the contract – if the cancelled purchases to which Mr Langley was referring were to reflect the demand from the Defendant after the expiry of the notice of termination of the contract, the breach of the contract of the Defendant in cutting off early the opportunity for the Claimant to meet that need would have made no difference to the need to cancel; if on the other hand the purchases being spoken of would have met that need before the expiry of the notice (on the counterfactual assumption that the Defendant would have continued to use the Claimant's services), the cancellations would have resulted in a saving. The evidence before the court does not address this issue.

37. During examination in chief[8], Mr McGawley was asked whether the accounts of the Claimant were not a more accurate basis for assessing any loss of profit. He replied that they were not because they covered the turnover and costs relating to short term hires, such as the Contract

[8] He was permitted to enlarge on his statement in examination in chief since the Defendant only indicated that it was relying on the accounts of the Claimant company at the last minute.

with the Defendant, those from long term hires and the Claimant's business of buying and selling vehicles. The profitability of different parts of the business were very different.

TERMINATION OF THE CONTRACT

38. Ms Krebs' statement deals with the circumstances of terminating the Contract. The Defendant took the view that it would be more efficient to have a single supplier of vehicles. The Claimant was not a viable contender for this role since it was not large enough. The Defendant took the decision to terminate its agreement with Landar and also to terminate the Contract with the Claimant. Notice of termination was given by the Defendant to the Claimant in a letter dated 5 September 2019. Since Clause 4 of the agreement provides that termination shall be on "*not less than 3 months' written notice, such notice to expire at the end of the Successive Period (as the case may be),"* and the successive period in which 3 months notice from the date of the letter expired on 7 March 2020, it is, as noted above, common ground that the notice was effective from that date.

39. However, the Defendant accepts that, with effect from 10 October 2019, it ceased to allow the Claimant access to the Booking Master Sheet and did not thereafter take any steps to inform the Claimant of its needs for replacement vehicles.

THE ISSUES

40. In advance of the trial, the issues identified by the parties could conveniently be defined thus:

    40.1. Did the Defendant's obligation to engage the Claimant during the course of the Contract amount to:

        (a) a duty to inform the Claimant of its need for replacement hire vehicle services? and/or

        (b) a duty to give the Claimant an opportunity to offer its services in response to the reservation requests communicated, and to consider offers made by the Claimant? and/or

        (c) a duty to allow the Claimant access to the Booking Master Sheet? (Issue 1 – Contractual Duties)

    40.2. Did the Defendant breach the terms of the contract alleged in Issue 1? (Issue 2 – Breach)

    40.3. Was the Defendant's liability for loss of profits, as claimed by the Claimant, excluded by the terms of the Contract? (Issue 3 – Exclusion of Liability)

    40.4. What, if any, losses did the Claimant suffer as a result of the alleged breach(es) of contract? (Issue 4 – Loss)

41. These seemed at the commencement of the trial to be a fair summary of the issues in the case, and I gratefully adopt this analysis for the purpose of this judgment.

A FURTHER ISSUE

42. During closing submissions, the Defendant sought to advance an argument that had previously not been stated or particularised to the effect that the Contract only governed those types of vehicles identified in Schedule 2 to the Contract and at the rates therein stated. The Defendant contended that any provision of a vehicle by the Claimant of a type that did not have a hire rate in Schedule 2 or any hire of a vehicle that appears with a rate in Schedule 2 but where in fact the hire was at a different rate could not be a provision pursuant to the Contract.

43. The Defendant argues (and the Claimant does not dispute) that the hires for the period to September 2019 included Skodas and Seats (which are not referred to in the Schedules to the Contract) as well as Volkswagen and Audi vehicles. Further, the Defendant pointed out that, on the Claimant's own case (as apparent from cross examination of Mr McGawley), the hires from the Claimant to the Defendant included vehicles within the Volkswagen and Audi models that were not listed or priced in Schedule 2. Furthermore, the hire rates charged in the period leading up to the termination of the Contract (as used by the Claimant to calculate its probable income from hires but for the alleged breach) were in at least some cases at a higher rate than those referred to in the Schedule.

44. At its extreme, the implication of this argument seems to be that none of the cars provided by the Claimant in the period preceding termination of the Contract were provided pursuant to that agreement, or at the very least the Claimant was unable to prove that any such vehicles were provided pursuant to the Contract, because on the Claimant's own case, hire rates had increased over the years and therefore were no longer as set out in the schedules. Thus, it might be argued that the losses claim could not succeed at all simply on the ground that it could not be shown that, had the Defendant not terminated the Contract, any vehicles would have been provided pursuant to it.

45. Counsel for the Defendant, appreciating that this argument might seem to have a somewhat extreme effect, sought to give it the rather more limited consequences that any vehicle of a type not listed in Schedule 2 could not have been provided pursuant to the Contract and therefore should be disregarded in the calculation of loss and that furthermore, at least in principle, the provision of a vehicle of a type named in the Schedule could only be valued at the rental rate referred to therein rather than the actual rate paid by the Defendant in the preceding year.

46. This submission came as a surprise both to the Claimant and to the court. It had never previously been argued whether within statements of case or skeleton argument. Whilst I had dispensed

with oral openings in order to manage the trial efficiently, it was not suggested at the start of the trial that this alternative case was being advanced, nor was it put in any detail to the witnesses.

47. In response to this, counsel for the Defendant drew attention to the fact that the burden of proving loss lies upon the Claimant and that the Defendant had put the Claimant to proof of its losses (see paragraph 32(c) of the Amended Defence). Further, he correctly noted that the Claimant had not within the Particulars of Claim adequately particularised the vehicle hires on which the claim for lost profits was based, so that the Defendant could not have known the case that it had to meet until witness evidence was exchanged.

48. It is unsatisfactory that the issue arose in this way. The need for the proper pleading of relevant facts is vital to the proper management of litigation. The importance of this has been repeatedly emphasised.

48.1. Mummery LJ stated in Boake Allen Ltd & others v HMRC [2006] EWCA Civ 25 at paragraph 131:

"While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason - so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial."

48.2. Rimer LJ said in Lombard North Central v Automobile World (UK) Ltd [2010] EWCA Civ 20:

"It remains a basic principle of our system of civil procedure that the factual case the parties wish to assert at trial must ordinarily be set out in their statements of case ('pleadings'). That is not a principle based on mere formalism. It is essential to the conduct of a fair trial that each side should know in advance what case the other is making, and thus what case it has to meet and prepare for. It is the function of the pleadings to provide that information."

48.3. Further, in UK Learning Academy v Secretary of State for Education [2020] EWCA Civ 370 at paragraph 47, David Richards LJ as he then was said:

"*... I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is*

> *good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."*

49. It is obvious in the light of these authorities that, if the Defendant wanted to pursue a case that the hires upon which the Claimant was seeking to calculate the quantum of the claim wrongly included vehicles outside the scope of the Contract, it was incumbent upon the Defendant to plead that case. The Defendant states that it did not know the case being advanced by the Claimant until late in the day. But this must at least have been apparent once the statement of Mr McGawley and the attached documents were produced in or around August 2022. At that stage, one would have anticipated an application to amend to plead the point if it was being taken. At the very least, one might have expected reference to the point in the skeleton argument for trial. Instead, as I have indicated, the point was only raised in closing submissions.

50. The pleading of this issue was very important. The evidence adduced by the Claimant was only consistent with all hires from the Claimant to the Defendant being governed by the Contract. Had the Claimant known that the Defendant was arguing that this was not in fact the case, it could have adduced evidence and/or argued a case to deal with the allegation. Whilst the position may not have been entirely straightforward[9], the Claimant may have argued that there was variation of the Contract to include other vehicles and/or hire rates or that hire at different rates or of vehicles not referred to in the Schedules to the Contract were pursuant to an essentially identical agreement to be implied from the conduct of the parties in conducting hires on this basis.

51. I make no comment on the merit of these arguments (which were not advanced before me) other than saying that they are not obviously unarguable. It follows that this cannot be said to be one of those cases where the failure to plead the case is a mere technicality that causes no prejudice to the Claimant. It is strongly arguable that, as an exercise of case management powers, the court could and should simply have refused to allow the Defendant to argue the point as an attempt to advance an argument at trial that had not previously been pleaded.

52. But the Defendant's position is even weaker than this might suggest. One aspect of the claim that the parties resolved between the issue of proceedings and the trial, and that therefore did not require resolution by the court, related to the contention at paragraphs 20 to 27 of the Amended Particulars of Claim that the Defendant was liable to indemnify the Claimant for fuel shortfalls when hire vehicles were returned. This is expressly pleaded to be an obligation pursuant to Schedule 1 of the Contract (see paragraph 21 of the Particulars of Claim). In its Amended

[9] The Contract contains a complex "*Change Control Mechanism*" at part 21. Any variation other than pursuant to that mechanism is provided by clause 36.6 only to be effective if agreed in writing and signed by the duly authorised representatives of the parties. Without being able to produce written evidence of agreement to vary, the Claimant may have had difficulty in showing that any alleged variation was permissible in accordance with the express terms of the contract. However, both the factual basis of any alleged variation and the legal consequences thereof were simply unexplored, neither party having raised the issues.

Defence at paragraph 17, the Defendant admits paragraph 21 of the Particulars of Claim. The Amended Defence goes on to dispute the charges claimed on various grounds set out at Schedule 2 to the Defence[10]. This document includes the vehicle codes. If one looks at these codes, one can see references to Seats and Skodas as well as Volkswagens and Audis. Thus, for the purpose of this claim, the Defendant has necessarily, if impliedly, admitted that the hire of vehicles was governed by the Contract even though they are not vehicles of a type listed in Schedule 2.

53. There can be no proper basis for allowing the Defendant to advance an unpleaded case that is argued at the last minute and which in any event is inconsistent with another part of its pleaded case. I have no hesitation in rejecting the Defendant's argument that it was only the hire of the vehicles listed in Schedule 2 to the Contract (and at the rates in that schedule) that fell within the ambit of the terms of that agreement.

THE RELEVANT LAW

54. The law as to the proper approach to contractual construction is not in dispute. In ABC Electrification Limited v Network Rail Infrastructure Limited [2020] EWCA Civ 1645, Carr LJ put it thus:

> *"[17] The well-known general principles of contractual construction are to be found in a series of recent cases, including Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900; Arnold v Britton [2015] UKSC 36; [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173.*
>
> *[18] A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:*
>
> *(i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;*

[10] Pages 310 to 313 of the trial bundle.

(ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

(iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

(iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

(v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

> *(vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.*
>
> *[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."*

55. The Claimant referred me to paragraph 8 of the judgment of Popplewell J in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd [2018] EWHC 163 (Comm) to like effect:

> *There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] CLC 1243; [1998] 1 WLR 896 ; Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101; Re Sigma Finance Corp [2010] 1 All ER 571; Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900; Arnold v Britton [2015] AC 1619; and Wood v Capita Insurance Services Ltd [2017] AC 1173. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to*

something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

56. One specific point raised by the Claimant is the presumption against surplusage in the construction of a contract. As Moore-Bick LJ put it at paragraph 13 of his judgment in Dwr Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd [2007] EWCA Civ 285:

"*In my view what points most strongly to the conclusion that they intended clause 17 to have contractual effect is the very fact that they chose to include it in the Agreement. Surplusage is by no means unknown in commercial contracts, of course, but it is unusual for parties to include in the operative part of a formal agreement of this kind a whole clause which is not intended to have contractual effect of any kind. One starts, therefore, from the presumption that it was intended to have some effect on the parties' rights and obligations*."

57. On the quantification of losses, the Claimant relies on the following propositions of law:

57.1. The measure of damages in the case of a breach of contract is the sum necessary to put the injured party in the same position as he would have been in had he not sustained the wrong (see Patten LJ in Durham Tees Valley Airport Limited v BMI Baby Limited [2010] EWCA Civ 485 at paragraph 63, citing Livingston v Rawyards Coal Company (1880) 5 App. Cas. 25 at page 39);

57.2. If the Contract imposes a specified minimum level of performance, such as agreeing to purchase not less than a minimum quantity of goods, damages would be based on the quantifiable minimum level of performance (see Patton LJ at paragraph 64 in Durham Tees).

57.3. If instead the contract creates a single obligation expressed in broad terms or with an element of discretion in how it is performed or otherwise refrains from laying down a minimum level of performance or a method for calculating it), the Court awards damages based on the remuneration the claimant might reasonably be expected to receive had the defendant kept to the contract, and not the bare minimum necessary to have amounted to performance (see Patton LJ in Durham Tees at paragraph 69 and

Toulson LJ in the same case at paragraphs 131-132, approving the approach in Abrahams v Herbert Reiach Limited [1922] 1 KB 477).

THE CLAIMANT'S CASE

Issue 1- Contractual Duties

58. Having referred to clause 2.1 of the Contract, by which it is stated that "*VWG engages the Provider to provide the services to VWG"* the Claimant contends at paragraph 5A of the Amended Particulars of Claim that:

> *"The Defendant's obligation to engage the Claimant during the course of the Contract amounted to a duty to:*
>
> *(a) Inform the Claimant of its need for replacement hire vehicle services;*
>
> *(b) Give the Claimant an opportunity to offer its services in response to the reservation requests communicated; and*
>
> *(c) To consider offers made by the Claimant."*

59. These obligations are said to arise from the true construction of clause 2.1.

60. The Claimant relies on the following in support of this construction:

    60.1. Clauses 2.1 relating to the engagement by the Defendant of the Claimant to provide the Services is not a mere recording but rather is an express term of the Contract (as the Defendant admits at paragraph 6(a) of the Amended Defence).

    60.2. Clause 2.1 is to be contrasted with the background section of the Contract – clause 2.1 is preceded by the heading "*Agreed Terms"* and is clearly intended to be part of the operative obligations rather than simply an explanation for why the Contract is being entered into;

    60.3. The reference in clause 2.1 to the engagement taking effect from the Commencement Date is a clear indication that it involved obligations on the parties.

    60.4. The Contract had both commencement and termination provisions with its obligations to continue until termination (see clauses 4 and 19.1), This would be meaningless if the engagement of the Claimant by the Defendant under the Contract did not involve some positive obligations on the parties.

    60.5. The failure to ascribe a contractual meaning to clause 2.1 would offend against the presumption against surplusage referred to above – the natural meaning of the clause it

that it is intended to have some significance to the parties' obligations rather than simply to restate the background to the Contract.

60.6. There is nothing in principle against a contract to engage a party which did not specify any minimum amount of dealing between the parties. Examples cited by the Claimant include Turner v Goldsmith [1891] 1 QB 544 and Manubens v Leon [1919] 1 KB 208.

60.7. The Claimant could only provide services pursuant to the Contract if it was informed of the Defendant's needs. Whilst there was some suggestion in the Defendant's skeleton argument that the Claimant, could, following the service of notification of termination of the agreement, have offered its services to the Defendant of its own initiative[11], Mr Weston accepted in cross examination that the reality of the relationship was that, for the Claimant to be able to offer to supply a vehicle, it would have needed to know what the Defendant's particular needs were. As he put it, "*It did not work by AMT offering a vehicle speculatively."*

60.8. The contract expressly provides for the Defendant to inform the Claimant of its need for a replacement vehicle by the mechanism, referred to in Schedule 1.

61. The Claimant says that, stepping back from the detail of the argument, the Defendant could not be said to be engaging the Claimant as a supplier of hire vehicles in the context of this arrangement if it did not communicate its need for such vehicles to the Claimant.

Issue 2 - Breach

62. There is no dispute that the Claimants are entitled to rely on the Minimum Term provision such that the Defendant's contractual obligations continued until 7 March 2020.

63. The Defendant admits:

63.1. By paragraph 11(c) of the Amended Defence, that it denied the Claimant access to the Booking Master Sheet from 10 October 2019; and

63.2. By paragraph 26(aa)(i) of the Amended Defence that it did not communicate its needs for replacement hire vehicles to the Claimant beyond this time.

64. The Claimant says that this is a clear admission of breach of the duty which it contends exists as a result of the true construction of Clause 2.1 of the Contract.

[11] See paragraph 28(b) of the skeleton argument for the Defendant which asserts that "*C remained able to telephone or email D to discuss any replacement vehicles D may have needed*."

Issue 3 – Exclusion of Liability

65. The Claimant contends that the loss of profits that it claims is direct loss which does not fall within the ambit of clause 17.1.1, since they are sums that the Defendant would have paid to the Claimant but for the Defendant's breach of contract.

66. If the loss of profits is properly to be treated as indirect or consequential loss that fall within the ambit of clause 17.1.1, the Claimant contends that one of the exceptions in clause 17.1.3 applies. The Claimant's case is that the Defendant's conduct amounted to Wilful Abandonment of the Contract (within clause 17.1.3(e)) or to deliberate acts or Wilful Breach of the Contract (within clause 17.1.3(f)). Mr Tolson made clear on behalf of the Claimant that the "*Wilful Act"* exception to the exclusion clause was not relied on. Given that the definition requires proof of an intention to harm the Claimant, this is hardly surprising. There is no material from which the court could infer that the Defendant's acts were committed other than for its own perceived self interest.

67. However, the other exceptions relied on are met here on the Claimant's case. *"Wilful Abandonment"* requires proof of "*a conscious decision by a Party to repudiate its contractual obligations under this Agreement." "Wilful Breach"* means *"a conscious decision by a Party to materially breach its contractual obligations under this Agreement*." The Claimant says that these descriptions exactly match what the Defendant did in serving the notice of termination. It made a conscious decision not to continue to be bound by the Contract. Further this was the Defendant's deliberate act. Thus, on each of these grounds the exception to the exclusion clause applies.

Issue 4 – Loss

68. The Claimant contends that the Contract imposed a single obligation on the Defendant to "*engage"* the Claimant. That involves discharging those duties referred to under Issue 1 above, namely:

    (a) To inform the Claimant of its need for replacement hire vehicle services;

    (b) To give the Claimant an opportunity to offer its services in response to the reservation requests communicated; and

    (c) To consider offers made by the Claimant.

69. In such a case "*compensation is to be based on the probabilities of the case – on the renumeration which the claimant might reasonably be expected to receive – and not on the bare minimum necessary to have amounted to performance of the contract"* (per Toulson LJ in

Durham Tees at paragraph 131). Accordingly, the proper approach to quantification is to look at what on the balance of probabilities would have happened had the Defendant performed its contractual obligations by informing the Claimant of its need for replacement hire vehicle services, giving the Claimant an opportunity to offer its services in response to the reservation requests communicated and considering offers made by the Claimant. The Claimant contends that the answer to that can be seen from what happened when the Defendant was indeed performing its side of the bargain in a reasonable fashion, as evidenced by the past dealings pursuant to the Contract. It cites And So To Bed Ltd v Dixon [2001] F.S.R. 47 in support of this approach.

70. As to the calculation of loss, the Claimant has approached the issue in this way:

70.1. A spreadsheet[12] sets out the total payments from the Defendant to the Claimant for car hires in the 12 months from October 2018 to September 2019. These figures are set out in Appendix A to this judgment and equate to a daily figure of £10,480.09.

70.2. To this figure the Claimant applies a multiplier of 149 to reflect the number of days on which it was denied the opportunity to provide hire vehicles, giving a total claim of £1,561,533.12.

70.3. From this figure the Claimant deducts the costs that it accepts would have been incurred in earning these profits, but which were avoided by the Claimant not having to provide vehicles. Whilst the hires were taking place, the Claimant incurred fuel costs in delivering and collecting cars from customers. These costs averaged £15.64 per vehicle "movement" and there were on average 44 vehicles movements per day relating to hires under the contract. Accordingly, the Claimant saved £15.64 x 44 x 149 = £102,535.84.

70.4. The net loss claimed was therefore:

£1,561,533.12 - £102,535.84 = £1,458,997.28[13].

71. The Claimant concedes the possibility that it may have saved staffing costs relating to the use of drivers to deliver and collect vehicles. After the Defendant terminated the Contract, some drivers left the Claimant's employment and were not replaced. However, the Claimant draws attention to the fact that such drivers did not necessarily leave because of the termination of the Contract.

[12] The original version of the spreadsheet referred to in paragraph 65 of Mr McGawley's trial statement included within it sums received by the Claimant from the Defendant to compensate it for expenses such as parking charges incurred whilst vehicles were on hire that the Claimant had to meet. It was agreed at trial that these should not have been included and the spreadsheet was consequently redrafted.

[13] The discrepancy between this and the figure of £1,478,541.86 is explained by the error in the original calculation referred to in the previous footnote.

72. Having conceded the possibility of such saving, the Claimant sought to value it, using a similar approach to other figures considered above:

    72.1. The average daily driver costs prior to notice being given was £5,581.00 per day;

    72.2. The average driver costs per day after the Defendant stopped providing the Claimant with the opportunity to provide hires was £4,262.56;

    72.3. Accordingly, there was a daily reduction of £1,318.44;

    72.4. The total arguable saving over the whole period from the removal of the Claimant from the Master Spread Sheet to the date on which the Contract terminated pursuant to the Defendant's notice (7 March 2020) was therefore £1,318.44 x 149 = £196,447.27.

73. In response to the Defendant's argument that the Claimant's approach to the loss of profit on this contract led to an improbably high profitability figure, the Claimant responded that this depended on whether one looked at the profitability exclusively as claimed on the hires that were said to be lost by the Defendant's breach of contract (which the Claimant accepted was, on its calculation, very much higher than the general level of profitability of the Claimant's business) or the effect of the claimed loss of turnover on the Claimant's overall profitability. Looked at in the latter way, the extra turnover which the Claimant contends that it would have obtained but for the Defendant's breach of contract would have increased the company profits for the year end April 2020 to £3.2 million or 12.2% of turnover. This was not out of line with earlier years.

THE DEFENDANT'S CASE

Issue 1 - Contractual Duties

74. The Defendant's primary argument is that the Contract is a framework agreement. Clause 2.1 provides no obligation on the Defendant at all. It simply records that if and when the parties agree a particular supply on a case-by-case basis, the supply will be performed by the Claimant and paid for by the Defendant under the terms of the Contract.

75. In support of this argument, the Defendant relies on the following:

    75.1. The Contract is a well-drafted document, which gives the word "*engage*" in clause 2.1 its normal meaning, namely, to connote an involvement between the parties to provide services on the terms of the Contract.

    75.2. This interpretation is supported by the fact that the use of the word "*engage*" in this contract is more consistent with it meaning "*involve*" (or similar) than "*employ*" (or similar). This is said to be apparent from clauses 15 and 19.2.2 of the Contract.

75.3. This interpretation is consistent with the fact that the Contract contains no minimum number of car hires from the Claimant.

75.4. It is also consistent with the fact that the Claimant was able to supply only a limited range of vehicles. The Defendant points out that only 23 types of vehicle were specified in the table of charges at Schedule 2 (though as I have already noted, in fact the Claimant supplied a greater range of vehicles).

75.5. Clause 2.1 is not vague in a way that requires the court to engage in the complexities of contractual interpretation so as to give it commercial effectiveness.

Issue 2 - Breach

76. The Defendant denied breach of the duty alleged by the Claimant in the following terms in its skeleton argument:

76.1. Even though the Defendant stopped offering the Claimant the opportunity to provide new vehicle hires, it informed the Claimant of its need for the continuation of pre-existing replacement hires. Those hires continued until December 2019.

76.2. The Defendant gave the Claimant an opportunity to offer hire vehicles to it. The Defendant remained in contact with the Claimant throughout the notice period. The Claimant remained able to telephone or email the Defendant to discuss any replacement vehicles the Defendant may have needed.

76.3. On the Claimant's own case, it never made any offers to supply new vehicles during the notice period. Therefore, the Defendant cannot have breached a duty to consider offers that were not made.

77. These arguments were not greatly expanded upon at trial, save that, in light of the evidence of Mr Weston, the Defendant conceded that the first argument could not be maintained.

Issue 3 – Exclusion of Liability

78. The Defendant argues that the exclusion of liability clause applies here. The claim is for loss of profits. These are clearly a consequential or indirect loss rather than a direct loss, so clause 17.1.1 applies.

79. None of the exceptions in clause 17.3.1 apply because the Claimant is unable to prove that the Defendant consciously committed any of the breaches complained of in the sense of willing (or even realising) that the consequence of serving the Notice of Termination was to render it in breach of the Contract. This is demonstrated by paragraphs 21 to 23 of the statement of Ms Krebs which explains the reasoning behind the change of arrangements.

80. During submissions, my attention was drawn to an email from Ms Krebs to a fellow employee of the Defendant dated 3 September 2019 in which she says amongst other things:

> "*Last week I notified AMT that we would be terminating them as a supplier of replacement vehicles to the Group mobility programme as volume has reduced by 40% and we are also looking to simplify the programme.*
>
> *We have an agreement with AMT which does not commit to a volume of hire nor do we have a PO committing to a volume of spend, so in short we need to notify them of formal termination but we are not committed to any volume.*
>
> *I have advised AMT that we will be reducing hire into them in a phased approach. Some of this reduction of volume will commence later this month with the last customer being placed into hire in October, with all bookings ended by end of November."*

This is arguably consistent with the Defendant's case that Ms Krebs did not believe that the Defendant was breaching any contractual obligation by serving notice of termination.

81. The Defendant therefore contends that any liability for such loss is excluded by clause 17.1.1.

Issue 4 – Loss

82. The Defendant raises three issues in respect of the loss claimed by the Claimant:

82.1. It contends that the loss was not caused by the alleged breach of contract. Rather, it was a consequence of the Defendant's decision to restructure its provision of replacement vehicles in a way that led to the winding down of Landar Ltd. The Claimant's analysis of the counter factual scenario is bedevilled by the fact that the termination of the Contract was just one part of the restructure.

82.2. The losses claimed by the Claimant are inherently improbable given the general levels of profitability of the business disclosed in their accounts. The claim made by the Claimant would indicate that the profitability on this contract, calculated as profits as a proportion of turnover, was over 93% (or over 81% if a discount is made for staffing costs along the lines referred to above). This contrasts with profitability of around 6% in the year end 30 April 2019, the Claimant's highest recorded profit in its accounts for the previous 5 years. This is simply implausible.

82.3. In any event, the various uncertainties as to the hires that would have occurred but for the Defendant's alleged breach of contract are not properly factored into the calculation.

DISCUSSION

Issue 1 – Contractual Duties

83. Paragraph 5A of the Amended Particulars of Claim sets out the Claimant's case as to the proper interpretation of the word "*engages*" in clause 2.1 of the Contract. To this, the Defendant pleads that paragraph 5A places no obligation on the Defendant at all, or certainly not the obligations pleaded. I consider that in the light of the well-established principles of contractual construction referred to above.

84. A convenient starting point is to look at how the relationship between the parties was intended to work. The Defendant, through Landar, provided information about the need for replacement vehicles through the Booking Master Sheet or some similar system[14]; the Claimant pitched its offer to meet the Defendant's need; and the Defendant might accept that offer, depending on the closeness of match to the need, the speed with which the offer was made and the ability to get the vehicle to the customer. There was, as Mr Weston readily agreed in cross examination, no realistic mechanism for the Claimant to provide services pursuant to the Contract other than by it being notified of the Defendant's need.

85. Accordingly, knowledge of that need was central to the performance of this contract. That would suggest that the commercial efficacy of the Contract depended on there being a contractual obligation on the Defendant to give such notification, since without such notification, the Claimant would simply have been unable to provide vehicles pursuant to the contract.

86. That construction is supported by several features of the Contract which indicate that its ambit was greater than simply the governance of individual hires of vehicles.

    86.1. Clause 2.1 is worded to be a term of the Contract, not simply background to it, suggesting that it is meant to have some operational significance rather than simply explaining why the Contract is being entered into.

    86.2. The presumption against surplusage would tend in favour of the clause having some meaning beyond the simple repetition of the background assertion that the parties wished to enter into a contract of this nature.

    86.3. The provision within the Contract of anticipated minimum numbers of hires is indicative of an expectation of the parties that such hire will in fact take place from time to time.

[14] As noted above, it may be that the document defined as the Booking Master Sheet actually post dates the contract. If this were so, it would not alter the picture greatly since it was preceded by another system in which the Defendant via Landar made known its needs to the Claimant.

86.4. The commencement and termination provisions of the Contract indicate that it commences before and may well terminate after any particular hire of a vehicle.

86.5. The obligation on the Claimant to provide management information is an indication that the Contract was intended to deal with more than the detail of individual hires – it imposed obligations on the parties that applied to their relationship generally.

87. Against this, the Defendant's argument that the Contract is no more than a framework agreement simply providing for the terms on which individual hires took place is unconvincing. It is of course correct that the Defendant was under no obligation to engage the Claimant in respect of any particular vehicle need and that there was no guaranteed minimum number of car hires. But, as the Claimant rightly points out, this of itself is not inconsistent with there being contractual obligations as to how the parties dealt with each other, including a contractual obligation on the Defendant to give the Claimant the opportunity to pitch for any individual hire.

88. I accept that the contractual term in issue here is different from that in Durham Tees Valley Airport v BMI Baby [2010] EWCA Civ 485. In that case, the Court of Appeal held on the true construction of the contract that establishing "*a second based aircraft operation*" at the airport was only consistent with the Defendant using the airport by flying aircraft, even if it had a discretion as to how precisely how and when flights operated. The Contract in the instant case involves different terminology and is not easily equated to that case. But what both contracts have in common is that they establish a working relationship between the parties. Such a relationship may well, in a particular case, involve a party being obliged to allow the other to offer up its services.

89. The Defendant contends that the use of the word "*engage*" in this contract is more consistent with it meaning "*involved*" (or similar) than "*employed*" (or similar). This is said to be apparent from clauses 15 and 19.2.2 of the Contract, where "*engaged*" and "*involved*" are used interchangeably.

90. I accept that, in the context of an apparently carefully drafted contract, consistency of use of word might be anticipated. However, the use of the word in clause 15 is in the passive voice, whereas in contrast its use in clause 2.1 is in the active voice and in a transitive context. In the passive sense, to be "*engaged in*" an activity (the wording of clause 15) may well connote being involved in it. Equally, in an active but intransitive context, to "*engage with"* someone may mean to become involved with them. But in the active voice and transitive form of clause 2.1, it is not in accordance with ordinary speech to say that "*to engage someone*" means "*to become involved with them.*" Whilst the Cambridge Dictionary of English has been relied on for the definition of "*engage,*" the passage cited does not make the distinction between its use in these different ways. The Oxford English Dictionary makes clear this difference and this accords with

normal speech. I do not see that consistency of the use of language points at all in the direction of what would be a forced interpretation. Indeed, if anything, the natural meaning of the word "*engage*" in this context is closer to the synonym "*employ*" referred to in the Cambridge English Dictionary.

91. For these reasons, I am satisfied that the Claimant's core argument, that the terms of Clause 2.1 gave rise to obligations on the part of the Defendant, is correct. As to the nature of those obligations, the Claimant's contention as set out at paragraph 5A of the Amended Particulars of Claim encapsulates the core sense of the word "*engage"* as contended for by the Claimant and I accept that this is a proper description of the relevant contractual obligations.

Issue 2 – Breach

92. In closing submissions, the Defendant accepted that the first of the assertions referred to above was not sustainable and that it clearly did not notify the Claimant every time it needed a car during the notice period. In fact, it is clear from the pleading that the Defendant did not offer any opportunity to the Claimant to hire vehicles after access to the Master Booking Sheet was terminated on 10 October 2019. The Defendant's own witness accepted that it was not realistic to expect the Claimant to contact the Defendant to offer its vehicles. The relationship only worked by the Defendant making its needs known to the Claimant through the Master Booking Sheet or some similar arrangement.

93. It follows that the Defendant was in breach of contract in terminating the Claimant's access to the Booking Master Sheet without establishing some alternative means to communicate its demand for hire cars. I agree with the Defendant that there was no breach on account of the Defendant failing to consider offers made by the Claimant, for the simple reason that no such offer was made (or could have been made) because of the Defendant's other breaches.

94. It follows that I am satisfied that the Defendant was in breach of Clause 2.1 in not informing the Claimant of its need for replacement hire vehicle services or giving the Claimant an opportunity to offer its services in response to such information from 10 October 2019 until the termination of the contract on 7 March 2020.

Issue 3 – Exclusion of Liability

95. On the issue of whether these losses are direct or indirect, I bear in mind the analysis by the authors of McGregor on Damages, Twenty First edition, at paragraph 3-14 and the authorities referred to therein)[15]:

[15] The authors doubt that this is in fact a good principle of law but consider it to be the result of Court of Appeal authority which is binding on me.

"*…in the context of contractual exclusions of liability for consequential loss or damage, the courts have consistently seen the distinction between normal and consequential losses … as that between losses falling within the first and second rules in Hadley v Baxendale respectively."*

96. In my judgment, the potential loss to the Claimant from the Defendant terminating the engagement in breach of contract is plain and obvious – the Claimant will, or at least may, suffer a loss of profits because of its inability to hire out its vehicles. This falls squarely within the first rule in Hadley v Baxendale as loss which the court treats as direct. It follows that the Defendant is not entitled to rely on clause 17.1.1.

97. If contrary to this conclusion, clause 17.1.1 is in play based on these losses being indirect or consequential, the question of the proper interpretation and application of clause 17.1.3 arises. The Defendant's interpretation of the exceptions to the exclusion clause relied on here requires the Claimant to prove that the Defendant was aware, when it sent the Notice of Termination that it was thereby in breach of contract. The Defendant's interpretation would have the effect of excusing the contract breaker who acted deliberately and consciously in terminating the relationship between the parties so long as they did not intend to break the contract. So, for example, if it did not realise that its act amounted to a breach of contract, that would not amount to Wilful Abandonment or Wilful Breach. Equally, it would not be a "*deliberate"* act of breaching the contract in that the party did not realise it was in breach.

98. Such an approach would reward the party who failed to take advice on its actions. Indeed, it would render ignorance of the law to be a defence. This may seem an unattractive conclusion, though there is some support for the interpretation of "*wilful"* in exactly this way. In French v Elliott [1959] 3 All ER 866 at 874, Paull J, in considering whether the actions of a tenant in holding over after the termination of his tenancy were done "*wilfully"* said:

> "*The wording of the Landlord and Tenant Act 1730 is: "In case any tenant … shall wilfully hold over any … tenements … after the determination of [his] term." … It has been held that "wilfully" means "contumaciously"* [*Wright v Smith (1805) 5 Esp 203*], *but I can see no reason why the old English word "wilfully" does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumacious tenant. It deals only with the moment of time when the tenancy comes to an end. At that moment of time a tenant may say: "I shall stay on. I think I have a right to do so". His staying on is not wilful. On the other hand, a tenant may say: "I will stay on, although I know I have no right to do so." That is wilful, and well illustrates the now sometimes forgotten distinction between "I shall" and the insistent "I will".*'

99. The fact that Ms Krebs did not attend trial left the Claimant unable to cross examine on the basis for the Defendant terminating the agreement. On the limited available material, I see some merit

in the Defendant's argument that the breach could not be said to be "*wilful"* on the grounds that it thought that it was entitled to terminate the agreement in this way since it believed that its contractual obligations only arose where an individual car hire had been agreed and in respect of that hire, and that therefore terminating the agreement was not causing it to be in breach of any obligation to the Claimant.

100. However, I do not see an answer to the Claimant's argument that the act of terminating the agreement was a "*deliberate"* act. It clearly was, as is apparent from the very fact of the Defendant serving a document called Notice of Termination. The word "*deliberate"* is not qualified within the Contract by any word such as "*wilful*" or indeed "*conscious*" that might import the requirement on the Claimant to prove that the Defendant knew that its act was a breach of contract. To be a "*deliberate"* act, it suffices that the Defendant intended to terminate the agreement. Accordingly, one of the exceptions in clause 17.1.3 applies here, and the exclusion clause is therefore not effective to the Defendant's benefit.

Issue 4 – Loss

101. Given the nature of the contractual duty in this case, namely to engage the Claimant by informing it of the Defendant's need for hire vehicles and allowing the Claimant to pitch for those needs, I agree with the Claimant that this is a case of a single obligation where compensation for breach of duty is properly assessed by the court looking at the probabilities of the case based on what the Claimant might reasonably have expected to receive but for the breach.

102. Whilst there is clearly an element of uncertainty in this (and it would have been possible for the Defendant not to contract for any particular hires at all with the Claimant), the probabilities are very much against that. The Defendant had employed the Claimant at a level that can be identified whilst it was performing its side of the Contract. It would probably have continued to do so, had it continued to engage the Claimant in the manner required by the Contract.

103. It is no answer to this to say that the Defendant's changing needs meant that it no longer wished to contract with the Claimant. That is indeed the factual background to the Defendant terminating the Contract, but to suppose that it might not have broken its contractual obligations yet not used the Claimant is to assume something that is very improbable and/or supposes that the Defendant would have breached the Contract in a different way. There is no basis for thinking that the Defendant, if forced by its contractual obligations to go to the trouble of stating its needs to the Claimant, would not have taken up some of the offers that the Claimant would on the balance of probabilities have made. It is highly likely that the individual offers would have been as attractive to the Defendant after it had given notice of termination of the Contract as they were before. It was not the terms of dealing with individual hires that had caused the Defendant

to bring its contractual relationship with the Claimant to an end, but rather the whole system inherent in the Booking Master Sheet or equivalent methods of stating its needs to the Claimant and other suppliers.

104. It is only if the Defendant had taken an across the board decision not to use the Claimant's services at all that it could be said to be more likely than not that there would have been no hires. Yet, for the Defendant to have done this would have been a breach of the third element of the duty to engage, namely the duty to consider offers made by the Claimant. Losses cannot properly be calculated on the assumption that the Defendant would have acted in breach of contract since to do that would be to excuse a party from liability for its breach of contract by assuming an alternative hypothetical breach of contract. It would be wrong in principle to allow a party to escape its liabilities in this way. Accordingly, this possibility should be ignored.

105. Further the alternative argument that the Defendant was winding down its relationship with Landar does not assist the Defendant's case. Whilst its decision to part with the services of Landar obviously affected how the Defendant would have engaged the Claimant had it not wrongly terminated the existing arrangement, this cannot detract from the fact that it would have been obliged to continue engaging the Claimant, by providing it with information about its need for vehicles. There is no sound basis for supposing that whatever method it had come up with for discharging its contractual duties would have greatly changed the number of vehicle hires that would have been supplied by the Claimant.

106. Accordingly the proper approach to the losses is to seek to assess what hires the Defendant would probably have obtained from the Claimant, disregarding any possibility that the Defendant would simply have refused to countenance any hires, then to discount from the sums received for such hire the costs that the Claimant would have incurred in order to achieve those profits, which costs have been avoided by the Defendant's breach.

107. As to the basis of calculating the hires that would have been made, I have rejected the argument advanced by the Defendant in closing submissions relating to hires of vehicles other than those listed in Schedule 2 to the Contract and/or hires at rates other than specified in that Schedule. Accordingly, there is no basis for any other conclusion than the one which is implicit both in the Particulars of Claim and the Defence, that all hires of vehicles in the VW Group by the Claimant to the Defendant following the Contract coming into effect were governed by it.

108. I see no clearer way of measuring those hires than the approach taken by the Claimant of looking at an average from a previous period. The Claimant's first attempt at this was flawed for reasons noted above, but the second spreadsheet produced at trial which stripped out sums received by the Claimant in respect of costs other than the car hires themselves represents the best evidence before the court on the probable hires (and the probable turnover from such hires) but for the

Defendant's breach. I take the total figure of £1,561,533.12 referred to above as the starting point.

109. From this must be deducted the expenses that were saved through not having to provide those hires. These clearly include the fuel cost for which the Claimant has given credit. Further, I can see no basis for failing to discount the driver costs. Whilst it may be true that no particular driver's services were dispensed with because of the Defendant's breach of contract, it seems clear from the Claimant's own figures that the failure of the Claimant to be able to deliver hires to the Claimant resulted in a reduction of the costs of employing drivers.

110. It is implicit in Mr McGawley's approach to calculating loss that one looks to average figures to prove what the turnover would have been and looks to average figures to deduct the saving on fuel costs. It would seem obvious that the same principle applies to the saving on the cost of employing drivers, even if no particular saving could unequivocally be attributed to the Contract.

111. Indeed, the failure of Mr McGawley to concede this point causes me to be cautious about accepting his evidence on quantum issues. The original calculation of the claim to include not only the receipts from vehicle hires but also reimbursement of expenses such as parking fees which generated no profit for the Claimant added to this concern. Whilst there was no point at which I thought he was less than honest, I was concerned that Mr McGawley had not carefully thought through the quantification of the claim and had not carefully considered the true costs involved in earning the profits.

112. I therefore consider that the figures of £102,535.84 for avoidable fuel costs and £196,447.27 for a saving on driver costs properly fall to be deducted as expenses that were avoided by the Claimant not being engaged under the Contract.

113. This however still leaves a level of gross profit of over 81% of turnover. This is improbably high, in particular in light of the Claimant's general level of profitability, as the Defendant has noted.

114. I bear in mind the principle that, in assessing damages the court is entitled to make reasonable assumptions about what would have happened, "*which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties"* (per Leggatt J as he then was in Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111). That principle though has little application where the uncertainty could have been resolved by the claimant deploying evidence which is available to it - see for example Ratcliffe v Evans [1892] 2 QB 524.

115. This is a case where either party could have sought to rely on expert evidence and neither did. One might think that an assessment of the profitability of the Contract would be a reasonably straightforward calculation. On my assessment, there is no doubting that the Claimant shows that

it suffered some loss, since it lost the ability to earn profits from vehicle hires, a business which it can show previously it operated at a profit. The issue here is not the turnover that would have been generated but for the breach but rather the proper discount to be made from that figure for the expenses incurred in generating the turnover.

116. The improbably high level of profitability for which the Claimant contends, coupled with lack of robust evidence from the Claimant as to its expenses causes me to exercise a degree of caution.

117. I was particularly concerned that the Claimant did not appear to have considered the argument that there would have been a saving in vehicle costs as a result of the Defendant announcing what amounted to an immediate termination of supply of replacement vehicles from the Claimant. The email of 5 September 2019 seems to be a clear response to this announcement in a manner that one would expect the Claimant to have responded so as to mitigate its loss. It is surprising that the Claimant does not accept that there was some saving in this regard. Indeed, one might have expected a saving more generally in that, if vehicles were used less for hire, their maintenance and repair costs would fall.

118. I accept that I cannot simply look at the vehicle costs that were incurred by the Claimant in previous years in order to estimate the likely saving here. I do not see that it is possible to deduce from the accounts the average annual expenditure on purchasing and maintaining vehicles. This leads to the obvious argument that the court should simply use the profitability percentage from the past to predict the probable loss of profit from the loss of turnover here. However, I accept that this is likely to do injustice to the Claimant. This was an unplanned situation. Had the Claimant been given proper notice before the demand dried up, it could have sought to manage its fleet of vehicles and its staffing and other expenses so as to mitigate its loss. As it was, the termination happened almost overnight, and the Claimant had no such opportunity.

119. In closing submission, Mr Tolson contended that, if I was persuaded that there were costs that had not properly been brought into account in the Claimant's calculations, I should give directions for a disposal hearing to deal with this discrete issue. Whilst it is unfortunate not to deal with all matters at this stage, I am persuaded that this is the correct course of action where it seems that a cost has not been properly brought into the calculation, but I do not have the means to assess myself even on a rough and ready basis.

120. For these reasons, I will direct a further hearing if that is necessary. It will be on the discrete issue of the savings on vehicle costs (if any) that the Claimant made following the Defendant's notice dated 5 September 2019 effectively terminating the contractual relation with effect from 10 October 2019, in so far as those savings would not have been achieved if the Defendant had instead, by notice of the same date, indicated that the effective termination of the Contract was to be 7 March 2020, with the Claimant being able to offer its vehicles for hire until that date and

assuming that the Defendant's take up of such offers would have been at a similar rate to that in the 12 month period to September 2020. By "savings on vehicle costs," I mean purchases that did not need to be made or disposals that achieved a higher figure than would have been the case but for the identified breach, together with any other savings that can be directly attributed to the need to provide vehicles to service the Contract which were avoided because of its abrupt termination. However, I do not consider it appropriate to widen the enquiry to any other savings. Staffing and fuel issues have already been dealt with in my findings above and no other specific savings have been suggested.

121. This narrow issue may be capable of agreement by the parties, especially if appropriate disclosure is given. If it is not, I anticipate that expert evidence may be necessary in order to value the savings, but I indicate now that it is likely that this will only be permitted by way of single joint expert, regardless of the views of the parties, in order to ensure that the remaining part of this dispute is resolved speedily and at proportionate cost.

122. I leave it to the parties to seek to agree a way of case and costs managing this issue. I invite them to submit a draft order dealing with it and any other consequential matters. If the parties' preferred way forward is to allow a period for negotiation, either before or after disclosure and the exchange of evidence, I shall be happy to accommodate that.

CONCLUSION

123. For these reasons, the Claimant is entitled to judgment in the principal sum of £1,262,550.01[16] less such further sum (if any) as is established as a saving on vehicle costs pursuant to the enquiry referred to above. I leave questions of the costs and case management of that issue, interest and consequential matters such as costs to be considered by the parties and to be the subject of further submissions if necessary.

[16] £1,561,533.12 loss of turnover less £102,535.84 for avoidable fuel costs and £196,447.27 for avoidable driver costs.

APPENDIX A

October 2018	£ 341,531.73
November 2018	£ 344,111.36
December 2018	£ 354,347.06
January 2019	£ 368,823.70
February 2019	£ 337,185.63
March 2019	£ 316,138.70
April 2019	£ 252,863.07
May 2019	£ 348,933.66
June 2019	£ 275,947.02
July 19	£ 315,452.38
August 2019	£ 247,702.22
September 2019	£ 322,195.65
Total	£ 3,825,232.15