IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim No HQ11X01479

BETWEEN:

DAVID PIPER — **Claimant**

and

MARK HALES — **Defendant**

Judgment

Alexander Wright (Counsel) instructed by Wilmot & Co Solicitors LLP for the Claimant
Iris Ferber (Counsel) instructed by RHF Solicitors for the Defendant.

INTRODUCTION

1. This is a case about a replica classic car, the legendary Porsche 917 which was originally produced by Porsche in 1969. It is a very fast, powerful and rare racing car that gave Porsche wins at Le Mans in 1970 and 1971. It became iconic and universally recognised after it featured in the 1971 film, *Le Mans,* starring Steve McQueen.

2. The Claimant, now in his eighties, is a former Formula 1 racing driver who had been a works driver for Porsche and had raced 917' s. He owns an original Porsche 917 valued at about £5m and was, until recently, the owner of a replica valued at £1.25m built using genuine Porsche parts. Although he gave up racing many years ago, he continues to run cars in historic events, such as the Goodwood Festival of Speed. He is an acknowledged authority on these cars and, indeed was injured when driving one in the film

3. The Defendant is also a distinguished former racing driver who now works as a motoring journalist, sports car tester and racing driving teacher. Since 2004, he has practised through Fenlands Limited, a limited liability company owned and controlled by him.

4. In or around early 2009, the Defendant conceived of an idea for an article comparing the Porsche 917 with the Ferrari 512S, another iconic vehicle from around the same period as the Porsche 917. He procured the Ferrari 512S from Nick Mason, a pop

musician and personal friend of the Defendant's, who had lent the Defendant his Ferrari 512S on a number of previous occasions, for the purposes of testing on a track nearby to him at the Cadwell Park circuit, near Louth in Lincolnshire.

5. The Defendant approached the Claimant in early March 2009 to procure a Porsche 917. The parties agreed that the Claimant would let the replica 917 go to the Defendant along with its mechanic Stephen Webb at an agreed fee of £2,000 + VAT, as documented in an email dated 30 March 2009. On that same day, the Defendant confirmed his booking of the track, marshal, medic and fire crew, having confirmed the insurance arrangements on 25 March 2009 that Octane Media Limited, his publishers, would insure the cars involved and also have public liability insurance in place too.

6. Meanwhile, on 19 March 2009, Richard Attwood, another famous former racing driver and Porsche works driver with particular expertise and experience in driving the 917, drove the Claimant's replica around the track at Goodwood in order to demonstrate it. It is accepted that the demonstration was a success and there were no apparent faults with the car.

7. On 22 April 2009, the Claimant, the Claimant's mechanic Mr Webb, Mr Ward (a journalist from Auto Italia), the Defendant, Mr Knill-Jones (Mr Mason's mechanic) and Mr Mason together with the Ferrari and the Porsche went to the test track at Cadwell Park.

8. There is no dispute that (1) the Claimant checked with the Defendant that his car had been insured, albeit the policy was not available to be produced, and the Defendant understood this to cover damage caused by river error but not mechanical defect; (2) before he went off on his own, after a photo shoot, to test the car the Defendant was specifically instructed by the Claimant and Mr Webb, to ensure that the care was not over revved beyond 7,000 RPM by missing the synchromesh gears, otherwise the engine would break as notoriously happened in 1970 involving Jo Siffert and then Vic Elford when the Porsche team lost two 917's at Le Mans. The Defendant accepts that

he gave this assurance as he was *'not competing and was not under pressure to deliver a fastest lap.'*

9. The Car was first driven by the Defendant on a photographic session, at which the Car was driven slowly round for the benefit of static photographs. Mr Webb rode in the passenger seat of the Car during this session. Nothing untoward was noticed with the car or its gearbox.

10. The Defendant then test-drove the Ferrari with a dog tooth gearbox first and then the Porsche with its synchromesh one. After a few laps, he returned to the pits and had a conversation with the mechanic about the car in which he raised issues about the height of the steering wheel and the brakes.

11. At that point the parties' accounts diverge:

    (a) The Claimant's evidence and that of Mr Webb is that the Defendant performed a few laps and then asked to adjust the steering wheel, but made no complaint about the gears. Mr Webb accepts that the Defendant raised concerns about the shuddering brakes;

    (b) The Defendant's evidence is that he experienced problems when changing gear, in particular in engaging third gear, and that he reported this to Mr Webb who acknowledged that there was a problem with the gearbox but advised the Defendant to "*carry on and just be careful*"; Mr Knill-Jones, the mechanic for the Ferrari gave evidence that something was said about the gears but the noise was too great for him to say what was actually said.

12. The Defendant went out again for several more laps until the car over revved to at least 8,200 RPM coming out of Park Corner whereon the engine blew.

13. The matter was pursued by Octane through its insurers. After protracted correspondence, the insurers (RSA) accepted (by letter dated 14 July 2010) that the cause of the engine damage was "*driver error*" but averred that the damage was not

insured under the policy because of the exclusion of damage "*as a result of mechanical breakdown*": the proximate cause of the damage to the engine was caused by the over revving of the engine and so specifically excluded from cover under the terms of the policy issued

14. In the meantime, the Claimant had arranged for the Car to be repaired. The engine was sent to Germany to be repaired by Gustav Nitsche, a specialist and former chief mechanic for the Porsche factory where the 917 was built. The total sums paid to Mr Nitsche were €37,370, as evidenced by an invoice with its itemised breakdown.

15. In addition, the Claimant incurred further costs associated with the repair:

    (a) The Claimant paid his mechanic £100 per day for work to the Car itself, and work associated with removing and re-installing the engine. The days worked are set out in the Schedule of Loss: in total 12 days were worked at a cost of £1,200. Costs associated with parts and consumables was £240;

    (b) The Claimant alleges he has incurred costs of £2,080 in transporting the engine. In the case of the return journey, these costs took the form of allowing David Griffiths to set off a fee against sums otherwise owing to the Claimant.

16. Having unsuccessfully tried to claim through Octane's insurers, the Claimant sought redress from the Defendant. The Defendant disputed liability and a formal letter of claim was sent to him on 8 March 2011. Following his continued denials, proceedings were issued on 19 April 2011.

17. The Claimant's case in this action is that the Defendant is personally liable because he failed to ensure the engagement of the gear as he was specifically requested to do. He claims that the Defendant's failure to do so was negligent and in breach of bailment. He claims from the Defendant the repair and allied costs of £37,071.45 and general damages for loss of use in the sum of £10,890.41.

18. The Defendant says that the cause of the over-revving was because the Car had a defective gearbox. This meant that the Car jumped out of gear momentarily, despite

reasonable care and skill exercised by him, causing the engine to over-rev. He asserts it had a defective turret and spider & slider mechanism that allowed this to happen despite reasonable care being taken by him to obey the Claimant's specific instructions. The Defendant disputes the repair claim and denies the loss of use claim in full. He also alleges that he is not personally liable as the invoices between the parties were corporate not personal.

ISSUES

19. Upon opening there were 7 issues to be determined.

Liability

(a) Who were the parties to the contract for the hire of the Car?

(b) What duties, if any, were owed by the Defendant to the Claimant in respect of the Car?

(c) What was the cause of the engine damage?

(d) In the premises did the Defendant fail to discharge such duties as he owed the Claimant?

Quantum

(e) What recoverable loss did the Claimant suffer in respect of the cost of repairs?

(f) What recoverable loss, if any, did the Claimant suffer in respect of loss of use?

(g) Did the Claimant fail to mitigate his losses?

20. I have carefully considered both Counsel's most helpful Opening and Closing written and oral submissions in the light of all the evidence and adopt them where they co-incide with my judgment.

21. **(a) Parties**: The issues here are whether Mr Piper contracted personally or for Bromcount (his company), and whether Mr Hales contracted personally or for Fenlands (his company).

Bromcount

22. The Defendant no longer maintains the plea that the Claimant has no title to sue because the owner of the Car was Bromcount, not him personally.

Fenlands

(a) The Defendant no longer maintains the plea that Fenlands rather than himself personally was the contracting party. The Defendant raises an unpleaded plea of estoppel in his closing submissions on the basis that the invoicing was corporate for VAT reasons. In my judgement this, as the Claimant submits, is simply unsustainable: it is trite law that for there to be an estoppel by representation, there must be an unequivocal representation, reliance, detriment and unconscionability. None of those features are present in this case. There was no representation (and certainly no unequivocal representation) from the Claimant to the effect that Fenlands would be party to the contract (as opposed to the party to whom the invoice was directed), there is no evidence of reliance on any alleged representation, there is no evidence of detriment and no grounds for finding the Claimant's conduct to be unconscionable.

23. **(b) Duties**: The contract pursuant to which the Car was hired out by the Claimant to the Defendant was a contract of bailment as a contract for the hire of chattels, involving the temporary transfer of a chattel (the Car) in consideration for the payment of £2,000: Palmer on Bailment (3rd ed, 2009), para 21-004. Therefore, the Defendant as hirer was under an obligation to: "*take reasonable care of the chattel and...use reasonable skill in its management and use reasonable skill in its management and use*": Palmer, para 21-058.

24. The Defendant pleads in paragraph 15 of his Defence that "he *Defendant made it clear to the Claimant that neither the Defendant nor [Fenlands] was to be liable for any damage to the engine of the Car that might occur during the track testing and the Claimant agreed to this*".

25. It is the Defendant's case that this term was either expressly agreed or implied through custom and usage.

26. **(i) Express exclusion**: This is a matter of fact between the Claimant and the Defendant. Mr Piper was clear in his evidence that there was "*no way*" that he would agree to any such exclusion. In his witness statements, Mr Hales did not depose to there being an exclusion in terms but simply said that the parties would have a "*mature conversation*" if he missed a gear. I accept that the Claimant was a times a little vague upon some aspects of his evidence during lengthy cross examination in an uncomfortable court but that is quite understandable at his age. However, like all good witnesses, he was certain, accurate and truthful on the things that mattered and he is a very savvy business man. I accept the Claimant's submission that the embellishment given by Mr Hales orally in court, to the effect that Mr Piper agreed not to hold Mr Hales liable for his own errors, is an incredible one long after the event nearly 4 years ago now. I emphatically reject the Defendant's version. Quite aside from its surprising omission from Mr Hales's statement, having seen Mr Piper in court I find it hardly likely that Mr Piper would agree such a wide-ranging exclusion *for driver error*, bearing in mind the value of a prized £1.25m car in a non-competitive test largely for Mr Hales own benefit both professionally and personally, his insistence and understanding there was full insurance cover and the very modest level of the fee by comparison.

27. **(ii) Implied term:** the relevant principles are set out in Chitty at para 13-019:

> *"If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom; provided there is no inconsistency between the usage and terms of the contract. To be binding, however, the usage must be notorious, certain and reasonable, and not contrary to law; and it must also be something more than a mere trade practice".*

28. I accept the submission of the Claimant that the evidence in this case falls very far short of that stringent test:

(a) First, there is doubt over the quality of the evidence tendered in support of the alleged custom or usage. The Defendant has produced no expert evidence to support this but relies solely on lay evidence, including a statement from Nick Mason, who is a musician albeit with a long interest in motorsport collection;

(b) Secondly, the evidence even on its face does not support the existence of any custom that driver error be for the vehicle owner's account. Mr Mason makes no reference to driver error, and the reference to it being a "*matter of luck as to who is at the wheel at the moment that rods, valve or pistons decide to throw themselves out of the crankcase*" is consistent with a fortuitous mechanical breakdown rather than driver error. Richard Peacock does not mention driver error either. Charles Knill-Jones, in oral evidence, said that the question of driver error had not been "*raised to our knowledge*" although he thought that in a case of race participation (i.e. where the driver is racing the car for the owner), or possibly testing or practice for the owner's benefit, that the driver would not be personally liable for his errors;

(c) Thirdly, and in any event, the evidence falls far short of demonstrating a custom that was "*invariable, certain and general*". At best, it was "*mere trade practice*" of the type that cannot give rise to an implied term: see Chitty, *supra*.

29. **(c) Causation**: This is the key hotly contested issue in the case to be determined as a matter of fact from the witness evidence, there being no independent engineering expert evidence of the car or its gearbox.

30. The approach in law to this to this issue is critical: the burden of proof is significant here as this is a case of bailment. There is no dispute that the Car (and specifically its engine) was returned to the Claimant in a damaged state. In such circumstances, where goods are lost or damaged, the burden is on the bailee (or sub-bailee) to "*show – that the loss or damage caused without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty*": Morris v CW Martin [1966] 1 QB 716, 726. The burden is therefore on the Defendant to show that the engine damage was caused notwithstanding his reasonable skill and care.

31. Approaching the matter pragmatically, however, it is clear that the immediate cause of the engine damage was the over-revving. Both parties have advanced rival cases as to the cause of that over-revving: the Claimant says that the Defendant missed a gear, the Defendant says that the Car momentarily pulled out of gear as a result of a mechanical defect in the gearbox. No other possible cause of over-revving has been advanced.

32. As submitted by the Claimant, the Court should therefore proceed on the basis set out in Ide v ATB Sales [2008] EWCA Civ 424 at [6]: "*As a matter of common sense it will usually be safe for a judge to conclude, where there are two competing theories before him neither of which is improbable, that having rejected one it is logical to accept the other as being the case on the balance of probabilities*". In other words, the Court is invited to approach the issue of causation of engine damage on the basis that one of the two rival hypotheses should be accepted, not that the burden of proof has not been discharged as in the Popi M [1985] 1 WLR 948.

33. The critical witnesses on this were the Claimant, Mr Webb, (the mechanic) and the Defendant. Each party has attacked the credibility of each of these witnesses as rendering their evidence unreliable.

34. The guidance about how courts approach this is given in the extra-judicial writing of the late Lord Bingham of Cornhill approved by the courts is apposite. In "The Judge as Juror: The Judicial Determination of Factual Issues" published in "The Business of Judging", Oxford 2000, reprinted from Current Legal Problems, vol 38, 1985 p 1-27, he wrote:

". . . Faced with a conflict of evidence on an issue substantially effecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it ? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? . . .

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action

should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of Lords in ***Onassis v Vergottis*** *[1968] 2 Lloyds Rep 403 at p 431. In this he touches on so many of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:*

"Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue . . . . more often dishonest evidence is likely to be prompted by the hope of gain, the

desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:

> *(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;*
>
> *(2) the internal consistency of the witness's evidence;*
>
> *(3) consistency with what the witness has said or deposed on other occasions;*
>
> *(4) the credit of the witness in relation to matters not germane to the litigation;*
>
> *(5) the demeanour of the witness.*
>
> *The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.*
>
> *The fourth test is perhaps more arguable. . . ."*

35. The following guidance of Lord Goff in Grace Shipping v. Sharp & Co [1987] 1 Lloyd's Law Rep. 207 at 215-6 is also helpful:.

*"And it is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in Armagas Ltd v. Mundogas S.A. (**The Ocean Frost**), [1985] 1 Lloyd's Rep. 1, when he said at p. 57:–*

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the

objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth." [emphases added].

That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence."

In that context he was impressed by a witness described in the following terms.

"Although like the other main witnesses his evidence was a mixture of reconstruction and original recollection, he took considerable trouble to distinguish precisely between the two, to an extent which I found convincing and reliable."

That is so important, and so infrequently done."

36. This approach to fact finding was amplified recently by Lady Justice Arden in the Court of Appeal in Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others [2011] EWCA Civ. 610, in paragraphs 11, 12 & 14:

11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.

12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.

14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

37. Contemporaneity, consistency, probability and motive are key criteria and more important than demeanour which can be distorted through the prism of prejudice: how witnesses present themselves in a cramped witness box surrounded for the first time with multiple files can be distorted, particularly elderly ones being asked to remember minute details of what happened and what was said, and unrecorded, nearly 4 years later as here. Lengthy witness statements prepared by the parties' lawyers long after the events also distort the accurate picture even though they are meant to assist the court.

38. Adopting this guidance I make the following findings of fact based on the witness evidence and the contemporaneous documentation:

(a) I accept the evidence of both Mr Piper and Mr Webb that the Car and the gearbox had not experienced any problems before the incident. They were well placed to opine on the condition of the Car and were experts of longstanding in the Porsche 917. Under cross-examination, Mr Webb also gave evidence that the Car was raced after the incident (without any repairs in the meantime to the gearbox) without difficulty. I also accept the evidence of Mr Webb he had never heard of a Porsche 917 "jumping out of gear" as alleged by the Defendant;

(b) I accept the evidence of Mr Attwood who gave unimpeachable evidence that he drove the Car on 19 March 2009, just a month before the incident, without experiencing any problems. As he confirmed in cross-examination, he took the Car up to fourth gear i.e. through and beyond 2nd and 3rd involved in this case and it was standard;

(c) No independent evidence was submitted by the Defendant to support his hypothesis of mechanical defect or any of the theories he advanced as to how the over revving occurred. He repeatedly asserted in oral evidence that it would be impossible to determine what the (alleged) problem was without inspecting the gearbox – which makes even more surprising the fact that he has *failed* to arrange that inspection. The suggestion by the Defendant that he reported serious problems with the gearbox immediately before the incident,

but Mr Webb told him to "carry on" is inherently improbable. If those serious problems truly existed, it defies belief that Mr Webb would agree for the test to continue given the serious risk of damage to the precious car of its owner who was with him and injury or death to the Defendant. I accept, contrary to what Mr Webb says, that it is possible there may have been some general comments on the gears, as Mr Knill-Jones (the Ferrari mechanic) says. that would not be surprising on a test drive when driver and mechanics would talk about those matters. In my judgment, bearing in mind that the very purpose of the test was to report upon the performance of the car in an article and that Mr Hales duly did so on 3 July 2009 supports the contention that he may have commented on *'a vague gearshift'* . However, this was not a defect – this is the nature of the gearbox. It is a difficult car to drive that requires the highest firm skill: this is not the same as a serious 'problem' or a defect. Mr Attwood, whose evidence I accept, said that *"you have to be careful; you have to be firm, positive with the gear changes. Mr Hales knew how to drive the Car; he was given advice before the drive. The 917 gears are difficult; you have to be more conscious, and the throw of the gear lever is longer than normal."* In answer to a question about world champion racing drivers Vic Elford and Jo Siffert suffering blown engines in the Porsche 917, Mr Attwood said that *"Drivers have made mistakes with this car in the past"*. In my judgment that is what Mr Hales made – a 'mistake'. It is accepted by both parties that it was always important to ensure the gear was engaged to avoid over revving. The article by the Defendant does not refer to 'problems' as one might have expected if there had been an email written to the Defendant by Octane 5 days after the incident on 22 April 2009 in the context of an insurance claim refers merely to *'concerns'* and *such 'problems of this nature'*, not mechanical defects or a gear jumping out of position or such like:

Hi Mark,

I have now had a chance to look at the insurance policy, and, not surprisingly, the insurance specifically excludes 'damage to the engine, gearbox, and transmission following mechanical or electrical breakdown or failure'.

This obviously puts everyone in a difficult position. As you mentioned to

both myself and David, you did point out to the Piper team some concerns you had with regards to the gearbox, and they informed you that it was fine to continue.

...From an Octane point of view, if the mechanical failure was likely to happen, and it was timing that it happened on an Octane shoot rather than a couple of days later, then should Octane be liable for the costs?...

Obviously this is a delicate situation, and a very unfortunate one for a gearbox to develop problems of this nature and we will help where we can.

(d) The Defendant only developed the hypothesis, apparently as a result of discussions with David Griffiths in late 2009, that the wrong gearbox turret had been fitted. This evidence did not feature in his first statement of 26 October 2011 but only appeared in his revised statement of 12 December 2011. Mr Griffiths' account is rather different but in any event, Mr Griffiths had not worked on the Car for years. I accept Mr Webb's oral evidence, in which he confirmed directly that the correct (five-speed) turret was fitted. I accept Mr Piper's written evidence that the Car was built from original parts. I dismiss this theory as highly unlikely;

(e) The Defendant also speculated that there may have been a problem with the "spider and slider" mechanism. That hypothesis was, allegedly, developed following conversations with Kevin Jeannette, an American expert on Porsche 917 but not called to give evidence. Those conversations do not feature in the Defendant's statement. Moreover, the Defendant accepted that Mr Jeannette had not even seen the Car in question (so Mr Jeannette would also have been speculating). The Defendant accepted in evidence that there were no rational grounds for his comment that he "*believed*" this to what happened at Park Corner. Again I dismiss this theory as highly unlikely;

(f) The Defendant himself composed a signed and dated (3 June 2009) detailed note for Octane's insurers relatively shortly after the incident. This included the frank admission that:

There was no fault apparent with the car before this incident, and I admit the damage to the engine was caused by my failure to select the gear correctly".

(g) The Defendant said that the note was "*not accurate in some respects*" and "*not as clear as it should have been and in hindsight should have been worded in a different way on the basis that the gear has disengaged without necessarily fault on the part of me as the driver but distinct from otherwise a mechanical issue*". He also said that it was prepared with a view to claiming on the insurance. I accept that this was indeed written and I find it was a true version: it was relatively contemporaneous one and it was made in the context of an insurance claim requiring good faith on the part of Octane. No evidence was adduced to support the serious allegation that Octane were party to an insurance fraud and no one was called to answer such allegation. The contemporaneous e-mail traffic between the Defendant and Octane do not support that or the Defendant's' assertion that he was being pressurised into this admission. It was only when the Claimant started to intimate a claim against the Defendant that he resiled from this clear admission. I reject the Defendant's evidence that it was untrue in key areas but true in others. I find such an attempt to resile from a signed and written statement long after it was written as a self interested and cynical attempt to avoid the consequences a an uninsured judgment and substantial costs against him personally. Mr Hales was a most unreliable witness whose evidence was creative, inconsistent, self motivated and incredible. .

(h) There was been a recurrent suggestion that Porsche 917's are inherently prone to faulty gear-shifting. It is a difficult car to drive and requires great skill but that does not make the gear box defective. The well-documented accidents were under racing conditions. There was simply not the same racing pressure on the Defendant here who was merely testing for a magazine article. Those other incidents do not establish defect and are of limited relevance. More relevant is the diagnosis by Mr Nitsche of this incident that this was an instance of *'over revving and/or missing a gear'*, something that was most likely to happen. In my judgment this is what occurred in this case.

39. In my judgment, the evidence overwhelmingly points to the cause of the engine damage being the Defendant's failure to properly engage gear and over run the

engine.

40. **(d) Liability:** Accordingly, I find the Defendant to be liable to the Claimant: he failed to properly engage gear having been expressly told to do so and specifically warned about the risk of serious damage to the Car if this was not done. His level of driving – on this particular occasion – fell below the standard of care, albeit high, required of him.

41. Even on his own factual case, I would have found the Defendant liable in that (1) he identified a problem with the gearbox in changing gears, and (2) he had been specifically warned that a failure to engage gear might cause engine damage, it was therefore reckless of him to continue driving the Car. That recklessness was an intervening act: Borealis v Geogas Trading [2011] 1 Lloyd's Rep 482 at [45]. It was the proximate cause of the engine damage.

42. **(e) Cost of repairs.** It is common ground that, subject to liability, the Claimant is entitled to recover the reasonable cost of repairing the damage to the Car and the engine. Aside from one small item regarding the cost of transporting the engine back from Germany, the Defendant has simply put the Claimant to proof of its loss. The Defendant has not served any counter-schedule of loss and has not sought to call any relevant evidence on what it says were the reasonable cost of repairs.

43. In the absence of any countervailing evidence, I accept the Claimant's evidence that having the engine repaired in Germany by Mr Nitsche was the most economical means of repair, and accept the documentary invoice and receipt that cost was €37,370. I also accept the claims in respect of the sums payable to Mr Webb and the small costs in respect of the parts set out in the Schedule of Loss.

44. The only item on which the Defendant advances a positive case is the cost of transporting the engine back from Germany. The engine was transported back by David Griffiths. The Claimant's case is that Mr Griffiths was remunerated by allowing him to offset a fee against moneys otherwise owing to the Claimant; the

Defendant says that in fact Mr Griffiths carried out this work gratuitously.

45. I accept the evidence of the Claimant and Mr Griffiths that such transportation costs were incurred and paid.

46. I assess the Claimant's special damages in the sum of £37,071.45

47. **(f) Loss of use.** The Defendant avers in his Defence that no claim for loss of use can lie because "*the Car would not have been in practical use by the Claimant, in any event*". That argument is dubious even on the facts, since the evidence is that the Car was actually hired out periodically by the Claimant: see the schedule of events for which it was booked at.

48. More fundamentally, as submitted by the Claimant, that assertion is bad in law. A claim for loss of use will (at least potentially) lie whenever a chattel is damaged: "*where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages*": The "Mediana" [1900] AC 113, 116, *per* Earl of Halsbury LC (emphasis added). The Lord Chancellor went on, at 117: "*...the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except – and this I think has been the fallacy running through the arguments at the bar – when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage*".

49. In submissions, the Defendant relies upon Beechwood Birmingham v Hoyer [2011] QB 357 in support of its contention that the Claimant is not entitled to recover general damages. However, this does not assist him: Beechwood Birmingham extends the proposition that general damages are recoverable for loss of use to situations where there has been "*loss of use not of a non-profit earning chattel but of a chattel which was profit-earning but which would not have been used for earning profits during the period of repair*": McGregor, para 32-044A.

50. So far as quantification of the loss of use, this has been calculated having regard to the Claimant's evidence that the engine was brought back on 9 November 2009. Allowing a period of 12 days for the engine to be re-installed in the Car, the Car was out of use for 212 days (from 23 April 2009 to 21 November 2009). At an interest rate of 1.5%, the conventional calculation set out in McGregor para 32-046 and Beechwood Birmingham at [45] gives a damages award of £10,890.41. I assess general damages for loss of use in that sum.

51. **(g) Mitigation of Loss:** This was not pursued in evidence. In my judgment, the Claimant acted promptly and properly in mitigating his loss.

52. Accordingly, I give judgment to the Claimant in the sum of £47,961.86.

His Honour Judge Simon Brown QC
Additional High Court Judge,

S. 9 Senior Courts Act

18th January 2013