**SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW**

**[2026] SC GLA 16**

GLW-A842-22

JUDGMENT OF SHERIFF D N TAYLOR

in the cause

ANNAS EL-KIHEL

Pursuer

against

SANTANDER CONSUMER FINANCE

Defender

GLASGOW, 2 December 2025

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:

(1) The parties are as designed in the instance.

(2) On 14 June 2021, the pursuer and defender entered into a conditional sale agreement with agreement number 100-2102-05773-22 (the "Agreement"). The Agreement was signed by the pursuer on 14 June 2021. The Agreement was signed on behalf of the defender on 15 June 2021. No 6/1 of process is a copy of the Agreement.

(3) In terms of the Agreement, the defender supplied to the pursuer a BMW 3 Series Auto motor vehicle, registration number YF19 CCJ ("the vehicle").

(4) The vehicle was delivered to the pursuer on 14 June 2021 ("the delivery date") and had a mileage of approximately 22,700 miles.

(5) On some unknown date prior to the delivery date the vehicle was involved in a serious accident. The driver's curtain airbag was deployed during the accident.

(6) Following the accident the airbag was not replaced. Instead, a component, referred to as a resistor, was inserted into the vehicle's electrical circuitry. The resistor simulated the electrical parameters an airbag would produce when connected to the vehicle's electrical systems. As a result, the vehicle did not have a functioning driver's curtain airbag on the delivery date, nor throughout the period when the pursuer used the vehicle.

(7) The absence of a driver's curtain airbag meant that the vehicle was less safe to drive, particularly in the event of an impact to the driver's side.

(8) The cost of replacing and fitting the driver's curtain airbag would have been between about £2,000 and £9,000.

(9) The vehicle was repaired following the accident which occurred prior to the delivery date. The repair work included welding, the replacement of panels on the driver's side and the repair of a component in the lower B post of the vehicle. This work was not carried out properly and in accordance with the manufacturer's instructions. As a result, the vehicle was left with a poor cosmetic finish.

(10) The pursuer has failed to prove (i) that the repairs referred to in paragraph (8) above affected the safety of the vehicle; (ii) that the accident which occurred prior to the delivery date affected any other safety systems of the vehicle apart from the missing driver's curtain airbag.

(11) The total amount payable by the pursuer to the defender under the Agreement was £34,199.58. That amount comprised the cash price of the vehicle of £29,715.00 and interest charges of £4,484.58. The full amount was repayable over a period of 49 months

between 14 June 2021 and 14 July 2025 (1,492 days) which equates to a daily rate of payment of £22.92.

(12) The vehicle was not of satisfactory quality at the delivery date. It was however roadworthy in that it was capable of being driven on the road.

(13) On 22 March 2022 the vehicle passed an MOT test. No 6/5 of process is a copy of the MOT history for the vehicle. No advisory items - ie potential issues that might require attention in the future - were identified in the course of the MOT. The vehicle had a mileage of approximately 30,835 at the time it passed its MOT.

(14) No 5/2 of process is a copy of an email sent by the pursuer to Enkae Prestige Motors on 6 April 2022 complaining about the condition of the vehicle. The pursuer had by then been made aware that the driver's curtain airbag had not been replaced following the prior accident. He stated in the email inter alia: "God forbid if I ever had an accident with that car and the airbag on the driver side wouldn't deploy it would lead to tragic consequences which I rather not ponder upon."

(15) The defender, through its legal agents DWF LLP, asked the pursuer, through his agent Reject My Ltd, if the pursuer would allow the defender to repair the vehicle. The pursuer refused the defender's request to allow the defender an opportunity to repair the vehicle and rejected the vehicle on 11 July 2022. On 26 September 2022, the defender elected to accept the pursuer's rejection of the vehicle rather than insist on its statutory right to repair it.

(16) The vehicle was collected by the defender's recovery agents on 3 November 2022 ("the collection date"). On the collection date the vehicle had a mileage of approximately 32,272. Accordingly, the vehicle had been driven for approximately 9,572 miles between the delivery date and the collection date. It had been driven for

approximately 1,272 miles between the date of the pursuer's complaint to Enkae Prestige Motors on 6 April 2022 and the collection date.

(17) The pursuer paid the sum of £15,650.40 to the defender in terms of the Agreement. That sum represents the initial payment of £11,500 and 16 monthly payments of £259.40 totalling £4,150.40.

(18) On 27 October 2022, the defender paid the pursuer the sum of £10,550.40. That sum represents the sum paid by the pursuer in terms of the Agreement of £15,650.40 less £5,100 as a deduction for the pursuer's use of the vehicle. The sum of £5,100 was calculated by applying a period of 340 days use to a usage rate of £15 per day.

(19) In addition to paying the pursuer the sum of £10,550.40 the defender also paid him the sum of £1,636,18. That sum represents £500 for general compensation or inconvenience, £350 in respect of the cost of an expert report and £786.18 as a contribution towards repair costs for the vehicle.

(20) No 5/9 is a copy of an undated report prepared by Mr Mark Percy, automotive engineer, commenting on the condition of the vehicle. Mr Percy did not inspect the vehicle for the purposes of his report.

(21) No 6/3 of process is a copy of a report dated 17 February 2023 prepared by Mr Alan Bathgate, automotive engineer, on behalf of the defender commenting on the condition of the vehicle. Mr Bathgate did not inspect the vehicle for the purposes of his report.

**Finds in fact and in law:**

(1) That the pursuer is not entitled to grant of the declarator as first craved on the basis that the orders sought are unnecessary.

(2) That in terms of section 24(8) of the Consumer Rights Act 2015 ("the 2015 Act") a reasonable amount to allow for the pursuer's use of the vehicle in the period from the delivery date to the date of rejection on 11 July 2022 is £3,896.40.

(3) That accordingly the pursuer is entitled to payment of the sum of £1,203.40, being the difference between the amount of £5,100 deducted by the defender from the amount refunded to the pursuer, and the sum of £3,896.40.

(4) That the sum of £500 paid by the defender to the pursuer is adequate reparation to the pursuer in respect of any inconvenience he suffered as a result of the defender's breach of contract.

THEREFORE, Repels the first plea in law for the pursuer; Sustains the first plea in law for the defender and refuses to grant decree of declarator as first craved; Sustains the second plea in law for the pursuer; Repels, in part, the seventh plea in law for the defender and grants decree for payment by the defender to the pursuer of the sum of ONE THOUSAND TWO HUNDRED AND THREE POUNDS AND FORTY PENCE (£1,203.40) Sterling with interest thereon at the rate of 8% per annum from 22 September 2022 until payment as second craved; Repels the pursuer's third plea in law; Sustains the defender's seventh plea in law, in part, and refuses to grant decree as third craved; Assigns a hearing on all questions of expenses to take place on 18 December 2025 at 9.30am within Glasgow Sheriff Court, 1 Carlton Place, G5 9DA to call in open court.

**NOTE:**

**Background**

[1] In this action the pursuer seeks declarator that he is entitled to reject a BMW vehicle which he purchased in terms of a conditional sale agreement entered into between the parties. He also seeks payment of the sum of £5,100 in terms of the amended second crave and of the sum of £1,000 as third craved. Craves four and five are no longer being insisted upon.

[2] It is a matter of admission that the vehicle was not of satisfactory quality at the time of supply and that accordingly the pursuer was entitled to reject it.

[3] The defender accepted the pursuer's rejection of the vehicle on 26 September 2022. Subsequently the defender paid the pursuer the sum of £10,550.40. That sum comprised a refund due to the pursuer in respect of sums paid under the Agreement of £15,650.40 less a deduction for the pursuer's use of the vehicle of £5,100. In addition, the defender paid the pursuer the sum of £1,636.18 which included an amount of £500 in respect of general inconvenience.

[4] The parties are in dispute on three issues: (i) whether the pursuer is entitled to declarator as first craved; (ii) whether the defender was entitled to deduct anything from the sum due to be refunded to the pursuer in respect of the pursuer's use of the vehicle and if so what that deduction should be; and (iii) the sum which should be awarded for inconvenience in terms of the third crave.

[5] Because the dispute was focused on the foregoing issues the court ordained the defender to lead at the diet of proof in terms of its interlocutor of 11 January 2024.

[6] Prior to the commencement of the proof the parties lodged a joint minute of admissions, No 21 of process. A written statement was lodged for the witness

Charlotte Wilkinson, No 19 of process and an affidavit, No 37 of process, was lodged for the pursuer, albeit the pursuer's affidavit was not lodged until after the first day of the proof.

[7] The pursuer lodged six inventories of productions and the defender lodged four inventories.

[8] In the course of its proof the defender led evidence from Charlotte Wilkinson and Alan Bathgate. In the course of his proof the pursuer led evidence from Mark Percy and the pursuer. After a hearing on submissions I made avizandum. Prior to making avizandum I granted the pursuer's opposed motion made at the bar of the court to amend the sum sued for in the second crave to £5,100. I now issue my judgment.

**Summary of the evidence**

***The defender's proof***

*Charlotte Wilkinson*

[9] Charlotte Wilkinson adopted her written statement No 19 of process, as her evidence in chief.

[10] Ms Wilkinson has been employed by the defender since April 2017. She has worked as a financial ombudsman team leader since 1 January 2024. Prior to that date she worked as a satisfactory quality team leader. She specialises in satisfactory quality complaints and the management of vehicle rejection complaints including deductions for use applied to any agreement where a vehicle was validly rejected.

[11] She spoke to the circumstances surrounding the pursuer's rejection of the vehicle.

[12] In relation to the calculation of the refund and the deduction for the pursuer's use of the vehicle the defender does not apply a strict formula when working out what sum is payable.

[13] In some instances, a mileage-based deduction has been applied to work out the amount of the deduction. However, an approach based on mileage is not always considered to be appropriate as it can produce results that do not truly reflect the use the customer has had of the vehicle.

[14] The report obtained in respect of the pursuer's vehicle did not indicate any mechanical problems or that the vehicle was unsafe.

[15] In calculating the refund in this case, various factors were considered including: (i) the nature of the fault that resulted in the rejection of the vehicle; (ii) the period of use and enjoyment that the pursuer had enjoyed since the date of delivery of the vehicle; (iii) the amount of money paid by the pursuer throughout the duration of the Agreement; (iv) the contractual daily rate of payment that the pursuer would have paid under the Agreement throughout the natural term of the Agreement.

[16] Ms Wilkinson explained at paragraphs 30 to 33 of her written statement how, applying the foregoing factors, the defender calculated a deduction for use of £5,100.

[17] Under cross-examination, Ms Wilkinson accepted that the nature of any faults in the vehicle would be relevant to the calculation of any deduction for use. She also accepted that no further investigations were carried out into the condition of the vehicle as recommended by Robert Cadzow of Automotive Consulting Engineers and that therefore it was not possible to say whether the vehicle had any mechanical problems.

*Alan Bathgate*

[18] Mr Bathgate is an automotive engineer. He spoke to and adopted, as his evidence in chief, his report, No 6/3 of process. He did not inspect the vehicle for the purposes of his report.

[19] He testified that the vehicle had been involved in an accident in which the driver's curtain airbag had been activated. The airbag had not been replaced following the accident. Instead, the vehicle's electrical wiring had been altered so that the missing airbag did not show up as a fault. The airbag in question was an optional piece of equipment in the vehicle and was not mandatory.

[20] The welding work carried to the vehicle after the accident was sufficient albeit untidy and not finished to a professional standard.

[21] The B post of the vehicle is the section between the front and rear doors onto which the front door closes and the rear door hinges are attached. The photographs of the vehicle were not of sufficient quality to determine the extent to which the B post had been damaged as a result of the previous accident. The fact that the vehicle passed an MOT indicated that there could not have been excessive misalignment of the B post.

[22] A component which he identified as a door hinge mount, not a seatbelt mount, was securely welded onto the B post of the vehicle although the welding was rough and not finished properly.

[23] An MOT tester would have noticed if the vehicle was structurally compromised. The photographs of the vehicle which Mr Bathgate had viewed were not of sufficient quality to enable him to comment on the structural integrity of the vehicle.

[24] There was a possibility that the vehicle would not handle correctly if it was structurally compromised.

[25] Based on the photographs of the repaired welds and the fact of the passing of the MOT test, the vehicle was roadworthy between the date of delivery and the date of the MOT test at least.

[26] Using a pence per mile rate to calculate the value of the use of a vehicle was not a fair method as during the period in question there were large fluctuations in the values of used cars caused by the Covid lockdown and the chip shortage. Also, it is extremely difficult to select a fair pence per mile rate for any one vehicle because different cars have different running costs and service requirements.

[27] The fairest way to calculate any deduction for use was to calculate a daily rate for the use of the vehicle based upon the Agreement entered into between the parties. That was fair because the parties agreed the rate specified in the Agreement. An adjustment could then be made to the figure for use to allow for the fact that the driver's curtain airbag was missing.

[28] In cross-examination Mr Bathgate accepted that the insertion of a resistor into the electrical circuitry tricked the system into detecting the presence of a fully operational airbag when in fact the airbag had not been replaced. Adopting this procedure was not part of the correct repair procedure but was not disreputable.

[29] Mr Bathgate accepted that the cosmetic appearance of a number of the repairs to the vehicle carried out after the accident was poor. He accepted that more work needed to be done to improve the cosmetic appearance of the vehicle but suggested that any cosmetic work would not necessarily make the vehicle any different from a driver's perspective.

[30] Finally, he accepted that a higher deduction from the use figure would be justified if there was more wrong with the vehicle than just the airbag. However, neither he nor Mr Percy could state that there was anything else wrong with the vehicle without inspecting it.

***The pursuer's proof***

*Mark Percy*

[31] Mr Percy is an automotive engineer. He spoke to and adopted, as his evidence in chief, his report which is lodged as item 1 of the pursuer's fourth inventory of productions. He did not inspect the vehicle for the purposes of his report.

[32] Mr Percy testified that the vehicle had sustained significant structural damage as a result of a previous accident. The driver's curtain airbag had deployed. A resistor had then been installed to trick the vehicle's electrical system into detecting the airbag when the airbag had deployed and not been replaced. The driver would not have known that the airbag had deployed and that the vehicle was unsafe to drive.

[33] Post-accident the vehicle had been plug welded and not spot welded as it should have been. A component in the lower B post had not been welded in accordance with the manufacturer's standards. In general, the repairs had not been done properly.

[34] It was difficult to say what effect the substandard repairs had on the safety of the vehicle. If though the vehicle was hit again from the side a portion of the panel work designed to protect the occupant would give way much sooner.

[35] The missing airbag and substandard repairs would not have been detected in the course of the MOT carried out on the vehicle. The MOT tester would just have turned on the ignition, checked for any warning lights and checked the steering and the function of the suspension.

[36] There was a difference between a vehicle being roadworthy and it being safe.

[37] Bypassing the curtain airbag could have disrupted the vehicle's circuitry, potentially preventing other safety systems, including seatbelts, from activating in a subsequent incident.

[38] The cost of repairing the various faults in the vehicle, including replacing the airbag, the associated wiring loom and the inner B post was estimated at £17,706.73. Other faults might be found on inspection of the vehicle.

[39] Mr Percy described the vehicle as "almost a death trap".

[40] In cross-examination Mr Percy accepted that it was not a legal requirement to have curtain airbags; not every vehicle has curtain airbags.

[41] The vehicle had passed its MOT. However, that did not mean that there were not structural issues. An MOT tester would not be looking for the kind of damage which the vehicle had sustained.

[42] Mr Percy accepted that his opinion that additional safety systems may have been affected by the bypassing of the airbag was speculation on his part but believed that it was likely that that happened.

[43] If other safety systems of the vehicle had been affected the appropriate SRS warning light should have been activated. If an SRS warning light had been activated the vehicle would not have passed its MOT. However other safety systems may have been bypassed in addition to the driver's curtain airbag.

*The pursuer*

[44] The pursuer adopted his affidavit as his evidence in chief. He bought the vehicle from Enkae Prestige Motors in June 2021. After an initial difficulty with the mileage of the vehicle had been resolved he signed the Agreement when he collected the vehicle on 15 June 2021.

[45] In or about August 2021 a message appeared on the vehicle's dashboard display which read "restraint system fault". As the vehicle was under warranty the pursuer

arranged for the vehicle to be examined by BMW. On inspection BMW advised the pursuer that there was an issue with the airbag tensioner but that further investigation, out with the terms of the warranty, would be required to determine the precise problem.

[46] The vehicle was inspected again in March 2022 at a cost to the pursuer of £786.18. At that stage BMW advised that the airbag on the driver's side had been deployed and had not been replaced. They indicated that the vehicle was not roadworthy as a critical safety feature was missing.

[47] Overall BMW's investigations indicated that the vehicle had been involved in an accident as a result of which repairs had been done. The pursuer had not been provided with this information when he purchased the vehicle. He sent a complaint to Enkae about the position on 6 April 2022.

[48] In or about May 2022 the pursuer instructed Reject My Car. They arranged for an engineer to inspect the vehicle. The engineer told the pursuer not to drive the vehicle as it was not safe. The pursuer had driven the vehicle normally until September 2021 when he was notified that there was an issue with the airbag. He then drove the vehicle less frequently between September 2021 and March 2022 when he was made aware of the extent of the problems. From March 2022 to July 2022, he hardly used the vehicle as he knew how unsafe it was to drive without a functioning airbag. After July 2002 he did not use the vehicle at all.

[49] The pursuer was working as a delivery driver in 2021/22 and had access to a Renault Clio car which he used for work. His sister also used the Renault Clio. He only used the vehicle if his sister was using the Renault Clio and he had an emergency or other immediate need for a car.

[50] The pursuer found the situation with the vehicle extremely stressful and worrying as he had been driving the vehicle without a functioning airbag.

[51] In cross-examination it was put to the pursuer that he must have thought that the vehicle was safe to drive given that it passed its MOT in March 2022. The pursuer accepted that he drove the vehicle for approximately 1,272 miles between the date of his complaint to Enkae in April 2002 and the collection date. He was asked why he drove the vehicle if he believed it to be unsafe. In response he stated that he did not have a choice. He said that he had no answer when he was asked why he had continued to drive the vehicle after complaining in April 2022 that the lack of a functioning airbag had exposed him to the risk of extreme injury or death. When the pursuer was asked why he should get a full refund for the vehicle without any deduction for use he replied that there should be no deduction for use because he was sold a different car.

[52] In re-examination the pursuer stated that he was frightened and worried when he discovered that the vehicle did not have a functioning driver's side airbag.

**The pursuer's submissions**

[53] The pursuer adopted his written submissions, No 34 of process.

[54] In short, the pursuer invited the court to (i) grant decree of declarator as first craved; (ii) grant decree for payment of the sum of £5,100 in terms of the amended second crave; (iii) grant decree to compensate the pursuer for the inconvenience suffered as third craved; and (iv) find the defender liable in the expenses of the action.

[55] After rehearsing the applicable statutory provisions, the pursuer submitted that the court should approach the question of deduction for use by considering the condition of the

vehicle and how that affected the sum to be deducted in terms of section 24(8) of the 2015 Act.

[56] In his written submissions the pursuer referred in some detail to the evidence of the two experts, Mr Bathgate and Mr Percy, on the condition of the vehicle.

[57] He submitted that I should prefer the evidence of Mr Percy and the pursuer over that of Mr Bathgate in relation to the condition of the vehicle. On that basis the court should find that the vehicle was structurally compromised and unsafe to drive from the point of sale to the collection date.

[58] The court had a discretion as to whether to allow any deduction for use in terms of section 24(8) of the 2015 Act. With reference to the Guidance published by the Department for Business, Innovation and Skills all relevant information included the safety of the vehicle. Any deduction for use should reflect the risks that the pursuer was exposed to while driving the vehicle.

[59] The pursuer's evidence at paragraph 16 of his affidavit was that he only had full use of the vehicle between June and September 2021. He hardly used the vehicle at all after March 2022.

[60] His primary position was that there should be no deduction for his use of the vehicle. Esto any deduction should be made for usage the deduction calculated by the defender was excessive.

[61] The facts of *Van Gordon* (infra at paragraph 84) were distinguishable from the present circumstances.

[62] In relation to his inconvenience claim the pursuer cited the Inner House's decision in *Mack* v *Glasgow City Council* 2006 SC 543 referring in particular to paragraph 15 of the

opinion of the court. In oral submissions it was suggested that *Mack* was somewhat analogous to the facts of the present case.

[63] In the final part of his written submissions the pursuer made observations about the defender's written submissions and about the reference to excerpts from the MOT inspection manual. In that context reference was made to the Supreme Court's decision in *TUI UK Ltd* v *Griffiths* [2023] UKSC 48 at paragraph 70.

**The defender's submissions**

[64] The defender adopted its written submissions, No 39 of process.

[65] The pursuer was not entitled to grant of declarator as first craved as the defender had accepted the pursuer's rejection of the vehicle prior to the closure of the record.

[66] Charlotte Wilkinson's evidence was credible and reliable. In relation to her cross-examination there was no averment nor evidence that there were any mechanical problems with the vehicle.

[67] Mr Bathgate's evidence in relation to the appropriate method of calculating the deduction for use, the condition of the vehicle and its roadworthiness and safety was credible and reliable. His evidence should be preferred to that of Mr Percy.

[68] Certain passages in the pursuer's affidavit were objected to on the basis that the passages sought to introduce evidence for which there was no record. Otherwise, the pursuer's evidence in his affidavit was inconsistent with the evidence of the mileage of the vehicle at various points in time. He was unable to explain why he continued to use the vehicle if he genuinely believed that it was unsafe to drive.

[69] Mr Percy's evidence should be rejected in so far as it did not coincide with that of Mr Bathgate. Much of his evidence was speculative. He did not testify on the method of calculating any deduction for the use of the vehicle.

[70] In summary the pursuer used the vehicle from the delivery date until the collection date. There was no averment on record nor evidence to justify a finding in fact that his use of the vehicle should be free.

[71] Accepting the evidence of Mr Bathgate and rejecting that of Mr Percy the vehicle was at all times roadworthy and safe. Various excerpts from the MOT inspection manual were referred to in support of this proposition.

[72] The deduction for use calculated by the defender was adequate and fair.

[73] Having regard to *King* (infra at paragraph 88) and *Chitty on Contracts* at paragraph 41-555, the critical factor was the use the pursuer had of the vehicle after it was delivered. The fault which resulted in the pursuer's rejection of the vehicle did not affect the pursuer's use of the vehicle. The pursuer was able to drive the vehicle normally on a day to day basis.

[74] The 2015 Act does not specify how any deduction for use should be calculated. The court should consider the Guidance for business document on the 2015 Act published by the Department for Business, Innovation and Skills in September 2016.

[75] The pursuer avers in Article 2 of condescendence that a reasonable rate for the use of the vehicle would be £0.20 per mile. There is no averment nor any evidence to explain why this rate is a reasonable rate.

[76] The defender considered several approaches in calculating the deduction for use figure. The approach eventually adopted was to restrict the deduction to £5,100.

[77] The approach adopted by the defender is entirely consistent with the approach adopted in the English case of *Van Gordon* (infra at paragraph 84).

[78] In his third crave the pursuer seeks damages for inconvenience. There is no averment as to what inconvenience the pursuer has suffered. In any event the defender has paid the pursuer the sum of £1,636.18 which includes an amount of £500 for general inconvenience. In the circumstances the pursuer has received adequate compensation for any inconvenience suffered.

[79] In summary the defender's first and seventh pleas in law should be sustained with the pursuer's first to fourth pleas in law being repelled.

**Decision**

***The Law***

[80] Section 24(8) of the 2015 Act states:

> "24(8) If the consumer exercises the final right to reject, any refund to the consumer may be reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered, but this is subject to subsections (9) and (10)."

Section 58(5) of the 2015 Act mirrors, more or less, the terms of section 24(8) and states:

> "58(5) If the consumer has claimed to exercise the final right to reject, the court may order that any reimbursement to the consumer is reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered."

[81] I agree with the submission made to me by the pursuer that the use of the word "may" in sections 24(8) and 58(5) makes it clear that the court has a discretion as to what, if any, deduction for use it allows where the final right to reject has been exercised.

[82] Parties advised me that there is no reported Scottish authority on the issue of deduction for use in this type of situation.

[83] Two recent English cases were referred to. It is helpful to consider these cases bearing in mind that the material provisions of the 2015 Act are of UK wide application.

[84] In *William Van Gordon* v *Volkswagen Financial Services (UK) Ltd* [2019] 4 WLUK 476, HHJ Godsmark QC found that the claimant was entitled to reject a car he purchased from the defendant. He deducted the sum of £2,425 from the damages awarded to the claimant in respect of the claimant's use of the car prior to rejection. After detailing the use of the car and the mileage he stated at paragraph 53 of his judgment:

> "The hire purchase monthly payments were £541 - say £17.45 per day. Whilst that might be an indication of the value of daily usage of this vehicle it would not, in my judgement, reflect the trip to Italy and higher mileage. Taking account of those factors over the three months with which I am concerned I would put value for the use of this vehicle over that period at £25 per day. Over 97 days that is £2425 and credit should be given to that sum."

[85] It is apparent from the foregoing comments that HHJ Godsmark, in calculating the sum to be deducted, took as a reference point the daily amount of the hire purchase payments for the car.

[86] In *Kynaston-Mainwaring* v *GVE London Ltd* [2023] RTR 17, the Court of Appeal dismissed the appellant's appeal against the High Court judge's decision that the respondent had been entitled to reject a luxury car purchased from the appellant. HHJ Pearce ordered the appellant to refund the sum of £117,000 to the respondent which represented the price paid for the car of £122,000 less a deduction of £5,000 for use. The Court of Appeal's decision is concerned with whether the respondent was entitled to reject the car. The issue of deduction for use is only dealt with in the passing - see paragraph 13 of the judgment.

[87] In the High Court HHJ Pearce dealt with the deduction for use at paragraphs 174 to 176 of his judgment. It is clear that he approached the matter broadly, taking into account that the respondent did not use the vehicle often. There is no explanation of how the deduction for use of £5,000 was calculated and as such I do not consider that the case is of any great assistance in calculating any deduction for usage in the present case.

[88] Although the issue of deduction for use has not been considered in any reported Scottish case there are obiter comments about section 24(8) of the 2015 Act in the recent Inner House case of *King* v *Black Horse Limited* [2024] CSIH 3.

[89] *King* was concerned with the common law rule that there was an absolute bar on the continued use of goods after rejection by the buyer. The sheriff at first instance and the Sheriff Appeal Court held that there was nothing in the provisions of the 2015 Act which displaced this common law rule. On appeal the Inner House disagreed.

[90] The Inner House observed that the provisions about rejection in the 2015 Act had their origins in the Directive of the European Parliament and of the Council of 25 May 1999 (Directive 1999/44/EC). Recital 15 of the Directive made it clear that the detailed arrangements in relation to recission of the contract (including the exercise of the final right to reject) were to be laid down by national law.

[91] In relation to section 24(8) the court observed at paragraph 43 that:

> "If the consumer does exercise the final right to reject, any refund may be reduced by a deduction for the use which he has made of the goods in the period since they were delivered (section 24(8)). These are very similar to the words used in the Directive (recital 15), transposed to the statute. The only end point reasonably to be inferred from this is the date at which the refund is to be given and calculated. The period since they were delivered does not suggest a period ending with the date of rejection. The period in question is the period from delivery to refund, not the period from delivery to rejection. The effect, if any, of continued use may be reflected in a suitable deduction in favour of the trader, if justified by the whole circumstances."

[92] Both parties also referred to the Guidance for business document on the 2015 Act published by the Department for Business, Innovation and Skills in September 2016. At p 52 of this document it states:

> "Making a deduction for use. If you do apply a deduction for use, it must reflect the use that the consumer has had from the goods. The law does not prescribe how to calculate the deduction. But you must be able to show that it reflects the use that the consumer has had, rather than, for example, reducing the refund to the second-hand value of the goods. You can consider all relevant information (for example the type of goods, the intended use, expected lifespan, etc.) when assessing how much use the consumer has had and what level of deduction would be appropriate to reflect this. For example, in the case of a car, you will have evidence of the mileage, whereas for other goods you might need to assess the wear and tear that the goods show. In some situations there may be no evidence either way. The deduction should not take account of any time that the goods were with you for repair or assessment of the fault – the consumer had no use of them at that time. You may not take account of any use the consumer had at any times when you had agreed to collect the goods but were late or did not do so. If you apply a deduction and the consumer believes that it is unfair, you will need to be able to justify your calculation so it is good practice to be able to show objective criteria or information that the calculation is based on. Ultimately, if you and the consumer fail to reach an agreement, it would be for a court to decide."

[93] In the course of considering matters at avizandum I drew parties' attention to two further authorities: *Benjamin's Sale of Goods* 12th Edn and *Quelle AG* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände* (C-404/06)[2008] ECR I -2685.

[94] I was particularly interested in the comments made about section 24(8) of the 2015 Act in *Benjamin* at footnote 834 to paragraph 14-120 that:

> "It would appear that the calculation of any amount to take account of the use the consumer has had of the goods should focus on the prevention of the consumer's unjustified enrichment, and so reflect the benefit enjoyed in respect of the goods, though if the goods have suffered from wear and tear in use, this could also be reflected in the calculation"

[95] *Quelle AG* is cited as authority for the foregoing proposition. In *Quelle AG* the European Court of Justice required to interpret Directive 1999/44/EC in a reference from the Federal Supreme Court of Germany. At paragraphs 38 and 39 of its opinion the court stated:

> "38. As regards, first, the scope which must be accorded to the 15th recital in the preamble to the Directive, which permits account to be taken of the use the consumer has had of the goods not in conformity, it should be noted that the first part of that recital refers to a 'reimbursement' to be made to the consumer, whereas the second part mentions the 'detailed arrangements whereby rescission of the contract is effected'. Those expressions are identical to those used in the Common Position of the Council to which the German Government also referred.
>
> 39. That terminology makes it clear that the situation envisaged in the 15th recital is restricted to cases where the contract is terminated, as provided for in Article 3(5) of the Directive, and where, pursuant to the principle that the contracting parties must each give up the benefits they have received, the seller must reimburse to the consumer the selling price of the goods. Contrary to the contentions of the German Government, the 15th recital cannot, therefore, be interpreted as a general principle enabling the Member States to take account, in any situation they wish, including that of a mere request for replacement submitted pursuant to Article 3(3) of the Directive, of the use which the consumer has had of goods not in conformity"

[96] I allowed parties to make supplementary written submission on the relevance of these further authorities to my decision in the present case.

[97] In his supplementary submissions the pursuer distinguished *Quelle AG* on the basis that it concerned the seller's right to compensation from the consumer where goods were replaced. The present case concerns the exercise of the consumer's final right to reject. The defender made the same point in its supplementary submissions. I agree that *Quelle AG* is distinguishable on that basis. However the comments at paragraphs 38 and 39 of *Quelle AG* were made in the context of the 15th recital in the preamble to the 1999 Directive. As stated in *Quelle AG* the 15th recital is concerned with cases where the contract is terminated which would include a case where, as here, the final right to reject has been exercised. As observed by the Inner House in *King* (see paragraph 91 above) the wording in section 24(8) of the 2015 Act is very similar to the wording in recital 15. In that respect I consider that the comments made about recital 15 in *Quelle AG* are of assistance in determining how any deduction for use should be calculated in terms of section 24(8).

[98] In the words of the court in *Quelle AG* where the contract has been terminated "the contracting parties must each give up the benefits they have received". It follows that the primary focus should be on assessing the extent of the benefit the consumer has received from the use of the vehicle.

[99] In his supplementary submissions the pursuer also referred to recital 60 of Directive 2019/771 EU which states:

> "The Directive should not affect the freedom of Member States to regulate the consequences of termination other than those provided for in this Directive, such as the consequences of the decrease of the value of the goods or of their destruction or loss. Member States should also be allowed to regulate the modalities for reimbursement of the price to the consumer, for example the modalities concerning the means to be used for such reimbursement or concerning possible costs and fees incurred as a result of the reimbursement. Member States should, for instance, also have the freedom to provide for certain time limits for the reimbursement of the price or for the return of the goods."

[100] It was submitted, under reference to recital 60, that the two most important factors to consider in assessing any deduction for use were (i) whether the pursuer was responsible for any loss in the value of the goods and (ii) to what extent the pursuer had been unjustly enriched.

[101] I accept, as the pursuer argued, that in terms of section 6(2) of the European Union (Withdrawal) Act 2018 the court can regard the 2019 Directive as persuasive in so far as the Directive is relevant to any matter before the court. However I do not consider that recital 60 assists in determining the amount to be allowed for a consumer's use of a vehicle.

[102] In my view the purpose of recital 60 is simply to confirm that member states are free to regulate the consequences of termination other than those provided for in the 2019 Directive. The use of the words "such as" make it clear that those consequences include, but are not limited to, the consequences of the decrease of the value of the goods or of their destruction or loss. I do not consider that anything else can be taken from recital 60

in the present context. In particular there is no indication, in recital 60 or elsewhere in the 2019 Directive, that the consequences of any decrease in the value of the goods are of any relevance to the calculation of any deduction for the consumer's use.

[103] In summary I take the following propositions from the foregoing statutory provisions and cases:

(i) Whether to allow a discount for use of a vehicle is a matter for the discretion of the court (section 24(8) of the 2015 Act).

(ii) The court should exercise its discretion in light of the whole circumstances of the case (*King supra*).

(iii) Particularly relevant factors include the daily rate payable for the vehicle under any applicable Hire Purchase Agreement (*Van Gordon supra*).

(iv) The deduction should reflect the benefit the consumer has enjoyed from the use of the vehicle (*Quelle AG supra*).

***Analysis***

*The pursuer's crave for declarator*

[104] In the pursuer's first crave he seeks declarator that the vehicle was not of satisfactory quality and that therefore he was entitled to reject it. Various other specific declaratory orders are sought on the back of the rejection of the vehicle.

[105] The defender opposed the grant of declarator as first craved on the basis that there was no need for the orders sought to be granted. The defender had admitted in answer 3 that the vehicle was not of satisfactory quality and that the pursuer was entitled to reject it. The defender had accepted the pursuer's rejection of the vehicle on 26 September 2022, some 5 months prior to the closure of the record on 28 February 2023.

[106] As stated in Macphail *Sheriff Court Practice* (4th Edition) at paragraph 20.01: "The court will only grant a declarator in respect of a live, practical issue having a sufficient degree of reality and immediacy." In so far as the defender accepted the pursuer's rejection of the vehicle months before the closure of the record there is no live, practical issue before the court which requires the grant of declarator as first craved. Accordingly, I shall sustain the defender's first plea in law and repel the pursuer's first plea in law.

*The deduction for use*

[107] I detailed at paragraph 103 the key legal propositions which I consider the court should apply to determine whether to allow any deduction for use.

[108] I have summarised the evidence I heard from parties' witnesses earlier in this judgment. In general, I found the pursuer, Ms Wilkinson and the two experts, Mr Percy and Mr Bathgate, to be credible and reliable in their testimony. I shall explain in the following paragraphs some specific aspects of the evidence of the witnesses which I did not accept. Before doing that there are two preliminary matters which require to be addressed.

[109] At paragraph 81 of its written submissions the defender argued that certain passages in the pursuer's affidavit went beyond the case averred on record and should not be admitted to probation. The affidavit is dated 17 July 2025. The first day of evidence in the proof took place in December 2024. The defender had not had an opportunity to put the matters in the passages in question to the witnesses who gave evidence in the course of the first day of the proof.

[110] In response, in his oral submissions, the pursuer submitted that the court had allowed the pursuer to lodge an affidavit to form his evidence in chief. In the event in the

course of closing oral submissions the defender indicated that it had no serious objection to the pursuer's affidavit being received.

[111] That was a sensible approach to take as, albeit the affidavit was lodged late in the day, the defender had an opportunity to cross-examine the pursuer in full on the terms of the affidavit on the second day of the proof. There was no motion by the defender to recall any of the witnesses who had already given evidence to allow them to be questioned on the matters raised in the pursuer's affidavit. In the circumstances I allowed the affidavit to be received.

[112] Although I allowed the affidavit to be received there remained an issue about the admissibility of certain parts of the affidavit. The defender objected to certain passages in the affidavit on the basis that there was no record for this evidence in the pursuer's pleadings. I accept that submission. I cannot see any reference on record to the matters referred to by the defender at paragraph 81(a) to (e) of its written submissions. Evidence without a basis in the pleadings cannot lead to findings in fact - see *Stephen Miller* v *Jacqueline Miller and Others* [2024] SAC (Civ) 51 at paragraph 15. Accordingly, I shall sustain the defender's objection to the passages referred to and exclude those parts of the affidavit from probation.

[113] The second preliminary matter which required to be determined related to the pursuer's objection to the defender's reference to certain passages from the MOT inspection manual for cars in its written submissions. The pursuer's objection is detailed at paragraphs 54 to 56 of his own written submissions under reference to the comments made at paragraph 70 of the Supreme Court's decision in *TUI UK* v *Griffiths* [2023] UKSC 48. The basis of the objection was that the passages from the MOT inspection manual were not

spoken to in evidence by the defender's expert or by any other witness nor put to the pursuer's expert in cross examination.

[114] I accept the pursuer's submission on this matter. I agree that if the defender's intention was to rely on passages from the MOT inspection manual any such passages should have been spoken to in evidence by a witness or witnesses and put to the pursuer's expert. Proceeding in that way would have been in line with the approach endorsed by the Supreme Court in *TUI*. The contents of the inspection manual do not speak for themselves. The inspection manual is not a legal authority. The defender's failure to introduce the inspection manual in evidence in the case deprived the pursuer, and in particular the pursuer's expert, of an opportunity to comment on the passages relied upon. Accordingly, I accept the submission made by the pursuer at paragraph 56 of its written submissions that I should not have regard to paragraphs 138 to 149 of the defender's written submissions ie the paragraphs which refer to the MOT inspection manual.

[115] I turn to the issue at the heart of this case ie whether the court should allow any deduction for use and, if so, what that deduction should be.

[116] The pursuer submitted that I should consider the condition of the vehicle in deciding whether to allow any deduction for use. I accept that submission. The condition of the vehicle is an important part of the "whole circumstances" to use the language of the Inner House in *King* (*supra*).

[117] It is instructive to consider the pursuer's pleaded case in relation to what is said about the condition of the vehicle. In Article 3 of condescendence the pursuer avers:

> "At the time of delivery and at all times since the vehicle was not of satisfactory quality. The vehicle was previously involved in a significant impact on the righthand side, which caused the driver airbag to deploy. Subsequently, the off-side curtain airbag was not present at the point of sale and the airbag membrane was cut away and the wiring modified to prevent the airbag

> deploying in the event of an accident. During repair of the vehicle, manufacturer standards were not followed. The inner B post of the vehicle is still significantly damaged, the seat belt mount has been dangerously and partially repaired and welded. The vehicle is structurally compromised. Hence, the vehicle supplied to the Pursuer was unfit for use."

[118] These averments focus on two issues, ie the absence of the driver's curtain airbag and the quality of repairs to the vehicle carried out after the previous accident.

[119] A great deal of evidence was carefully and diligently elicited from the two experts about the condition of the vehicle. At times I wondered whether some of that evidence was overly detailed given that the core issue in dispute between the parties concerned the pursuer's use of the vehicle. In any event in many respects there was not a great deal of dispute between the experts about the condition of the vehicle.

[120] I deal with the airbag issue first of all.

[121] Both experts testified that the driver's curtain airbag had not been replaced following the previous accident. They both stated that the electrical wiring of the vehicle had been altered to make it look as if the airbag was still installed.

[122] There was also broad agreement between the two experts that the repair work carried out after the previous accident was not done properly. The welding was substandard.

[123] Where the experts disagreed was in relation to the effect that the missing airbag and the poor-quality repairs had on the safety of the vehicle.

[124] Mr Bathgate denied that the alteration of the vehicle in relation to the missing airbag was disreputable. I found his evidence on this point difficult to understand. However, how the repairer's actions are categorised is not the important point. What matters is the effect that the missing airbag had upon the safety of the vehicle. In that respect the general tenor of Mr Bathgate's evidence, which I prefer on this point, was that the absence of the airbag

did not render the vehicle completely unsafe to drive. The driver's curtain airbag was not a mandatory piece of equipment. It was an optional extra.

[125] Both parties referred to the MOT history of the vehicle. The defender urged me to accept Mr Bathgate's evidence on the significance of the vehicle passing an MOT in March 2022. At p 43 of the transcript of the evidence led on 4 December 2024 Mr Bathgate said:

> "Again, going back to the MOT test, it passed that without any advisories or any repairs having to be carried out, so it must have satisfied an MOT tester that it met the minimum standard"

On the other hand Mr Percy suggested that a vehicle could pass an MOT if it had structural faults. Neither party appeared to realise that the best evidence of what would have been discovered in the course of the MOT would be the evidence of the person who tested the vehicle in March 2022. What I am left with is a conflict between two experienced automotive engineers about exactly what can be inferred from the vehicle's MOT history. I consider that the fact that the vehicle passed its MOT in March 2022 is indicative of it being roadworthy, ie capable of being driven on the road, at that time. In the absence of evidence from the MOT tester I am not prepared to make any more detailed findings about what might be inferred from the vehicle's MOT history.

[126] Mr Percy was asked about the effect that the poor-quality repairs had upon the safety of the vehicle. He found this question difficult to answer. That was hardly surprising given that he did not inspect the vehicle. At paragraph 5.0.3 of his report he stated: "A complete strip down of the vehicle would be necessary to fully assess the extent of the damage it sustained to panelwork". Despite his inability to fully assess the extent of the damage to the panelwork Mr Percy seemed at points to suggest that the damage to the panelwork could have affected the safety of the vehicle.

[127] Ultimately my impression was that Mr Percy's view that the poor-quality repairs may have affected the safety of the vehicle was speculation on his part based largely on the bypassing of the airbag. At p 133 of the transcript of the evidence led on 4 December 2024 he stated:

> "As such I cannot confidently say that the vehicle was repaired safely. Considering the cost cutting method used to bypass the airbag, it is reasonable to suggest that similar short-cuts may have been applied throughout the entire repair. The presence of rust supports this conclusion".

[128] Aside from Mr Percy's speculative evidence there was no other evidence led in support of the proposition that the poor-quality repairs had an effect on the safety of the vehicle. Indeed, Mr Bathgate testified that the handling of the vehicle would probably have been affected if it had been structurally compromised. I accept his evidence on this matter. There was no evidence from the pursuer or from anyone else that the handling of the vehicle was affected in any way.

[129] At paragraph 4.9 of his report Mr Percy stated that bypassing the airbag could have disrupted the vehicle's circuitry, potentially preventing other safety systems from activating in a subsequent incident. This was further speculation on Mr Percy's part. He accepted that he was speculating in cross examination (see p 161 of the transcript of the evidence led on 4 December 2024). Later in cross-examination on the same point he accepted that if other safety systems had been impacted the appropriate SRS light would have come on and that if that happened the vehicle would have failed its MOT (p 163 of the transcript of the evidence led on 4 December 2024). He then suggested that other safety systems could have been bypassed in the same way that the airbag had. There was no evidence to support this proposition.

[130] In summary I consider that Mr Percy went too far when he described the vehicle in his evidence as "almost a deathtrap" (p 144 of the transcript of the evidence led on 4 December 2024). The more realistic way to look at matters is to treat the vehicle as being less safe to drive as a result of the missing driver's curtain airbag, particularly if it had been involved in a driver's side collision. Aside from the missing airbag the poor-quality repairs had an effect on the cosmetic finish of the vehicle but there is no, or at least insufficient evidence, to establish that the poor-quality repairs affected its safety. There is no evidence to suggest that other safety systems, aside from the airbag, were affected as a result of the previous accident.

[131] Both Mr Bathgate and Mr Percy gave evidence about the extent and cost of repairs required to the vehicle. Mr Bathgate stated that it would cost approximately £2,000 to replace the driver's curtain airbag and the wiring. Mr Percy estimated that it would cost £17,706.73 to replace and fit the airbag, and to repair the panelwork. Of that sum he appeared to suggest that it would cost £8,000 to £9,000 to replace and fit the airbag alone -see p 138/139 of the transcript of the evidence led on 4 December 2024. However his evidence on this matter was somewhat vague. His answer to the question at the foot of p 138 of the transcript might suggest that the cost of replacing and fitting the airbag would be approximately £5,600 (ie twice the cost of replacing the loom). In any event giving Mr Percy the benefit of the doubt I have found that it would have cost between £2,000 and £9,000 to replace and fit the airbag. I have not made any findings in fact beyond that in relation to the cost of any further repairs which may have been required to the vehicle. The primary reason for that is that Mr Percy did not inspect the vehicle and conceded that a complete strip down of the vehicle would be necessary to assess the extent of the damage to the panelwork.

[132] Having made findings in fact reflecting my view on the condition and safety of the vehicle the remaining question is what, if any, deduction should be made for the use of the vehicle.

[133] In assessing any amount to be deducted for use, the focus should be on the quality of the pursuer's use (see *Quelle supra*).

[134] The pursuer's primary position was that there should be no deduction for use because of the effect that the condition of the vehicle (primarily the missing airbag) had on its safety - see paragraph 32 of his written submissions.

[135] In my view that is going too far. As already observed, the absence of the driver's curtain airbag did not mean that the vehicle could not be driven. That is demonstrated by the mileage of 9,572 between the delivery date and the collection date.

[136] The pursuer deponed at paragraph 15 of his affidavit that:

> "From March 2022 to July 2022, I hardly used the car as I knew how unsafe it was to drive without a functioning airbag. After July 2022, I didn't use it at all. On 1 November 2022, Santander Finance collected the car and took it away".

[137] This evidence did not square with the mileage of approximately 1,272 between the pursuer's email complaint to Enkae Motors on 6 April 2022 and the collection date. It is true that the pursuer used the vehicle less after 6 April 2022 in comparison to the usage prior to that date. However, it is difficult to see why the pursuer drove the vehicle at all after 6 April 2022 given that he deponed at paragraph 19 of his affidavit that: "If I had been in a crash, I would have been much more exposed to extreme injury or death".

[138] When he was asked why he drove the vehicle after April 2022 the pursuer stated that he had no choice. However, that answer was inconsistent with paragraph 17 of his affidavit where he deponed that he had access to another car in or around 2021/22 which he used for work.

[139] As far as the poor quality of the repairs are concerned it is clear from the pursuer's email to Enkae of 6 April 2022 that the focus of his complaint was on the missing airbag. The general condition and poor paintwork of the vehicle is only mentioned in the passing.

[140] The overall impression I had was that the pursuer exaggerated the effect that the absence of the airbag and the general condition of the vehicle had upon his use of the vehicle.

[141] The pursuer's position in his written submissions was that if an amount was to be allowed for use the figure applied by the defender was excessive.

[142] On record he avers, in Article 2 of condescendence, that a reasonable rate for the use of the vehicle would be £0.20 per mile. However, no evidence was led to explain why a rate of £0.20 per mile would be reasonable. Furthermore, Mr Bathgate gave unchallenged testimony that applying a pence per mile rate is not appropriate.

[143] In oral submissions the pursuer submitted that the two English cases of *Van Gordon* and *Kynaston-Mainwaring* were distinguishable on their facts. I was urged to take a broad-brush approach to the calculation and allow no more than £1,000. If *Kynaston-Mainwaring* was applied the appropriate figure would be about £1,300 representing 4% of the value of the vehicle.

[144] For the reasons expressed earlier in this judgment above I do not consider that *Kynaston-Mainwaring* is authority for the proposition that usage should be calculated by applying a percentage to the value of the vehicle. In my view a percentage approach would not be a true reflection of the use which a party has had of a vehicle. It would give rise to obvious anomalies, eg in relation to the calculation for the use of a high value vehicle for a short period of time.

[145] The defender's calculation for use is explained at paragraphs 30 and 31 of Charlotte Wilkinson's written statement. She deponed that the daily rate of payment under the Agreement was £22.92. The defender restricted that daily rate to £15 to allow for the issue with the missing airbag.

[146] The period between the delivery date and the date when the vehicle was rejected on 11 July 2022 was 392 days. The defender reduced that period to 340 days, ostensibly to account for days when the pursuer was unable to use the vehicle due to inspections or repairs. Applying the restricted daily rate of £15 to a reduced period of 340 days brought out a total figure for use of £5,100.

[147] The defender submitted that its calculation for use was consistent with the approach taken in *Van Gordon* which took as its starting point the daily rate payable for the vehicle in terms of the Agreement.

[148] In the absence of any other evidence, I agree that the daily rate of £22.92 worked to by the defender is a reasonable starting point for the use calculation. It represents the agreed amount under the Agreement the parties entered into. The pursuer submitted in his written submissions that the daily rate extrapolated from the Agreement was not a true reflection of the pursuer's usage as that rate was based on the pursuer owning the vehicle at the end of the Agreement. While it is true that the rate in the Agreement envisaged the pursuer eventually obtaining ownership of the vehicle, I do not consider that that means that the rate extrapolated from the Agreement ought not to be taken as a useful starting point. The rate can be reduced to reflect the point about ownership and any other circumstances which justify a smaller allowance for usage. It is significant that the court took the extrapolated daily Hire Purchase payment into account when considering the deduction for usage in *Van Gordon*.

[149] It is instructive, as a cross check, to consider the simple daily rate of hire (as opposed to the daily rate extrapolated from the Agreement) for a BMW vehicle of the same or similar type at the material time. Mr Bathgate stated at paragraph 6.8 of his report that:

> "By way of comparison, an internet search has identified that the cost to hire a BMW 320d varies from £105.00 to £176.00 per day. For longer duration hires these daily rates reduce to between £76.00 and £135.00 per 30 day period."

Mr Bathgate's evidence on this matter was unchallenged. It can be seen therefore that if a simple daily rate of hire was to be taken as the value of the pursuer's usage the calculation would bring out a much higher figure than the defender's figure. Even on the lowest of Mr Bathgate's figures the figure for use, assuming a period of 340 days, is £25,840 (340 x £76).

[150] The defender reduced the daily rate extrapolated from the Agreement to £15. In my view the reduction should be higher. It does not matter that the vehicle was not involved in an accident on the driver's side after the pursuer took delivery of it. The reality is that the vehicle was less safe than it should have been when the pursuer was driving it. That should result in a significant deduction to the usage figure.

[151] Approaching matters broadly I consider that a deduction of 50% in the daily rate extrapolated from the Agreement is appropriate. That results in a daily usage rate of £11.46.

[152] In terms of the period to which the rate of £11.46 should be applied there was little if any evidence led about exactly how long the pursuer was unable to use the vehicle for because of inspections or repairs. For that reason, it is difficult to see how the defender estimated 52 days as the number of days when the vehicle could not be used because of inspections or repairs.

[153] A better approach is to look at the usage between the delivery date and the pursuer's complaint to Enkae on 6 April 2022. During that 323 day period the pursuer used the vehicle extensively. After 6 April 2022 the usage was significantly reduced. On that basis,

again approaching the matter broadly, the defender's restricted period of 340 days is reasonable.

[154] On that basis a reasonable amount to allow for the pursuer's usage of the vehicle is £3,896.40 which represents a reduced daily rate of £11.46 multiplied by a period of 340 days.

[155] The defender deducted £5,100 from the amount it paid to the pursuer by way of a refund. It follows that the pursuer is entitled to payment of the sum of £1,203.60 being the difference between £5,100 and £3,896.40. I have granted decree for payment by the defender to the pursuer of that sum.

[156] No submission was made by either party about the interest which should run on any sum awarded. In the second crave of the initial writ interest is craved at the rate of 8% per annum from the date of citation. In the absence of any submission to the contrary, I have simply awarded interest at that rate.

*The claim for inconvenience*

[157] The pursuer submitted that he had suffered inconvenience as a result of the defender's breach of contract as described in his affidavit. He submitted that the pursuer's inconvenience claim in *Mack* (*supra*) was somewhat analogous to the pursuer's claim for inconvenience. The amount of £500 paid by the defender in respect of inconvenience was not enough.

[158] The defender submitted that the sum of £500 paid in respect of inconvenience was adequate compensation for any loss suffered by the pursuer.

[159] On record, in Article 6 of condescendence, the pursuer avers: "The pursuer has suffered loss of use and enjoyment of the vehicle and has been inconvenienced in requiring

to find alternative transport." In his affidavit the pursuer depones that he had access to another car. There is no detail of any costs which he incurred in relation to the use of the other car nor of any precise period of time during which he was inconvenienced as a result of having to use another car. There are other passages in the pursuer's affidavit which might support a claim for inconvenience. However, I have already indicated that a number of those passages are inadmissible because of a lack of record.

[160] In *Mack* the court observed that:

> "The inconvenience suffered by the pursuer is that she had to live in unpleasant conditions for a period of time as a result, so it is alleged, of the defenders' failure to fulfil their contractual obligation to keep the flat of which she was tenant in habitable condition."

Any inconvenience suffered by the pursuer in this case as a result of having to find alternative transport is quite different to the inconvenience suffered by the pursuer in *Mack*.

[161] Overall, I consider that the pursuer has failed to prove that he suffered any significant inconvenience because of the defender's breach of contract. I consider the sum of £500 allowed by the defender to be adequate compensation for any loss suffered by the pursuer in this respect. I shall therefore repel the pursuer's third plea in law, sustain the defender's seventh plea in law in part and refuse to grant decree as third craved.

[162] The parties did not make any detailed submissions in relation to the issue of expenses. In the circumstances I have fixed a hearing on expenses to take place on 18 December 2025 at 9.30am within Glasgow Sheriff Court, 1 Carlton Place G5 9DA to call in open court. If parties are able to reach agreement on the issue of expenses, they can contact my clerk to seek to have the hearing discharged and an appropriate interlocutor pronounced.