

CREDIT HIRE: PRACTICAL PROBLEMS AND SOLUTIONS

Background

1. All present will be aware of the plethora of arguments and cases that have been determined by the Court of Appeal and on occasion the House of Lords in respect of Credit Hire Agreements.
2. In 2002 the Court of Appeal and then the House of Lords tried to bring an end to the uncertainties and constant litigation in the case of *Clark v Ardington/Burdis v Livsey/Lagden v O'Connor et al.* Despite this attempt credit hire remains a much litigated area in practice and new arguments have sprung up to challenge the recovery of such charges putting Claimants and Defendants on a collision course once more.

The Agreement

3. In the early days of credit hire Defendants would often challenge the validity of the credit hire agreement itself. If the agreement was unenforceable by the hire company against the Claimant then the Defendant would also have no liability given the subrogated nature of the claim.
4. Arguments centred on the Consumer Credit Act 1974 and whether credit hire agreements were regulated consumer credit agreements pursuant to the Act. If agreements were regulated agreements there were certain requirements in respect of the form of the agreement (pursuant to section 61 of the Act) which, if not met would make the agreement unenforceable against the Claimant unless the hirer had the leave of the court.
5. These arguments have almost ceased in practice in consequence of *Dimond v Lovell* (2000) 2 WLR 1121 (HL) and then *Clark v Ardington*.
6. In *Dimond*, the Defendant succeeded in its argument that the agreement was a regulated agreement and thus unenforceable. However, in giving judgment Lord Hoffmann pointed out that article 3(1)(a) of the Consumer Credit (Exempt Agreements) Order 1989 (SI 1989 No. 869) exempted consumer credit agreements if the total number of payments to be made by the debtor did not exceed four and those payments were required to be made within a period not exceeding 12 months beginning with the date of the agreement. In consequence of this decision most credit hire companies re-drafted their agreements to include such a term and as a result most agreements are exempt agreements and not subject to the formalities required of regulated consumer credit agreements.
7. The Defendant insurers tried again in *Clark v Ardington* by arguing that the now re-drafted agreements purporting to be exempt agreements were shams to evade the CCA 1974. This argument failed.

8. The upshot is that if the credit hire agreement makes provision for payments not exceeding 4 within 12 months of the date of hire, it is likely to be difficult to challenge the validity of the agreement itself. It should be noted that it is important that the term makes provision for payment within 12 months. An agreement which provides for payment on the expiry of 12 months or on the first anniversary of the agreement is likely to fall outside the exemption and if it fails to comply with the requirements of the CCA 1974 will be unenforceable – Evans v Herrington Haulage LTL 12/6/2006.

Other Arguments in respect of the Agreement

9. Although the form of the agreement is unlikely to be challenged, I have been involved in making and contesting other arguments in respect of enforceability. Agreements have been attacked where the hirer has been told that they will not have to pay for the hire and/or that it is a courtesy vehicle. Challenges have been made on a number of grounds e.g. misrepresentation, that there is a collateral agreement not to enforce the agreement by the hire company, that the agreement is a sham etc. I have never been involved in a case where these arguments have succeeded and there are arguments to counter these. However, individual judges may see merit in some of the points raised and they are arguments to be aware of nonetheless.
10. On a practical level in recent times the scenario has arisen where hire is agreed on the telephone and may even start before the credit hire agreement is signed. Defendants have argued that the oral agreement was a concluded agreement which failed to comply with the CCA 1974 and the subsequent written agreement is an ex post facto document not supported by consideration and not enforceable. This has been rejected in 2 cases – Carson v Tazaki Foods Ltd LTL 6/12/2005 and Borley v Reed LTL 12/12/2005. It was concluded that the hire company clearly intended the hire to be on its standard terms and conditions and that the Claimant accepted this when they signed the written agreement. There was no concluded oral contract. Judge Mackie QC in Carson advocated a commercial view being taken in respect of these matters and denigrated the use of cross examination to allege the conclusion of an oral agreement when recollection is likely to be less clear than the clear terms of a signed written contract to determine the terms of the agreement and the intentions of the parties.
11. Despite Carson, it should be noted that some credit hire providers have in recent times fallen into difficulties when the hirer has not seen or been made aware of the terms of the hire at the time of the commencement of the hire or during the hire period for example where agreements are sent by post after the hire has ended – Company Call Centre v. Sheehan LTL 17/4/2009 or where an electronic signature is used to confirm receipt of the vehicle and the hirer is never sent the terms of hire. A failure to provide the terms and conditions of hire in such circumstances may result in the consideration for the agreement being past consideration and the agreement being unenforceable.

12. If there are no points on enforceability, the argument generally moves on to mitigation and this, in my experience, is the most litigated issue.

Mitigation

13. The most important aspect for Claimants and Defendants to concentrate on in respect of the questions they ask and information they elicit from hirers is in respect of the Claimant's duty to mitigate their loss. Most arguments now centre on mitigation of loss and a Claimant's failure to mitigate. There are 3 main areas of argument:
 - a) Whether a Claimant had a need to hire a vehicle at all;
 - b) Whether the Claimant hired a vehicle at a reasonable rate;
 - c) Whether the Claimant hired a vehicle for a reasonable period.
14. This is important because it could lead to the Claimant (and by proxy the hire company) recovering nothing from the Defendant or having the hire claim drastically reduced.
15. The Claimant has a duty to reasonably mitigate their loss. The Defendant has the burden of proving a failure to mitigate and the authorities suggest that the hurdle for a Claimant is not a high one. However this can pose a problem in credit hire cases where credit hire companies are often the first people to contact them and often no investigation or thought is put into alternatives to hire or credit hire.
16. An important issue which affects reasonableness and therefore may affect the recovery of hire charges at all or potentially reduces the hire charges that are recoverable is the issue of whether the Claimant is impecunious.

Does the Claimant have a need for a hire vehicle at all?

17. It is important to ascertain whether a hire vehicle was required at all. There is an inference raised that where someone runs a vehicle and incurs the costs associated with running that vehicle they have a need for it. Therefore in most cases it is not a difficult hurdle to jump. However, the Defendant can displace the inference depending on the circumstances. As hire charges are effectively damages for loss of use, if there was not a need to use the vehicle the hire may be found to be unreasonable. Examples given in the leading case of Giles v Thompson (1993) 2 WLR 908 include where someone is on holiday following the accident or is in hospital. In circumstances where the Claimant has a second car which could be used, a court might find that it was again unreasonable to hire a vehicle in the circumstances.
18. It is important to note that whether there is a need depends on the particular facts of the case. Asking questions at an early stage may prevent the loss of hire charges down the line if it is obvious that the hirer has other alternatives available.

19. An interesting question arises where the damaged vehicle is used exclusively by a family member and the hirer has other vehicles available to him. It is not clear from the case law whether there is “a need” in such circumstances. Defendants will argue that there clearly is no need because the hirer had alternative vehicles available to him and did not drive the vehicle damaged prior to the accident. Claimants will argue that the purpose of the damaged vehicle was to allow the family member to travel to work etc. This was why the Claimant needed the vehicle prior to the index accident and why he needs to hire a vehicle following the accident. This point has yet to be determined by the higher courts.
20. Another interesting area is in respect of businesses who hire on credit particularly fleet hire or taxi hire businesses. The principle of need was considered in the case of Singh v Aqua Descaling Ltd (Unreported) involving a taxi business whereby the Claimant hired taxis to self employed taxi drivers. The profit made by the company per vehicle was significantly less than the cost of hiring a vehicle on credit. The Claimant did not drive the vehicles himself and was found not to be impecunious. The judge found that the Claimant did not need to hire a vehicle in such circumstances. His loss was a loss of profit to his business and that is all he could claim. It was not reasonable to incur hire charges of £1300 per week to prevent a loss of £35 per week in profit. The judge did make a distinction between this business and a self employed taxi driver who would need his car for personal use in addition to business use. The same principle has been used in other cases relating to fleet hire or demonstrator vehicles.
21. Linked to need is impecuniosity. If a Claimant could afford to purchase a new vehicle immediately following the accident, again this may result in a finding that he had no need for a hire vehicle and it was unreasonable of him to hire one.

Offer of Vehicle from Claimant's own Insurer or the Defendant

22. Although not strictly relating to need but linked to it is the question of whether it is reasonable to enter into a credit hire agreement where the Claimant has been offered or has available an equivalent vehicle free of charge prior to the hire period starting or during the hire period.

From own Insurer

23. More recent authorities suggest that a Claimant does not fail to mitigate their loss by not obtaining a courtesy vehicle from their own insurer to mitigate their loss even if this would have been free of charge. Courts have tended to favour the argument that benefits acquired under an insurance policy are not taken into account in assessing loss or mitigation. However again the particular circumstances need to be considered. In the case of Whitworths v Crenoon Ltd (Unreported) a county court judge found that failure to take the benefit of a replacement vehicle pursuant to a long lease agreement was a failure to mitigate. In practical terms it is difficult to see why an insurance contract should be treated more favourably than any other form of contract.

From Defendant Insurer

24. This issue has now been considered by the Court of Appeal in the case of Copley v Lawn (2009) EWCA Civ 580; (2009) RTR 24. The Court of Appeal considered that it would not be unreasonable for a Claimant to hire from a credit hire provider, even where there had been an offer from the Defendant of a “free” replacement vehicle unless the offer contained all the information necessary for the Claimant and her insurers to make an informed choice and a reasonable response. The court considered that the Defendant should include the cost to the Defendant in providing the replacement vehicle in order for an informed decision to be made by the Claimant in respect of whether to hire from a credit provider or to accept the offer from the Defendant. If this information is provided and it suggests that the cost to the Defendant is less than the cost to the Claimant and his insurers of hiring from a credit hire company, in the absence of any other factor, the court is likely to consider the Claimant to have acted unreasonably. However, even where the Claimant is found to have acted unreasonably, in such circumstances the Claimant will still be entitled to recover at least the actual reasonable cost of hire which the Defendant could show he would have incurred (i.e. the cost to the Defendant of providing the “free” replacement vehicle).
25. In the circumstances it would be wise for Claimant credit hire providers to check mitigation questionnaires to ensure that a courtesy vehicle has not been offered or was not available to the Claimant. If the answer is yes then further enquiries should be made. For Defendants, it is important that any offer of a replacement includes the requisite information if the court is to find that the Claimant has acted unreasonably in refusing or ignoring such an offer.

Excessive Rate of Hire

26. It is common knowledge in the County Courts that credit hire charges include additional charges for the credit provided and for litigation services provided. These additional charges are generally irrecoverable. The Court of Appeal has made it clear that save where a Claimant is found to be impecunious all that a Claimant is entitled to recover is what it would have cost to hire a vehicle in the locality under an ordinary hire agreement i.e. one with no credit element – “the spot hire rate”.
27. In order to succeed Defendants often rely on reports from “Autofocus” which is an attempt to establish the spot hire rate local to the Claimant. There are many ways to attack such evidence but in most cases where impecuniosity is not an issue and there is such a report the court is likely to reduce the rate of hire.
28. The Court of Appeal has expressly stated that the ABI rates are of no assistance to the court in determining the reasonableness of the rate of hire. They are an agreement between insurers and not the appropriate measure of loss.
29. It should be borne in mind that the burden of showing whether a rate is reasonable or not is very much on the Defendant. Without evidence of spot hire rates, the court is likely to allow the full rate. However in most high value cases, the Defendant will most likely be fully prepared to challenge the rate charged. In such circumstances evidence in rebuttal showing

rates higher than those put forward by Autofocus and/or challenging the basis of the conclusions reached by Autofocus will be necessary if a substantial reduction in the rate is to be avoided.

Excessive Period of Hire

30. A Claimant will be expected to only hire a vehicle for as long as is reasonably necessary. In most cases where there was a need for hire and the damaged vehicle is not driveable a period of 2 to 4 weeks is normally considered reasonable but this will very much depend on the circumstances of each individual case. Where hire lasts for longer than a month the reasons for this should be explored in detail with the hirer.

Impecuniosity

31. This is perhaps the most important question in respect of credit hire claims.

32. The court will take into account the Claimant's means when assessing whether it was reasonable for the Claimant to hire a vehicle under a credit hire agreement and the period for which the vehicle was hired. If a Claimant is impecunious they will succeed in recovering the full credit hire rate regardless of the spot hire rate and it is likely to be more reasonable for the Claimant to hire a vehicle over a longer period.

33. Arguments usually centre around what is meant by "impecuniosity" and whether a Claimant is impecunious in a given case.

34. Impecuniosity was explored in the case of *Lagden v O'Connor* where two definitions appear from the judgments of Lord Nicholls and Lord Hope.

35. Lord Nicholls considered that the test was whether there was an inability to pay hire charges without making sacrifices [a Claimant] could not be expected to make".

36. Lord Hope employed a more practical approach and suggested that impecuniosity was where payment up front for hire would be an unreasonable burden. He suggested that possession of a credit or debit card would suggest that someone was not impecunious because this would afford the ability to pay up front for hire.

37. In my experience judges tend to favour the reasonable sacrifices test although the possession of a credit card will be explored by Defendants and may in certain cases suggest that a Claimant is not impecunious.

38. At the very least mitigation questionnaires should be used to identify whether this is likely to be a problem. Questionnaires may weed out those cases where a Claimant is quite clearly not impecunious and will inform the hire company at an early stage that in such cases the full rate of hire may well not be recovered.

Other points

Young Drivers and Prestige Vehicles

39. Young drivers are often prevented from hiring from a “spot hire” provider because of their age. In such circumstances credit hire is usually the only alternative and as such the full credit hire rate is likely to be recoverable, whether or not the hirer is impecunious (unless they could have afforded to replace the vehicle entirely in cases where the hire is caused by the hirer’s own vehicle being written off). Likewise, it may be difficult or impossible for someone with a prestige vehicle to hire from a spot hire provider. The question in such cases is likely to be whether there was a need for the hire in the first place and/or whether there was another credit provider who could have provided the vehicle at a lower rate.

Like for Like

40. This is usually not an issue. A Claimant is generally entitled to be put in the position they would have been in but for the accident. This includes being entitled to the same type of vehicle. If however they are hired a better vehicle, the increase in hire charge that this may entail is unlikely to be recoverable.

CDW

41. If the Claimant was only insured 3rd party fire and theft the court might not award any sum for CDW. This may also be the case where the Claimant’s own insurance could be used to insure the hire vehicle.

Checklist

42. In summary, the following issues are worth considering when considering a credit hire claim:
- a) Does the Claimant have any other vehicles available to him/her?
 - b) What does the Claimant need a hire vehicle for?
 - c) Does the Claimant have a courtesy vehicle available under his RTA insurance?
 - d) Has the Claimant been offered a courtesy vehicle by the Defendant insurer and if so, did the offer contain details of the cost to the Defendant in providing the vehicle?
 - e) Is the Claimant hiring for business reasons or individual need? If a business, is the vehicle for personal use or part of the business need? If so, is there a potential problem with regard to loss of profit being less than the hire charges?
 - f) Could the Claimant afford to hire a vehicle or purchase a new vehicle without hiring on credit?

Although these questions will not address every possible issue that can arise in a credit hire case they are a starting point to identifying the potential issues in any given case and potentially avoid the incurrance of unnecessary costs or fighting a losing battle which will inevitably result in the payment of the other side's costs.

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Case Study

Mr Benn is the owner of a private hire taxi firm. He has a fleet of 50 vehicles. He provides those vehicles to drivers for payment of a hire charge which effectively covers his costs of the hire namely the cost of insuring and taxing the vehicles and also providing the necessary licence. He has 100 drivers who work for him, the other 50 vehicles being owned by the drivers themselves. He hires radios to all his drivers at £100 per week. He makes a net profit of £40,000 per year.

Mr Jones hires his taxi from Mr Benn. He is involved in an accident in which this vehicle is damaged.

Question

a) What are the potential problems for a credit hire company in this scenario?

Mr Benn has a credit card with a credit limit of £4,500. He has £4000 of purchases on this card at the time of the accident. He has mortgage arrears and has creditors chasing debts of £100,000. He has entered into arrangements with both his creditors and mortgage company which leaves him a disposable income of £2000 per month.

b) Is Mr Benn impecunious?

Mr Benn's daughter Melissa is 18 years old and has her own car which she bought for £500. The car is written off in an accident. She generally lives within her means and has no debt. She has a £100 overdraft limit and her credit rating is good.

c) Is a credit hire company likely to have any problems recovering its charges from the Defendant in this scenario?