Credit Hire Update: *Stevens v Equity Syndicate Management Limited* [2015]

By Lucy McCormick

In the most important credit hire decision since Bent[1], the Court of Appeal rules that judges evaluating credit hire claims involving pecunious claimants should adopt the "*lowest reasonable rate*".

Introduction

1. Many readers will already be familiar with the MC Escher-like world of credit hire.

2. In short, the credit hire industry provides vehicles to motorists who are hit by insured vehicles and require a replacement car while theirs is being repaired. Credit hire companies take no money up front, but aim to recover their costs from the Defendant's insurer. Credit hire cars are often confused with 'courtesy cars', but unlike true 'courtesy cars' someone ultimately has to pay.

3. Credit hire has given rise over the years to a wide variety of satellite litigation. Usually this is because insurers balk at paying a large sum for a car hired 'on credit' when it would have been significantly cheaper for the motorist to have simply paid up front at his local Hertz or Avis.

[1] Bent v Highways and Utilities Construction (No. 2) [2011] EWCA Civ 1384

4. To recover the cost of hiring the car on credit ("*the Credit Hire Rate*"), the claimant must prove a need to hire the car on credit as opposed to paying up front on cash terms. This is commonly referred to as evidence that the claimant was 'impecunious'. Broadly speaking, a claimant is impecunious if he could not have afforded to pay in advance, or at least not without making unreasonable sacrifices. If impecunious, the claimant can recover the Credit Hire Rate in full. If not, the claimant can only recover the on the spot rate ("*the Basic Hire Rate*").

5. How to quantify this Basic Hire Rate is an issue which has been repeatedly before the courts, and was the issue in the present appeal.

Background

6. On 10 February 2011 Mr Stevens was driving his Audi A4 when an insured of the defendant reversed into him. Mr Stevens had comprehensive insurance but did not wish to jeopardise his own no claims discount by claiming for repairs on his own policy. Accordingly his insurers put him in touch with a credit hire company called Accident Exchange Limited which provided him with two services. First, it hired him a replacement Audi A4 whilst his own vehicle was being repaired. Second, it made arrangements for those repairs and funded the costs of carrying them out pending the recovery of those costs from the defendant insurer.

7. The total hire period was 28 days, running from 24 February 2011 to 23 March 2011. The daily rate of hire was £140 (exclusive of VAT), on the basis of a £1,500 excess. So Mr Stevens agreed to pay an additional charge of £22.50 per day (excluding VAT) to reduce the excess to nil, and a further £3.00 per day (excluding VAT) to reduce his liability for accidental damage to the windscreen, tyres and underbody to nil. The total daily hire rate agreed by Mr Stevens was therefore £165.50 (excluding VAT).

Decision at first instance

8. Liability was not in issue and the amount due in respect of the repairs was eventually agreed. Therefore the only live dispute at trial was the sum which was recoverable by the claimant in respect of hire charges. There were three issues before the original trial judge, Mr Recorder Tolson QC:

   8.1. Was the period of hire reasonable?
   8.2. Was Mr Stevens impecunious?
   8.3. If not, and Mr Stevens could have afforded to hire a replacement vehicle in the normal way, what sum should be recoverable as reflecting the Basic Hire Rate?

9. The trial judge knocked down the period of hire somewhat. He also made a finding that Mr Stevens was pecunious. Crucially, he used an unorthodox method to determine the Basic Hire Rate: he took the average of the rates quoted by four mainstream vehicle hire companies for vehicles in the relevant group and in this way arrived at a Basic Hire Rate of £63.02 (excluding VAT).

The first appeal

10. Mr Stevens appealed to the High Court against the trial judge's findings on each of the three issues. It is the outcome of the appeal on the Basic Hire Rate which is of wider significance.

11. It was common ground that the trial judge's approach of awarding an average was wrong, being clearly contrary to dicta in the earlier cases of Burdis v Livsey [2002] EWCA Civ 510 and Pattni v First Leicester Buses Ltd; Bent v Highways and Utilities Construction Ltd [2011] EWCA Civ 1384. What then was the correct approach?

12. Burnett J (as he then was) put emphasis on Lord Hoffman's speech in Dimond v Lovell [2002] 1 AC 384 which referred to the figure which the claimant would have been "*willing to pay an ordinary care hire company for the use of a car*". In assessing this figure, Burnett J found it was proper to take into account that "*the claimant was not especially affluent and had demonstrated by his evidence his disinclination to spend more than was necessary*". He felt that the "*correct approach to reflect the factors that the evidence disclosed in this case would have been likely to lead the judge to pick a figure somewhere in the middle, in fact a little less than the average upon which he eventually chose*".

13. On these particular facts, Burnett J therefore found that the trial judge's "*error in approach has not resulted in any detriment to the claimant*", and so the appeal on Basic Hire Rate was dismissed.

The second appeal

14. Mr Stevens then took the dispute as to hire to the Court of Appeal.

15. Kitchin LJ gave the leading judgment, and stated the problem thus at [32]:

> "[Where a report on locally available Basic Hire Rates is produced but, as is common, produces a wide range of figures] *How then is a judge in a fast track claim for a small sum to proceed? Should the judge take a figure from the top or the middle or the bottom of the range? Or should he take an average? Or should he conclude, as* [the claimant] *urges us to conclude in this case, that, if one of the figures at the top of the range is close to or exceeds the credit hire rate, then the defendant has simply failed to prove that the BHR is less than the claimed credit hire rate and so not apply a discount at all?"*

16. In answering this question, Kitchin LJ (like Burnett J below) put emphasis on the dicta in Dimond that the search must be for the figure which the claimant would have been willing to pay an ordinary hire company for the use of a car. However, unlike Burnett J, he found that this was an objective not a subjective question: "*I do not understand Lord Hoffmann to have been saying that it was necessary to consider what Mrs Dimond would herself have been prepared to pay. The attitude of the driver who is not at fault must be irrelevant to the analysis.*" In light of this, he found that the reasonable approximation for the Basic Hire Rate was to be found in the *"lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the claimant…or, if there is no mainstream supplier, by a local reputable supplier*".

17. Applying this approach on the facts, Kitchin LJ reached a figure close to but slightly below the figures reached by the two earlier judges. Accordingly, since Mr Stevens had not been disadvantaged by the error in approach, the appeal was dismissed.

Impact

18. The new approach set out by Kitchin LJ is highly favourable for defendants.

19. Aside from the fact that it is likely to significantly reduce payouts by defendant insurers generally, it also reduces the litigation risk in this type of dispute. So long as the defendant insurer gets its ducks in a row by providing decent rates reports (that is to say, for the correct type of car, in the correct geographical area, containing all the relevant terms and conditions, and catering for excess waiver cover and daily rates where appropriate) they can be reasonably confident the court will award the lowest reasonable rate. Defendant insurers are therefore presently engaged in a flurry of reviewing their existing offers, and taking them off the table if appropriate.

20. Naturally, the decision will be a blow to the credit hire industry. Initially, it will hit their cash flow as offers are withdrawn and claims are settled at lower levels. However, it must be remembered that the decision applies only to pecunious claimants, and it remains more-or-less open season on those who are found to be impecunious. Even where clients are pecunious, it is unlikely that Stevens will substantially change the legal landscape when it comes to the speciality markets of taxi hire, hire to young or very elderly drivers and those with substantial numbers of points on their licence.

21. In the longer term, Stevens may well prompt a change to the credit hire industry's business model, motivating them to undertake rather more robust investigations pre-hire as to whether their client is genuinely impecunious; one would also expect credit hire companies to be less ready to concede pecuniosity pre-trial. Some commentators also predict that the decision will shift the credit hire industry's focus to the opportunities for profit on credit repair claims.

22. As a practical side effect of the substantive decision, Stevens is likely to decrease the length of cross examination in credit hire cases. Previously, it was customary to question the bemused individual claimant at length on what, hypothetically, he would have done had he not used credit hire. This is no longer necessary given the shift to an objective approach.

23. The Court of Appeal has refused permission to appeal, but the claimant has indicated that it intends to seek to appeal directly to the Supreme Court.

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