

COMPARABLE HIRE RATE EVIDENCE

THE MERITS, THE PRESENT POSITION AND IMMUNISING THE DEFENDANT FROM ATTACK IN THE FUTURE

NOTE

1. The purpose of this Note is to address some of the more recent developments in respect of the treatment of comparable hire rate evidence in credit hire litigation. The use of such evidence has evolved since the House of Lords opinion in *Dimond v Lovell* [2002] 1 AC 384 indicated the need for that evidence to determine the recoverable daily hire rate and was reviewed and refined by the Court of Appeal in *Clark v Ardington* [2002] EWCA Civ 510 at paragraphs 134 to 150.

THE MERITS & THE PRESENT POSITION

2. The solution proposed by the Court of Appeal had a superficial attractiveness to it, which seemed to refine the approach that had evolved in County Court litigation after the *Seddon v Tekin* discounting of the claimed credit hire rate had fallen from favour. As a number of County Court judges have observed since, the Court of Appeal's confidence in assuming that 'application of the correct legal principles will lead to disproportionate costs in small cases' was misplaced. Credit hire claimants seek to subvert or avoid that solution to determining quantum on a routine basis.
3. Leaving to one side any debate about the passing of any evidential burden (at paragraph 148 of *Clark*), the defendant has to adduce comparable hire rate evidence that is both temporally and geographically relevant and A.B.I. scheme hire rates may not be used in hostile litigation (paragraph 150 of *Clark*). Geographical relevance is rarely a basis for an attack by a claimant on the evidence so adduced by a defendant although the use of evidence obtained from a national hire vehicle company's central offices has been so attacked notwithstanding that credit hire companies generally hold themselves out as operating on a similar basis.

THE NATURE OF THE ATTACK

4. The position taken by credit hire claimant has two principal lines of attack: first, that it is not temporally relevant and secondly, that the evidence is itself partial or tainted. The first line of attack is based upon the variation in 'spot' hire rates on a daily, weekly and seasonal basis, such that comparable hire rate evidence obtained in say June of a given year cannot assist in respect as to comparable hire rates in January of a year one or two years earlier. Such criticism might be answered by obtaining comparable hire rate evidence at a corresponding time of year but that is rarely practicable.
5. The attack is continued on the basis that inflation indexing (whether generally or by reference to historical industry-specific data) does not allow the Court to synthesise rates for a particular month from data for any given month.
6. The second line of attack is based upon the manner in which most defendants have to obtain their comparable hire rate evidence. Invariably, that evidence is obtained from a commercial organisation and, whether the evidence is given orally or on paper, the usual submission is that the witness has a vested interest giving testimony as to comparable hire rate evidence that is low or artificially low in order to assist the instructing defendant and thus to ensure a flow of future instructions. That attack appears to be commonplace but is especially so where the credit hire

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claimant routinely declines to serve any comparable hire rate evidence (such as Hephire claimants) and thus does not have any evidence that might be open to similar attack.

IMMUNITY FROM FUTURE ATTACK

7. In short, anything approaching complete immunity from attack on comparable hire rate evidence is an aspiration rather than a reality. However, it seems to me that defendant insurers and claims handlers can do substantially more to immunise themselves from future attacks and, perhaps, do so in a way that has a real cost-benefit both in terms of those claims that settle pre-issue and those that litigate.
8. My suggestion as to how defendant insurers and claims handlers might do so is predicated upon having in place or being able to put in place an efficient and properly maintained system for keeping records of historic vehicle hire rates from first notification of a credit hire claim and that such records are maintained for all such claims, whether the claim settles or litigates.
9. I would envisage such a process working in this way:
 - (i.) A claimant ("C") notifies a claim for credit hire charges (either under the A.B.I.-GTA or otherwise) to a defendant insurer or claims handler ("D").
 - (ii.) D (either a person for whom it is a dedicated task or the individual claims handler) obtains say 3 to 5 detailed comparable hire rate quotations under pre-set and rigid parameters for the vehicle damaged and the vehicle hired that are geographically relevant.
 - (iii.) To obtain those rate quotations, a mix of website enquiries and telephone enquiries should be made adopting, say, the methodology and structure used by companies such as Autofocus Ltd., for obtaining and recording that data.
 - (iv.) The quotation should be on the basis of unknown period of hire at the start of the hire but for the actual period of hire and should identify all the component terms of the hire rate quotation (e.g. mileage limits, collision damage waiver and theft excesses and charges, delivery and collection fees etc.).
 - (v.) D's records of the resulting data should be in hard copy form with a signed statement of truth and should attach any relevant documents e.g. website printouts of quotations and, if needs be, the statement of truth should be signed or counter-signed by someone in a managerial position.
 - (vi.) The hard copy records must be preserved in some form (certified scanned copies would be sufficient in most cases) but the data should also be entered into a spreadsheet that if updated on, say, a weekly basis would become a valuable resource for use in credit hire litigation that could be accessed by any member of staff of the defendant insurer or claims handler.
10. The immediate benefit to the defendant insurer or claims handler is that of having comparable hire rate quotations that are specific to any given case and may thus be used throughout the life of that claim as the basis for proposing offers of settlement. Geographical relevance would be present although temporal relevance might be displaced by a month or so. I take the view that a defendant would be markedly less vulnerable to attack on that basis than if advancing e.g. June 2006 rates for a January 2005 hire and a trial judge might want to see proper evidence to justify cross-examination or a submission that e.g. February 2005 rates were markedly different to January 2005 rates.
11. The ongoing benefit to the defendant insurer or claims handler is twofold. The first benefit is that of having a growing body of data that would allow a relatively secure position to be taken as regards hire rate quantum on any future credit hire or similar



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claim and that position would, over time, be reflected in the success rate with credit hire claimants.

12. The second benefit to the defendant insurer or claims handler is that of having a body of data that may be used in any credit hire claims that litigate as the basis for a witness statement on behalf of the defendant adducing comparable hire rate evidence. The data will, of course, be the insurer's or claims handler's and will be available to the defendant's legal representatives. Having access to such data, the legal representatives would be able to deploy the same as exhibits to a witness statement although the witness might well be someone other than the person who gathered the data in the first place. Thus, defendant insurer or claims handler would avoid incurring the costs of instructing a third party to provide such evidence and would, in any event, have evidence that was less vulnerable to attack generally but especially as to its temporal relevance.

CONCLUSION

13. I do not suggest that what I have outlined above is novel or a panacea for the present state of affairs. Inevitably, setting up and operating such a system might require the application of additional resources that may not have been budgeted for or considered necessary. However, the cost of commercial comparable hire rate evidence appears to be between £200 and £500 plus Value Added Tax and if the cost of a single instruction a week was avoided, much less the cost of attendance at trial, that would fund a good proportion of any increased workload or head count at claims handler level.
14. The gathering of such information, the methods by which it is recorded, the maintenance of those records, their retention and, most importantly, the integrity of the data therein is of the utmost importance if the information is to have any useful future as evidence at trial. The integrity of the data (and the systems which are used to gather, record and retain it) is wholly contingent upon those systems being, if not unimpeachable, capable of withstanding a high degree of forensic scrutiny and is only as good as the weakest part of those systems. Data that had such integrity and was recognised as having that quality might, of course, be data that could be marketed to industry peers and so defray the costs of obtaining etc. that data.
15. I would be happy to consider any matters that might arise from this Note and to advise as to any appropriate methodology for gathering, recording and retaining such data and the setting in place of such systems or, indeed, any other aspects that might be relevant to those who instruct me.

This Note is the most recent in an *ad hoc* series of such Notes since the House of Lords hearing in Dimond on various aspects of credit hire litigation. I am happy to forward copies of any of those prior Notes if requested but if those instructing me have any questions arising from this Note or otherwise please do not hesitate to contact me in Chambers.

IAN SIMPSON
isimpson.barrister@virgin.net
19th September 2006.
Mobile telephone 07930 378 624

1 Essex Court,
Temple,
London EC4R 9AY





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