clerksroom

Administration:
Equity House
Blackbrook Park Avenue
Taunton
Somerset TA1 2PX

DX: 97188 Taunton Blackbrook
T: 01823 247 247
F: 08123 704 087
mail@clerksroom.com
www.clerksroom.com

THE IMPLICATIONS OF BUNTING v ZURICH
[2020] EWHC 1807 (QB)

Introduction

There is yet another case on credit hire. Sometimes great interest is taken even in county court cases, and here we have a High Court case so this is bound to attract interest. This "trench war" between defendant insurers and hire companies is never ending and this has been the case ever since I started practising in this area of law in the year 2000.

As is usual, each side has a vested interest in pronouncing either that a new case changes the trench war in their favour, or that nothing much has really changed. In the midst of this, I offer my take on this case of Bunting v Zurich. This is not meant to be a definitive statement of law, just my understanding of the possible implications. I address this case in the following respects:

(1) summary of what happened in this case;

(2) has the law been changed or amended following the case?

(3) The practical implications of this case [which is not necessarily the same as (2)], both for claimants and defendants?

Summary of case

The High Court dismissed an appeal against a County Court Judge's decision to award a low basic hire rate (BHR) instead of the credit hire rate. Amongst the arguments put forward that the Judge should have disallowed the BHR evidence, were the following: (1) the BHR rate was subject to a 30 day maximum hire limit; (2) for the BHR there was no evidence as to deposits payable; (3) for the BHR there was no specific evidence of availability; (4) the BHR experts evidence should not have been accepted as it was in breach of the directions made.

Pepperall J dismissed the appeal, calling it a 'nit-picking challenge'. He said the Claimant came nowhere near demonstrating that the trial judge had acted perversely. Pepperall J found that the Judge had been 'absolutely entitled' to rely upon the Defendant's BHR evidence. He found that deposits were not relevant in the in a case where there was no evidence of impecuniosity and that there was no requirement for a defendant to demonstrate availability of a particular vehicle on a particular date.

Has the law been changed or amended following the case?

In addressing this, there are three crucial facts that need to be taken into account. Firstly, the Claimant did not claim he was impecunious. Following on from this (and secondly), the Claimant had provided no basic hire rates (BHR) and therefore it appears that only the Defendants BHR were available. Thirdly, the Claimant called the defence BHR expert to give evidence.

The court was deciding whether the decision of the Recorder was "perverse", which is not the same as setting out definitive law on credit hire. The decisions which the Recorder made, have at the lower courts been decided both ways, and the difference in this case is that it was decided that this particular decision should be appealed.

Administration:
Equity House
Blackbrook Park Avenue
Taunton
Somerset TA1 2PX

DX: 97188 Taunton Blackbrook
T: 01823 247 247
F: 08123 704 087
mail@clerksroom.com
www.clerksroom.com

It does not seem to me that in dismissing the appeal, there was anything ground-breaking. In the Court of Appeal case of Darren Bent v (1) Highways & Utilities Construction Ltd (2) Allianz Insurance Plc [2010] EWCA Civ 292, it was stated that (paragraph 8):

"Working with comparables and making adjustments is the daily diet of judges..." - this was referred to by Pepperall J in paragraph 15 of the judgment in Bunting v Zurich.

In Bunting v Zurich, it seems that the court was simply following this line adopted in the Court of Appeal in Bent, especially as the Claimant had not produced any BHR.

The court can only deal with the evidence that it has before it. From my experience when the claimant is not impecunious and the defendant has not produced any BHR, then usually the full credit hire rates will be awarded as this is the only evidence of rates. Conversely it should really be no surprise that where the claimant has not produced any BHR in the case of a pecunious claimant, that the court decides that the defendant BHR (albeit flawed) are accepted. The Court of Appeal in Darren Bent v (1) Highways & Utilities Construction Ltd (2) Allianz Insurance Plc [2010] EWCA Civ 292 stated (paragraph 8):

"Clearly evidence of the spot rate a year or so later than the relevant date is likely to throw considerable light on what the spot rate would have been at the time." - this was also referred to by Pepperall J in paragraph 15 of the judgment in Bunting v Zurich

So, it should be no surprise that it was not considered perverse to decide that there was no requirement for a defendant to demonstrate availability of a particular vehicle on a particular date. This is particularly so where a claimant has not produced any basic hire rates.

In my view the case of Bunting v Zurich does not change the law. Indeed, it reaffirms the law as it stands, namely that not too an "exacting" standard is expected of the basic hire rates. This is particularly so where the Claimant did not produce evidence of BHR. In Neil McBride v UK Insurance Ltd: Peter Clayton v Eui Ltd (T/A Admiral Insurance) [2017] EWCA Civ 144 the Court of Appeal stated as follows (paragraph 96):

"However, given that the credit hire companies do not produce that best evidence and, even though the burden is on the defendant insurer to demonstrate that the credit hire rate exceeds the basic hire rate and thus includes irrecoverable elements, it seems to me that it would be unjust to insist upon the rigorous and exacting approach to rates evidence in credit hire cases..."

The reality is that the type of arguments the defence put forward in Bunting v Zurich is the "daily diet" of judges in the county court. These arguments can be decided either way, often depending on which particular judge one appears before. Credit hire has always been one of the most unpredictable areas of practise. The nub of the issue is that in that in Bunting v Zurich, the court did not find it "perverse" for the lower instance judge to make the findings that were made. I do not see in the decision (albeit a High Court decision) anything which lays down a comprehensive statement of law on substantive issues. Indeed, Pepperall J made it clear in paragraph 10 of the judgement that: *"This appeal raises no new issues of law in this heavily litigated field."* Further Pepperall J states in paragraph 13: *"The real issue in this appeal is how the judge should have approached imperfect evidence as to the basic hire rate. This is not a new problem."*

Administration:
Equity House
Blackbrook Park Avenue
Taunton
Somerset TA1 2PX

DX: 97188 Taunton Blackbrook
T: 01823 247 247
F: 08123 704 087
mail@clerksroom.com
www.clerksroom.com

A county court judge who makes a decision against the defendant in the opposite direction concerning the issues raised in Bunting, may also face the prospects of appeal - it may however be the case that a higher court may still find that the decision on the facts is not perverse.

Bunting v Zurich is a case dependant on its facts, where the claimant did not produce its own basic hire rates. In my view the case of Bunting v Zurich certainly does not provide any "smoking gun" to the defendant insurers.

The practical implications of this case

Regardless of whether there has actually been any meaningful change to the law, the reality is that the case of Bunting v Zurich appears to give the defendants a tactical advantage. No doubt the case of Bunting v Zurich will be used in the county courts to show that in a case in which the defendant BHR were flawed, the High court upheld the decision of the lower court. However, attempts by defendants to suggest that there is any change to the law should be resisted.

The claimants must not however lose hope. As I stated in the previous paragraphs, in Bunting v Zurich the claimant had not produced their own BHR and the Claimant had called the Defendant BHR expert to give evidence. This is a fact specific case.

Generally, the claimants should be vigilant to ensure: (1) where there is evidence of impecuniosity, this ought to be produced; (2) if the claimant is pecunious, then BHR evidence is produced on behalf of the claimant. Otherwise it's too (understandably) tempting for a lower court to simply accept the defendant rates and generally speaking an appeal can be difficult to succeed on.

Otherwise, the claimants can in my view argue that Bunting v Zurich merely decided that the decision by the county court was not perverse on the facts and did not lay down any new law. Indeed, Bunting v Zurich appears to follow a long tradition in credit hire cases, whereby judges in the county court are for all intents and purposes given considerable leeway in dealing with rates evidence.

Azeem Ali

Please note this article does not constitute legal advice for any specific case or cases.

 20/07/2020