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INSURED HIRE SUBROGATION - BEE v JENSON AND W v VEOLIA

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Introduction

Insured hire subrogation is a topic which has been a live issue for as long as I have been in practise. The issues may have changed in this area, over the years. I recall that it used to be argued that the "hire agreement" (which had no payment terms as to the hire charges itself) was a regulated consumer hire agreement and therefore the agreement was unenforceable. This argument sometimes found success, even before Circuit Judges in "test" cases. This was obviously wrong and fortunately this line of attack is no longer used, as it is obviously flawed in law – the details and reasons I will not explain in this article, as the arguments have moved on.

There still however appears to be confusion as to insured hire subrogation, particularly in relation to two cases. In cases involving insured hire subrogation, two cases are often cited. Firstly, the Court of Appeal case of Bee v Jenson [2007] EWCA Civ 923 and secondly the High Court case of W v Veolia [2011] EWHC 2010 QB. Solicitors for both claimants and defendants will be aware that these two cases are often cited in insured hire subrogation cases.

This article is not meant to be a definitive interpretation of the law. It is an article examining a *possible* interpretation of the two cases in the insured hire subrogation context.

In this article, I will examine to what extent these two cases are relevant in insured hire subrogation and its implications. In summary, I will deal with the issues in the following order: (1) summary of Bee v Jenson; (2) implications of Bee v Jenson on insured hire subrogation (3) summary of W v Veolia; (4) implications of W v Veolia on insured hire subrogation and (5) conclusion and summary.

Summary of Bee v Jenson

"The appellant (J) appealed against the decision...that the respondent (B) had been entitled to recover the full cost of hiring a replacement car after a car accident for which J had admitted liability.

J had driven his car into the back of B's stationary car. J admitted responsibility for the accident. B's car was undriveable and was taken to a garage for repairs. B's motor insurance policy provided that an insurance company (D) would arrange for a hire car to be supplied by a nominated supplier. D duly arranged for the supply of a hire car from a hire company (H). H provided the replacement car and charged D the sum of £610.46 for 21 days hire. D originally had an arrangement with a different hire company but in return for D making a new overall agreement with H, H had made a contribution to the cost of D extricating itself from the previous agreement and had made a payment to an affiliate of D. J's case was that B and D should give credit for the payment to the affiliate against their claim for the hire charges of £610.46. The judge held that they did not have to give credit for that payment.

J submitted that the true cost of the hire of the replacement car was not £610.46 but only that sum as reduced by the payment made by H to D's affiliate and that B was never himself liable to pay the hire charges since it was D not B which had rendered itself liable to pay for the hire charges and B could not recover for sums which he was himself never liable to pay. B submitted that he was entitled to recover the reasonable cost of hiring a replacement car even if that cost was payable and paid by his insurers rather than personally by him.

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HELD: (1) B's liability for the hire charges was not relevant to the real issue in the case and it was not necessary to resolve the argument about his liability under his agreement with H. It did not follow from the fact that B was not liable for the hire charges of the replacement car, that he could not recover damages for the deprivation of his use of his car. There might be a question as to what the appropriate amount of such damages would be but, if he had in fact reasonably made arrangements for a hire car, there was no reason why he should not recover the cost of hire, whether or not he had rendered himself liable for the hire charges and whether or not the actual cost had been paid by him or somebody else such as an insurer or any other third party, Owners of the Steamship Mediana v Owners of the Lightship Comet [1900] A.C. 113 considered. (2) The real issue in the case was whether B could recover from J a reasonable hire charge reasonably incurred, or whether J was only liable for the true cost to B's insurers. B was in principle entitled to damages for loss of use of his car for the repair period, Dimond v Lovell [2002] 1 A.C. 384 applied, Lagden v O'Connor [2003] UKHL 64 considered. If a claimant needed a car while his own car was being repaired and that was due to negligence of the defendant and the cost of hiring such a car was reasonably incurred, there was no reason why the tortfeasor should not pay the reasonable cost of that hire. If a claimant had the use of a hire car but did not have to pay for it, he could not recover special damages. In the instant case where B did actually make use of a hire car, his general damages should be assessed by reference to the spot hire charge for a comparable vehicle. That was particularly so where the only reason why B had not himself paid for the use of the hire car was that he had paid a premium to his insurers to cover precisely the events which had happened. The fact that he was insured was irrelevant to his claim. His insurance might have the effect that, because he had not himself paid any hire charges, he was entitled to recover only general damages but the tortfeasor was always protected by the requirement that the claimant could recover no more than the reasonable cost of hiring the necessary replacement. It followed that B was entitled to recover the reasonable cost of hire even though, having been fully indemnified, he would hold that sum for the benefit of D." - Lawtel case summary.

Implications of Bee v Jenson on insured hire subrogation

The implications are significant. With all things being equal, it means that in theory some damages should always be potentially awarded for a case involving insured hire subrogation. The issue is the *amount* to be awarded.

The reason why it should be more of a question of the quantification of hire, rather than recovery, goes to the origins of the concept of loss. When a vehicle is damaged in an accident, the loss has already crystallised by virtue of the damage. It then becomes an issue of the quantification of that loss. There are two types of loss: direct loss and consequential loss. Direct loss usually finds expression in the cost of repairs, or if a vehicle is a write off then the value of the vehicle minus the salvage. Consequential loss often finds expression in the hiring of a vehicle, whether by way of "insured hire" or "credit hire".

That there is a loss crystallised by virtue of damage to the vehicle is exemplified by the example the Court of Appeal gave in Bee v Jenson of the case of The Mediana [1900] AC 113, 117 in the following famous extract from the speech of Lord Halsbury relating to his chair: *"Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd…".*

So, the general rule is that the deprivation of the use of a vehicle is a loss and the issue is really one of quantification of loss. This is the clear position in insured hire. The reason why no hire charges were recoverable in the credit hire case of Dimond v Lovell is that the agreement was "irredeemably unenforceable", and for

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Mrs Dimond to have recovered the hire charges would have led to "double recovery" for her – in other words she would have recovered hire charges when she was under no legal obligation to pay to the hire company, as the agreement was not enforceable. This would have represented a windfall. This reasoning also applies to other credit hire cases where the agreement is "irredeemably unenforceable". In insured hire subrogation where payment of the hire charges has been made no such difficulty arises, as the insured is bound upon the terms of subrogation to repay the hire charges to the insurance company. So, no issue of double recovery occurs in insured hire subrogation when the hire charges have been paid.

The issue then becomes one of quantification. In this regard, there has been considerable confusion. The Court of Appeal in Bee v Jenson stated it was a question of general damages or special damages to be awarded.

In my view where a valid hire agreement is produced (albeit in the insured hire subrogation context), then with all things being equal, there should be recovery of full hire charges as stated on the hire agreement. This is clear from the following passage cited in Bee v Jenson: *"In Lagden v O'Connor [2003] UKHL 64, [2004] AC 1067 Lord Scott of Foscote considered it useful to return to first principles and, in so doing said (in para. 78) that a claim for the cost of having a replacement vehicle could be regarded as either a claim for general damages in relation to which "a fair approach to quantum would be to award a sum based upon the spot hire charge for a comparable vehicle" (para. 76) or a "special damages claim based upon the cost of hire" (para.77)".*

Where there is clear evidence of the cost of hire through a hire agreement, then there is no good reason why the full hire charges should not be awarded as special damages. Of course, this is a broad generalisation so that the reader may understand the general point I am making, as in every trial there can be a multitude of evidential and legal matters in issue.

Where there is *no clear evidence of the actual costs of hire,* for example where no hire agreement is produced, then it is general damages that potentially becomes relevant. The suggested approach in Bee v Jenson appears to base the general damages on the "spot hire charge for a comparable vehicle". Of course, "spot rates" which are now called Basic Hire Rates are easy to identify where the claimant or the defendant have produced evidence of those rates. In my view, where is no clear evidence of the actual costs of hire, then the correct way to proceed would be to award damages based on Basic Hire Rates.

What about the situation where there is no clear evidence of the actual costs of hire and no evidence of Basic Hire Rates? It is clear that there is a loss incurred, as the claimant has been deprived of his/her vehicle. In my view the way to quantify this would be to award rates on the loss of use rates commonly awarded in the county court, for example at £15 per day – there is no fixed figure. Loss of use rates would probably be not a favourable outcome for the claimant, though it would still be better than no damages being awarded for lack of proof.

There is the obvious point that in all cases, solicitors should probably plead as an alternative general damages for the recovery of the hire.

Summary of W v Veolia

"The claimant (W), whose vehicle had been damaged in a collision caused by the defendant (V), sought to recover from V credit hire charges of some £138,000.

W's vehicle was a 21-year-old Bentley valued at £16,000. The garage arranged for the provision of a credit hire car whilst his own was being repaired. W told the garage that he needed a prestige vehicle to project the right image in his business and at the golf club. A hire company (X) provided him with a modern Bentley

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costing some £860 per day. W's finances would not have enabled him to pay the non-credit daily rate of £485. W signed the documentation at home when it was brought by X's driver. The contract, which included insurance for the recovery of the hire charges, limited the hire period to 85 days. W's car took 135 days to repair. A second hire agreement was therefore sent to W by post, which he signed and returned. V's defence to the credit hire claim was that the charges were irrecoverable by virtue of the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008. Consequently, W claimed the amount of the hire charges from the insurance policy supplied by X and paid them to X. The charges were paid in full despite the insurer's indemnity limit of £100,000. Thereafter W alleged that the question of unenforceability under the Regulations was irrelevant once the charges had been paid. The issues were (i) whether W was required by his duty to mitigate to challenge the charges under the Regulations; (ii) whether the Regulations were applicable; (iii) the extent to which the hire charges were recoverable in light of W's impecuniosity.

HELD: (1) W had mitigated his damage by hiring a car, becoming liable to hire charges and then paying them. There was no risk of double recovery because subrogation prevented it from arising; the claim was the same as if W had paid the charges from his own funds, Arab Bank Plc v John D Wood (Commercial) Ltd [2000] 1 W.L.R. 857 considered and Bee v Jenson [2007] EWCA Civ 923 , and Copley v Lawn [2009] EWCA Civ 580 applied. W was therefore entitled to recover the credit hire charges in their entirety (see paras 33-40, 62 of judgment). (2) The effect of the Regulations was that X could not enforce its first hire contract against W, Dimond v Lovell [2002] 1 A.C. 384 applied. Dimond applied as much to the Regulations as it did to the Consumer Credit Act 1974. As W had signed the contract at home, without the requisite notice under reg.7(2) , it was unenforceable under reg.7(6) , Wei v Cambridge Power & Light Ltd [2010] 9 WLUK 194 approved. As the second agreement had been sent to W by post, the Regulations could not be used to defeat it (paras 44-45, 54-55). (3) On the evidence, W was impecunious for the purposes of Lagden v O'Connor [2003] UKHL 64 and had had no choice but to take the credit hire car since he could not have been expected to pay the non-credit rate, Lagden followed. It was a fair point that the impecuniosity exception was not designed for the drivers of Bentleys, but in the instant case, W's old Bentley was worth no more than a modest modern car (paras 56-61). There were layers of artificiality on both sides of the case: V's reliance on the Regulations had arisen, not out of concern for consumers, but from a need for ammunition in the litigation. Likewise, although the contract between W and X was genuine, it was extraordinary that the insurance arm of the contract had paid out almost 40 per cent more than its policy limit. Considerations and motives behind the scenes did not, in themselves, invalidate the points taken or the transactions entered into, but the amount exceeding the insurer's indemnity limit was not to be treated as a good faith payment of a claim made under the policy (para.40)." - Lawtel case summary.

Implications of W v Veolia on insured hire subrogation

There is a tendency for claimants to argue in any case that as payment has been made for the hire charges, then the hire charges should be recoverable in full regardless of the circumstances. Reliance is placed upon W v Veolia. In my view this is a vast oversimplification of the situation. The case of W v Veolia was dealing with a consumer credit agreement *which was unenforceable*. However, in W v Veolia as payment had been made there was no risk of double recovery as there was in Dimond v Lovell - in other words there was no chance the claimant was seeking to avoid payment of hire through the unenforceability of the hire agreement. Hence *there was a loss*. If there is one word which is most helpful in understanding the conceptual nature of hire charges, it is the phrase "loss". *There was no issue that there was a hire agreement, nor was there any dispute on the terms.* Therefore, it does not follow that in an insured hire subrogation situation no proof is required

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of the hire agreement in order to recover the full amount *under special damages*. Indeed, in W v Veolia there was clear proof of a hire agreement. In insured hire, often the hire charges have already been paid by the insurance company – however this does not absolve the need for proof of the liability of the claimant if she/he wants to *recover the full amount as special damages.* This can only be done realistically when there is an evidence of a valid hire agreement. If there is however insufficient evidence of special damages under a hire agreement, then *one can go on to consider general damages under the Basic Hire Rates.*

To argue however that payment of hire charges should automatically lead to the *full recovery* of the hire charges is an absurd proposition. It would mean that the claimant does not need to demonstrate that he/she has acted reasonably in incurring full hire charges. Even in W v Veolia the full amount of the hire charges were not recoverable, as it was found that almost 40% more had not been paid in good faith by the insurance company.

Summary and conclusion

In summary and conclusion: (1) Bee v Jenson is support for the general proposition that the damage to a vehicle which prevents it being used, is a loss that needs to be compensated; (2) the issue is how this is quantified? If there is a valid hire agreement, then with all other things being equal, the claimant should be entitled to the hire charges claimed under the agreement. If, however, for example there is no valid hire agreement, then if BHR are available then these rates should be used. If there is no valid hire agreement and no evidence of basic hire rates, then court can award the loss of use rates which are usually at £10-15 per day; (3) W v Veolia does not support the proposition that if the hire charges are paid, then the full amount of hire charges are inevitably recoverable. This would lead to the absurd conclusion that there is no requirement for the claimant to prove anything else, once payment for hire has been made; (4) W v Veolia provides support for the proposition that payment of the hire notwithstanding the unenforceability of the agreement, can provide evidence that a liability or loss has been incurred; (5) However even in W v Veolia, the full hire charges were not recoverable as the insurance company had made payments it was not contractually bound to make. So, this shows that payment of hire charges without more is not sufficient. Indeed, in W v Veolia there was no dispute of an agreement nor its terms. It was however an unenforceable agreement, though this was of no consequence as the claimant had chosen not to raise the point (by making payment of the hire charges); (6) This is all subject to the point that solicitors should probably plead as an *alternative* general damages for recovery of the hire.

I hope that the article assists the reader in understanding the issues concerning the two cases of Bee v Jenson and W v Veolia in the context of insured hire subrogation.

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

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