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COURTESY CARS AND CREDIT HIRE

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Introduction

The issue of courtesy cars and credit hire often comes to light in court cases. This is the typical scenario: the claimant has given evidence that even though he/she signed a credit hire agreement, he/she thought he/she was getting a "courtesy" car. This evidence usually comes out in cross-examination. The defence counsel's and the judge's eyes light up, and the claimant counsel particularly if junior has an air of resignation about her/him. It seems that the case for credit hire has all but ended, as the claimant thought she/he was provided with a "free car". Sometimes it is stated that the credit hire agreement is "unenforceable". On other occasions, the judge will state that this makes the agreement "invalid". It almost seems inevitable at times that the credit hire will be dismissed - this however should not necessarily be the case, as I will explore in this article.

In this article, I would like to analyse what effect precisely a claimant believing he had a courtesy car *should have on a case*. This is not the same as what is sometimes happening in the courts.

In my view insufficient focus is being paid to the fact that a credit hire agreement is a *contract between the parties,* and therefore many of the basic principles surrounding the law of contract still apply. Please note this is not meant to be an article exhaustively analysing all the issues surrounding courtesy cars. Neither is this article meant to be an interpretation of the law. This article is an attempt to *re-formulate* some of the arguments surrounding a courtesy car on *basic contractual principles,* which in my view would be the correct approach.

The answer to whether a claim for credit hire should be dismissed where a claimant thinks he/she had a courtesy car *depends on the circumstances*. I will deal this in three sections as follows, namely: (1) Why a claimant believing he/she has a courtesy car is *insufficient on its own* to dismiss a hire claim (2) circumstances where a credit hire claim *should be dismissed* due to the claimant believing he/she had a "courtesy" car and (3) my *general thoughts* on the subject, which will hopefully be of assistance.

Why a claimant believing he/she has a courtesy car is insufficient on its own to dismiss a hire claim

The fact that the claimant states he/she thought he/she was hiring a courtesy car is not sufficient on its own to dismiss a hire claim. Indeed, without anything further, the credit hire claim should not be dismissed for this reason. This is based on very old principles of law. In Parker v South Eastern Ry. Co (1877, 2 CPD 416,421), it was stated by Mellish L.J: *"In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is provided by proving his signature, and, in the absence of fraud, it is wholly immaterial that he/she had not read the agreement and does not know its contents'.* The concept of fraud in credit hire agreements finds expression in the phrase "sham". The courts have traditionally shied away from declaring a hire agreement as a "sham" as this requires a "...common intention" to deceive (Snook v London and West Riding Investments Ltd (1967) 2 Q.B 786) – this is very difficult to prove as it would be highly unlikely that a hire company and a customer would conceive such a deception together.

So once a claimant has signed an agreement, then generally he/she will be bound by it.

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Situations where a credit hire claim should be dismissed due to the claimant believing he/she had a courtesy car

As discussed, the fact that a claimant states he/she thought he/she had a courtesy car is not sufficient on its own to defeat a credit hire claim. There must be more focus on why the claimant thought he/she had a courtesy car. A *misrepresentation of fact* that the car was a free car is potentially sufficient to defeat a hire claim. All the usual conditions for misrepresentation need to be fulfilled, namely an untrue statement of fact made by a party or its agent, which induces another party to enter into a contract causing loss. So there needs to be: (a) a statement of fact which is false; (b) made by a party or its agents which (c) induces another person to enter into a contract, causing loss. If the above conditions are not fulfilled, then a "general feeling" by the claimant that he/she was being provided with a courtesy car is not sufficient. The argument really needs to be pinned down. Specific conditions for misrepresentation need to be fulfilled.

The effect of a misrepresentation is that it makes the contract *voidable*. This however is not sufficient, as the claimant needs to void the contract as made clear by HHJ Lubna in Nur Kadir v Graham Thompson (Lawtel 25/08/2016) (the case is not binding). In Nur Kadir v Graham Thompson, the claimant had voided the contract as he was "disavowing any personal liability" for the hire charges at the trial. It seems that in Nur Kadir v Graham Thompson, it was decided that the claimant had voided the contract at the hearing. Indeed, the District Judge had stated that the agreement was "voidable"; however, the Circuit judge on appeal found that the District Judge had decided that the contract was indeed void when all the circumstances of the case were looked at.

My general thoughts

There does not appear to be sufficient focus on the fact that the claimant has brought a *claim for credit hire against the defendant* – surely this means that potentially the claimant has "affirmed" the agreement, notwithstanding the misrepresentation? What else is the claimant doing in bringing a credit hire claim to court, with signed particulars of claim and a signed witness statement? Has not the claimant lost the right to rescind at trial, if he/she has already affirmed the contract by bringing the action after becoming aware of the misrepresentation? In Long v Lloyd [1958] EWCA Civ 3 (19 May 1958), the Court of Appeal decided that the claimant had already affirmed the contract and if he *"...had a right to rescission which survived the completion of the contract, we think that on the facts of this case he lost any such right before his purported exercise of it".* The case of Long v Lloyd was not a credit hire case, however there is no reason why it should not apply to a credit hire case. As I stated earlier in this article, there is a general need for credit hire to be looked at more closely from basic contractual principles.

This school of thought certainly has implicit support in the form of old case law. In the Privy Council decision of King v. Victoria Insurance Company Ltd [1896] AC 250 it was stated: *"To their Lordships it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act."* This was an old case and not a credit hire case, though I do not see why the principle cannot be extended to credit hire. Indeed, the case of King v. Victoria Insurance Company Ltd was referred to and provided support to the judge in the county court credit hire case of Borely v Reed (unreported, Winchester County Court, 20th of October 2005).

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In Borely v Reed, the judge stated (paragraph 25) this [activity of the defendant] *"is a remarkable state of affairs when, given the limits of the doctrine of mitigation, the claimant owed the defendant torfeasor no obligation to take such points for herself: McGregor on Damages, para, 7.075 (no obligation to start uncertain litigation against a third party); (no obligation to give up rights such as her rights under the Helphire written agreements); para. 7-079 (no obligation to take steps to recover from third parties). If the defendant would lose in any attempt to establish that the claimant had failed to mitigate loss why should the defendant succeed when taking the same points directly?".*

I cannot see that either King v. Victoria Insurance Company Ltd or Borely v Reed were mentioned in Nur Kadir v Graham Thompson.

In the *Court of Appeal test case of Salat v Barutis* (2013, EWCA 1499, CA) *which I was involved in*, the cases of King v. Victoria Insurance Company Ltd and Borely v Reed were mentioned in the skeleton argument and the grounds of appeal. Whilst we did not find success in Salat v Barutis, the case involved an "irredeemably" unenforceable cancellation regulation, so it is arguable that the agreement cannot be redeemed by the claimant bringing a claim to recover the hire. Indeed, it is arguable that Salat v Barutis merely followed the case of Dimond v Lovell. Therefore, I have always found the terminology of "unenforceability" used in cases such as in Dimond v Lovell and Salat v Barutis (which involve "statutory unenforceability") also being applied to cases of misrepresentation (which involve voidable contracts) rather unhelpful and confusing. In cases of misrepresentation, the credit hire agreement becomes *voidable*, though the agreement can be affirmed by the claimant. In those circumstances, it seems to me a viable proposition that the bringing of proceedings is in fact an affirmation of the contract and the defendant really has no business in interfering with that. In my view King v. Victoria Insurance Company Ltd and Borely v Reed potentially support that line of reasoning. The case of Dimond v Lovell and even Salat v Barutis can be distinguished from misrepresentation cases, as those cases involved "irredeemable unenforceability".

In situations where the claimant states that it was misrepresented to her/him that he/she had a free courtesy car, yet he/she brings a claim for credit hire, *I do see a disconnect*. Whilst the current trend of the courts is to support the proposition that the claimant has voided the contract by "disavowing" the hire charges at court, perhaps more attention needs to be drawn to older case law such as King v. Victoria Insurance Company Ltd and Long v Lloyd.

Summary and conclusion

In summary and conclusion: (1) a claimant believing he/she has free courtesy car on its own is not sufficient to defeat a hire claim; (2) if there is a misrepresentation by the hire company or its agents which has induced the claimant, then the hire agreement is voidable – this can potentially defeat a hire claim *provided the claimant has voided the contract;* (3) it seems presently the threshold for what it takes for a claimant to void a contract is rather low, with the claimant disavowing the hire charges at court being considered sufficient (Nur Kadir v Graham Thompson); (4) perhaps there needs to be more focus on the claimant bringing a claim for hire to court, which could be considered an affirmation of the contract. Surely the claimant by bringing the claim has lost the right to rescind it at court, as he/she has already affirmed it? The case of Long v Lloyd provides support for that; (5) The distinction between "irredeemably" unenforceable contracts (for example in Dimond v Lovell and Salat v Barutis) and voidable contracts perhaps needs to be highlighted more clearly; (6) indeed in my view it is very

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unhelpful to call a contract "unenforceable" in a misrepresentation case, as it confuses cases like Dimond v Lovell and Salat v Barutis with misrepresentation cases; (7) in my view, there needs to be more focus on revisiting older cases such as King v. Victoria Insurance Company Ltd and Long v Lloyd; (8) there needs to be more focus of analysing courtesy cars and credit hire within a basic contractual framework.

In any event, in my view more careful thought needs to be applied to this area than is presently the case.

Azeem Ali

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

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