# Transparency, Accountability, Clarity, Justice and Efficiency

## suggested changes to Credit Hire

**Mohammed Azeem Ali**

June 2021

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## Introduction

The so-called credit hire "wars" have been raging for over two decades now. Like most wars, it has simply led to mistrust, confusion and no real victors in the long term on both sides.

In this article, I will suggest three simple changes to the way credit hire is dealt with in the courts. I suggest a major change to the definition of "sham" agreements for credit hire cases. I then suggest two changes in the way courts deal with credit hire. In my view this will lead to increased transparency, accountability, clarity, justice and efficiency.

I suggest the following three changes: (1) for a hire agreement to be declared a sham, a "*common*" intention to deceive" should no longer be required. An intention to deceive by *one party* should be sufficient; (2) the debarring orders in credit hire cases for impecuniosity should not be made in credit hire cases. Instead, an order for the claimant to provide impecuniosity documents should be made, without a debarring order and (3) the courts should be prepared to substitute reasonable rates when there is no impecuniosity in credit hire cases (excluding "taxi hire" and "luxury vehicle" cases), even in the absence of Basic Hire Rates being produced.

I will deal with each in turn.

## For a hire agreement to be declared a sham, there should be no need for a "*common*" intention to deceive" as per Snook v London and West Riding Investments Ltd.

Lord Diplock in Snook v London and West Riding Investments Ltd, [1967] 1 All England Law Reports 518, at page 528 in paragraph 8 stated this in relation to sham: "… it is necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

This case suggests that there must be a "common" intention to deceive parties for a hire agreement to be declared a "sham". Of course, a hire agreement is almost never declared a "sham", as it is almost impossible to prove that *both* the claimant and the hire company were involved in any deceit.

That sounds clear enough? Well then think again.

From my experience, especially where there is a very large hire claim the courts often instinctively mistrust the claim. It can be seen simply as a money bearing exercise for the hire company, a claim initiated by the hire company which is in reality led by it even though the claimant is the formal party. It does not help that when the claimant gives evidence, he/she will often state that he/she was given a "courtesy car". The evidence which is frequently heard at trial is that even though the claimant signed a written agreement making her/him liable for the hire charges, it was thought to be a "courtesy" and a "free" car. This can lead to the following impression in the court: the whole hire agreement has just been a money bearing exercise by the hire company. Whilst an agreement has been signed by the claimant committing to the hire, the reality is this was just a "paper exercise" and the vehicle was in reality "free". In reality, the hire company would never pursue the claimant for those hire charges as long he/she attended the trial and she/he cooperated.

However, as the accepted definition of "sham" requires a *common* intention to deceive, the courts will naturally shy away from declaring the agreement to be a sham, as it is almost impossible to prove that the lay claimant was a party to such an alleged sham. It is however my experience that this often leads the court to other false avenues. The courts will instead find other ways of dismissing the hire claim or vastly reducing it to a fraction of the figure it was claimed at. For example, a court may vastly reduce the hire period to a far smaller period or find an agreement unenforceable on the basis of the paperwork on very dubious legal grounds. In my view this is not at all acceptable. It creates mass uncertainty between parties. Indeed, credit hire can be one of the most unpredictable areas of law for this reason. It is time for the courts to "nail its colours to the mast".

In my view the law should be changed to allow a finding of a sham agreement even if one party only has an intention to deceive. I suggest that the definition of sham in Snook v London and West Riding Investments Ltd. be amended as follows: "it means acts done or documents executed *by a party* which are intended *by that party to give to another party or to the court* the appearance of creating between that party and another legal rights and obligations different from the actual legal rights and obligations (if any) which that party intends to create".

If for example the hire company never had any real intention of pursuing the hire if the court did not order the defendant to pay the hire charges to the claimant, then the agreement could be declared a sham under my proposed amended definition. A declaration by the court that the hire agreement was a "sham" due to an intention to deceive in these circumstances would circumvent any attempt by the hire company to enforce the hire charges against the claimant after the trial.

The benefits of this change to the definition of "sham agreements" could potentially be the following: (1) it would reduce the "cloak and dagger" approach that is sometimes seen in the courts. The real reason for dismissal of a credit hire case or substantial reduction in damages is often shrouded behind artificial reasons. This can create an overall level of mistrust in the field of credit hire. The streamlined definition of a sham agreement I have suggested would allow the courts to be more transparent and create more certainty in the field of credit hire; (2) All parties will be clear as to the real issues in the credit hire case, allowing each party to put the case in a clear way. This is also more likely to lead to cases being settled without the need to trouble the courts; (3) it could lead to more accountability in the sometimes "ambiguous" world of credit hire, where the interests of the claimant and the hire company may *seem* inseparable - however, the reality is that the actual interests of a hire company and the claimant can be very different. Due to the real possibility of a court finding that an agreement is a "sham", it would bring all parties out into the open including the hire company. This change to the law will reflect the "real" position in credit hire. The definition of "sham" applied for credit hire cases is presently outdated and needs to reflect the ground realities.

I would suggest that in order to alleviate any injustice to the hire company, a standard court order should be made placing the hire company on notice to join the proceedings as a party within a prescribed period of time, if so advised. This would allow the hire company to partake in the proceedings and defend its position, if required.

## The debarring orders in credit hire cases for impecuniosity should not be made in credit hire cases

The debarring orders are made routinely in credit hire cases. If the claimant is to plead impecuniosity the court will order that he/she must disclose wage slips, bank statements and any credit card statements for three months pre-accident and during the period of hire. If disclosure is not made, then the claimant is "debarred" from arguing impecuniosity.

Even a missing one-week wage slip or a missing one-page bank statement will lead to the claimant being debarred from asserting impecuniosity, unless a successful application for relief is made. In my view this is often setting up the claimant to fail. The overriding objective of any trial is to provide justice between the parties. In my view such straitjacket orders do not serve this purpose.

I propose that whilst an order should still be made that impecuniosity documents should be provided, there *should be no debarring provision attached to this order.* Instead, the standard court order should state that non-compliance with the order "may be taken into account by the trial judge in deciding whether the claimant was impecunious". The issue of impecuniosity should then be left to the trial judge to decide on all the evidence, including any explanation given for any missing documentation. It would be in the judge's discretion taking into account the evidence and any explanations given in cross examination for non-compliance. For example, it may be more likely that one-week missing payslips would not lead to a finding that the claimant has not proven she/he was impecunious. Conversely it may be that 1 month missing payslips would be more likely to lead to a finding that the claimant was not impecunious. The point is however that there should be no "straitjacket" as there is now. The court should have more discretion.

By allowing the court more flexibility, in my view this would lead to increased justice. This surely must be the *primary purpose* of any court.

## The courts should be prepared to substitute reasonable rates when there is no impecuniosity, even in the absence of Basic Hire Rates being provided by the defence

From my experience most judges are prepared to substitute alternative rates for physiotherapy, even *in the absence of evidence of alternative rates* provided by the defence. There is no reason why this should also not be applied to credit hire cases as well, excluding taxi hire and "luxury" vehicle cases. In taxi hire and "luxury" vehicle cases, I accept the position may not be so straightforward. However, in other "standard" cases, it should not be too complicated for a court to award daily rates without the need for Basic Hire Rates being provided. The approximate rates which mainstream suppliers charge for non-credit hire rates for standard vehicles is common knowledge. Indeed, a quick glance on the internet would readily disclose standard rates for hire vehicles. In my view it would be something within the "daily diet" of district judges.

This would in my opinion lead to increased efficiency. It would save considerable time in having to collect the basic hire rates. Often the defence will only provide evidence of Basic Hire Rates. In some cases, the Claimant will also provide BHR evidence in order to rebut defence evidence. These BHR rates can amount to hundreds of pages. This can take considerable time in court in dealing with.

## Summary and conclusion

I suggest three changes: (1) in order for a hire agreement to be declared a sham, there should be no requirement for a "*common* intention to deceive" as per Snook v West Riding Book in *credit hire cases*. Instead, an intention to deceive *by one party* should be sufficient; (2) the debarring orders should not be made in credit hire cases. An order that the claimant should provide the relevant impecuniosity documents should be made without the debarment provision. Any breaches of the order can be dealt with by the trial judge, depending on the extent of the breach and any explanation given by the claimant in evidence and (3) the courts should be prepared to substitute reasonable rates, even in the absence of Basic Hire Rates being provided in non-impecuniosity cases. This would align the position with the approach often taken by the courts for physiotherapy rates.

In my view these changes would potentially increase transparency, accountability, clarity, justice and efficiency. The so-called "credit hire" wars have gone on for far too long, in my view. By bringing the real issues in credit hire cases out into the open in a transparent way and allowing more flexibility in cases, there might actually be a reduction in the tension between the defendant insurance companies and claimant solicitors.

I am not stating everyone should agree with my proposed changes to credit hire. What is more important is that there should at least be more thought and discussion applied in trying to reduce the long running animosity between the parties in credit hire. As Albert Einstein stated: "Insanity is doing the same thing over and over and expecting different results." No war can realistically last forever...

Azeem Ali

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

 11/06/2021

## contact the author:

**Azeem Ali** (1997)
Barrister

**Contact:**
Email: **ali@clerksroom.com**
Call: **01823 247 247**

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**@Azeemali1Ali**

clerksroom.com