

Credit Hire: Pitfalls and Practical Solutions

By Andrew Mckie (Barrister at Law) – Clerksroom – June 2012

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Introduction

- Credit hire has always been a demanding and technically complex area of law.
- This factsheet seeks to highlight some of the key cases, both new and old, to assist those who practice in this area. The factsheet also attempts to provide some practical tips in relation to practice and procedure to deal with credit hire claims.
- The factsheet concludes by providing a summary of recent decisions.

Need for Hire/ Mitigation in Relation to Need / Duration of Hire

- It is a long standing principle of tort law that the Claimant has a duty to mitigate his loss. In ***Lombard North Central Plc v Automobile World (UK) Ltd [2010] EWCA Civ 20***, the Court of Appeal addressed the important issue of a party's duty to mitigate its loss. This duty arises in claims in contract and tort, and provides that an injured party cannot recover damages for any loss which could have been avoided by taking reasonable steps. The second limb prohibits unreasonable steps which increase loss. Whilst this case does not create new law, it is a timely restatement by an appellate court of the applicable principles. **In particular, the Court noted that the duty is not a "demanding one" and the onus is on the defaulting party to demonstrate that the other side has failed to mitigate its loss.**
- The Claimant must prove his need to hire a replacement vehicle, although the burden will usually be easy to satisfy. The need for a hire car is not self-proving (***Giles v Thompson [1994] 1 AC 142 per Lord Mustill at 167***). In most credit hire cases, the test to establish the need for another vehicle will be a low one, as this will be self-evident, if the Claimant already owned and ran the vehicle involved in the accident. However, the Defendant can displace the inference depending on the circumstances. Examples given in the leading case of ***Giles v Thompson (1993)*** include where someone is on holiday following the accident or is in hospital. In circumstances where the Claimant has a second car which could be used, a Court might find that it was again unreasonable to hire a vehicle in the circumstances.

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- It is important to remember that the need to hire depends upon the facts of the case. It is therefore important to ensure that the need for hire is established at the outset of the claim, to avoid a scenario where significant hire charges are incurred by the Claimant, and where the Claimant may be personally liable for hire charges incurred under the hire agreement.
- It is therefore important to ask the following question of the Claimant at the outset of the claim, to ensure that the need for hire can be established:-
 - a) Does the Claimant have any alternative vehicles in the household or that could have been borrowed from friends or family, instead of hiring on a credit basis?
 - b) If the Claimant had access to another vehicle, why did the Claimant still need to hire? Were both the credit hire car and the other vehicle in use at the same time?
 - c) Does the Claimant own more than one vehicle? The Defendant may be able to make enquiries with the DVLA/ Claimant's insurer and/ or request specific disclosure of the Claimant's certificate of insurance to confirm this.
 - d) If the Claimant did have access to more than one vehicle, is there any reason why he specifically needed to hire a vehicle?
 - e) Were temporary repairs possible to the Claimant's vehicle so he could have avoided on-going hire charges? If the engineer does not mention this in his report, it is always worth clarifying with the Claimant's engineer, by way of a Part 35 question, if necessary.
 - f) Could the Claimant have expedited the repair period any more quickly, for example, if the Claimant's vehicle was awaiting parts to arrive at the garage, could the garage have affected temporary repairs to the Claimant's vehicle? If the engineer does not mention this in his report, it is always worth clarifying with the Claimant's engineer or repairing garage, by way of a Part 35 question, if necessary. It will not be enough for the Defendant simply to say that the repair took too long, he must show that the Claimant has failed to mitigate, which requires a finding of some conduct on the part of the claimant, or on the part of someone for whom he is in law responsible, or indeed of a third party, which can truly be said to be an independent cause of the loss of his car for that period (***Mattocks v Mann [1973] RTR 13 per Lord Justice Beldam, at page 18***). If the garage has caused any unnecessary delay with the repairs, the Defendant may wish to consider adding in the garage or repair organisation as a potential Defendant.

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- g) Did the Claimant actually use the credit hire vehicle? Check the mileage in and out on the hire agreement or clarify with the Claimant. If the credit hire vehicle was only used for minimal journeys, could the Claimant have managed using public transport or taxis to cover the same journeys which would have been cheaper?
- h) Did the Claimant have sufficient funds to have purchased another vehicle at the start of the hire period, or during the hire period? Check the Claimant's financial disclosure.
- i) Consider the hire period generally to consider what is reasonable:-
 - a) Did the Claimant have his vehicle inspected within a reasonable period of time (7 days may be reasonable from the date of the accident)
 - b) Was the report disclosed to the Defendant's insurer within a reasonable period of time (7 days following inspection may be reasonable) and the Defendant's insurer offered the opportunity to make an interim payment?
 - c) If the vehicle was a total loss? Was there any delay making an interim payment? Was the interim payment chased? If so, how many times and how often? What was the reason given for any delay by the Defendant in making an interim payment?
 - d) If the vehicle was repairable, did the Claimant or his representative chase the repairing garage? If so how many times? Was the vehicle placed into repairs as soon as it was inspected, if not was the delay the Claimant's fault?
 - e) If the Claimant required the Defendant to fund the repairs, was the vehicle placed in for repairs, as soon as the Defendant's cheque was received and banked? If not, was the delay the Claimant's fault?
 - f) Was the vehicle repaired in accordance with the timescale set down by the engineer? If not, was the delay the Claimant's fault, or beyond the Claimant's control?
 - g) Once the vehicle was repaired/ total loss cheque received and banked, was the credit hire vehicle returned within a reasonable period of time? (24 -48 hours may be reasonable).

Offer of a vehicle from the Claimants' Insurer of the Defendant

- Most recent authorities suggest that a Claimant does not fail to mitigate their loss by obtaining a courtesy vehicle from their own insurer to mitigate their loss even if this would have been free of charge. Courts have tended to favour the argument that benefits acquired under an insurance policy are not taken into account in assessing loss or mitigation. However again the particular circumstances need to be considered.

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- The case of whether the Defendant can rely upon an offer of a free vehicle to the Claimant was decided in the case of **Copley v Lawn (2009) EWCA Civ 580; (2009) RTR 24**. It was held that where a Claimant's car was damaged in a road accident and the claimant wished to hire a replacement, it was not unreasonable to reject an offer of a replacement car from the Defendant's insurer if that offer did not indicate the cost of hire to the insurer. A Claimant who unreasonably rejected or ignored a defendant's offer of a replacement car did not forfeit his damages claim altogether but was entitled to recover at least the cost which the Defendant would reasonably have incurred.
- It is therefore important to ask the following questions of the Claimant at the outset of the claim, to ensure that an offer from the Defendant's insurer to the Claimant will not cause any issues later on :-
- Did the Claimant have a free/ courtesy vehicle on his own policy? If so, on what terms would the vehicle be provided, for how long would the vehicle be provided and what type of vehicle would be provided? The Defendant may ask for disclosure of the Claimant's policy of insurance and/ or policy schedule to confirm this.
- Did the Defendant make the Claimant an offer of free hire or repairs following the accident? If so, did this offer state the cost to the Defendant of the hire? If so, the Claimant should be asked to provide a copy of the offer letter. Sometimes these offers are made once the Defendant knows the Claimant has been placed into hire and the Claimant should be asked to forward any such letters received to his Solicitors.

Rate of Hire ?

- It is trite law that where a Claimant is found to be impecunious the credit hire 'spot rate' will apply i.e. the cost of hiring a vehicle an ordinary hire vehicle in the Claimant's locality.
- The burden is placed upon the Defendant to obtain the 'spot hire' report and to show the rate charged by the credit hire company was unreasonable. Where such a report is served by the Defendant, it is important that the Claimant considers obtaining evidence in support of the credit hire claim. This can be research in the form of a witness statement from the Claimant's Solicitor showing rates for vehicles in the Claimant's locality at the time of the accident. In order to obtain such evidence, the Claimant's Solicitor would have to conduct a short survey by telephone of hire companies in the Claimant's area to obtain rates for comparable vehicles at the time of the accident.

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- It would be important for any comparable rates obtained confirmed the following information about the ‘spot hire’ rate, in relation to the credit hire vehicle:-
 - a) The make and model of the spot hire vehicle was of the same class as the credit hire vehicle. The various ABI classes can be found at <http://apps.abi.org.uk/tphire>.
 - b) The spot hire vehicle would reasonably have been able to be hired at the same time as the credit hire vehicle.
 - c) The Claimant could have hired that vehicle, bearing in mind insurance factors such as age, driving convictions etc.
 - d) The rate quoted, would have applied, for same period that the Claimant hired for.
 - e) Any extra quoted such as collision damage waiver, insurance etc would have been comparable to the ones offered in relation to the credit hire vehicle.
- Consequently it follows, that there are a number of ways in which the credibility of ‘spot hire’ rates obtained can sometimes be challenged on one or more of the following grounds:-
 - The credit hire rates will more often than not be charged at a daily rate, as the credit hire company will not usually be aware at the start of the hire period, how long the Claimant needs to hire for. The Defendant will more often than not produce a report where a discount has been provided by the spot hire company for hiring a vehicle for a number of days. It can be argued that this discount would not have been available to the Claimant as they would not have known for how long they would have been hiring the vehicle for given this would depend on how long the repairs took and/ or when the total loss cheque was received. It can therefore be argued that the defendant’s rates evidence, does not offer a rate that would have reasonably available to the claimant at the time of the accident and during the period of hire and therefore the ‘spot hire’ rate is not a comparable one.
 - It is important to check that the Defendant’s ‘spot hire’ report specifies that the vehicle quoted would have been available to the Claimant at the time of the hire and for the duration of the hire. If the Defendant’s evidence is not contemporaneous, the Claimant may be able to argue that data offered is not comparable to the credit hire vehicle rate, as the spot hire vehicle would not have been available to the Claimant at the time of hire.

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- It is important to check the vehicles quoted in the 'spot hire' report would have been available in the Claimant's locality. If the vehicles were not local to the Claimant and a delivery/ collection service was not offered, would this mean that the Claimant may have to travel an unreasonable distance to collect and drop off the 'spot hire' vehicle? It is particularly important to check this point in relation to prestige vehicles, which may be more difficult to hire on a 'spot hire' basis in the Claimant's locality.
- Often only the headline daily rate of hire is considered when looking at whether the Claimant could afford to hire at 'spot rates'. Many 'spot hire' companies will require the Claimant to pay upfront charges for services such as a deposit, excess waiver, collision damage waiver, insurance etc, which the Claimant would not have to have paid for upfront on a credit hire basis. These can run into many hundred or even thousands of pounds over the course of the hire period. Even if the Claimant was not impecunious/ does not plead impecuniosity, it is advisable to check with the Claimant whether they could have afforded to pay these charges up front, in order to hire at 'spot rates' by paying these charges up front. If they could not, then the Claimant is likely to be impecunious.

Impecuniosity

- It is trite law that the Claimant will be able to recover the credit hire rate, if the Court finds that he impecunious. The Court will take into account the Claimant's financial position when deciding whether the Claimant is impecunious or not. In *Lagden v O'Connor* the test was whether there was an inability to pay hire charges without making sacrifices [a Claimant] could not be expected to make. A further test was whether the payment of hire upfront would bring an unreasonable burden upon the Claimant.
- When setting out to determine whether the Claimant was impecunious or not, the following points may be useful:-
 - a) The Court will more often than not expect disclosure of all the Claimant's bank, savings accounts, wage slips and credit card accounts for 3 months before the hire period and covering the hire period. In addition, if the Claimant was self-employed, copies of profit and loss accounts/ tax returns for the period two years before the accident and covering the period of hire.
 - b) In addition, if the Claimant's partner/ spouse was a named person on the hire agreement i.e. as a additional driver, their financial documents as listed above may also be reasonably requested. In my opinion, any disclosure order that goes beyond this, should be challenged by the

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Claimant. The Claimant is required to prove that he was impecunious on the balance of probability.

- c) It should be recorded that the Claimant is required to plead whether he was impecunious in the Particulars of Claim.
- d) If the Claimant pleads impecuniosity, the Claimant must obtain all the documents specified in the order and in full for all the dates ordered by the Court. The Court is often prepared to grant an Unless Order that the Claimant be debarred from relying upon the issues or impecuniosity or even striking out of the whole credit hire claim, in the absence of full disclosure by the date on the Order, upon an application by the Defendant. The disclosure is relevant to the issue of both whether the Claimant was impecunious and whether there has been a failure to mitigate loss.
- e) When checking if the Claimant was in fact impecunious, the Claimant's financial disclosure should be considered carefully to ensure that full disclosure has been provided for example:-
 - i) do the bank statements disclosed show transfer of funds to any linked accounts? If so, has full disclosure been provided?
 - ii) do the bank statements reveal ordinary spending habits of day to day living i.e payment of utility bills, mortgage, rent etc? If not, could there be more accounts?
- f) When checking the Claimant's financial disclosure consideration should be given to whether the Claimant at any point during the hire period had sufficient funds to reasonably buy or hire a replacement vehicle in order to bring the hire to an end. If there are significant such sums in the Claimant's accounts at any stage, the Claimant should be asked to confirm if those sums were earmarked for any other purpose i.e deposit for a house etc. It is wise for the Claimant's Solicitor to draft a detailed witness dealing with any such explanations.

Enforceability

- It is vitally important at the outset of the credit hire claim to check that all the hire agreement will be enforceable, against the Defendant, or the hire claim may fail on this point alone. Some the common problems may be outlined as follows:-

- a) Did the Claimant sign the hire agreement? If not, the hire agreement is unlikely to be enforceable against the Defendant.

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- b) Did someone else sign the hire agreement on the Claimant's behalf? If so, did the person who signed the agreement have the Claimant's ostensible authority to do so? If not, the agreement may not be enforceable against the Defendant. If someone else signed the agreement on behalf of the Claimant, a statement from that person will be required to confirm this.
- c) If the credit hire agreement makes provision for payments not exceeding 4 within 12 months of the date of hire, it is likely to be difficult to challenge the validity of the agreement itself. In *Dimond v Lovell (2000) 2WLR 1121 (HL)* and then *Clark v Ardington*, the Court held that *Consumer Credit (Exempt Agreements) Order 1989 (SI 1989No. 869)* exempted consumer credit agreements if the total number of payments to be made by the debtor did not exceed four and those payments were required to be made within a period not exceeding 12 months beginning with the date of the agreement. If an agreement
- d) Where was the hire agreement signed? If the hire agreement was signed at the office of the hire company, this should not cause an issue. However, if the credit hire car was delivered to the Claimant's home address or place of work, check whether the *Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008* apply. If the hire agreement did not contain a cancellation notice, the agreement may be unenforceable against the Defendant.
- e) **Other points to consider in relation to enforceability:-**
- f) Did the Claimant own the car involved in the accident and is he therefore the person who was properly entitled to hire? A DVLA search can be undertaken to confirm the registered keeper and the Claimant should be asked to provide evidence of purchase of the vehicle. The registered keeper at the DVLA may be always be the owner.
- g) Did the hire company own the vehicle hired to the Claimant? If not, should it have been properly hired to the Claimant in the first instance? A DVLA search can be undertaken to confirm the registered keeper and the Claimant should be asked to provide evidence of purchase of the vehicle. The registered keeper at the DVLA may be always be the owner.

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- h) Was the Claimant's vehicle insured on the day of the accident and was the credit hire vehicle insured for use as a credit hire vehicle? If not, was the Claimant's vehicle/ hire vehicle illegally on the road at the time of the accident? The Claimant and the hire company should be asked to provide a copy of the relevant certificate of insurance covering the date of the accident and the duration of the hire period.
- i) If the Claimant was a taxi driver did he have the correct taxi license and did the credit hire vehicle have the correct license to be used as a private hire vehicle? If not, should the vehicles have been used as a private hire vehicle either on the day of the accident, or during the hire period? The Claimant should be asked to produce the relevant taxi licenses for the vehicle damaged on the accident and the for the hire car, covering the duration of hire.

Other areas to watch out for?

Tax and MOT

Some credit hire companies in practice make charges on the hire agreement for the ordinary costs of running the vehicle such as Road Tax and MOT. It is arguable that these are not recoverable as they form an ordinary part of the cost of running a hire company business.

Collision Damage Waiver

It is important to check that whether the vehicle could have been insured on the Claimant's own policy therefore avoiding these charges.

Extra such as an Automatic, Satellite Navigation etc

If the credit hire company has charged the Claimant for extras on the agreement such as an automatic vehicle, satellite navigation etc check whether the Claimant's own vehicle was equipped with these items. If the Claimant's own vehicle did not have the benefit of the items, it may be unreasonable for the Claimant to recover them from the Defendant, as this would be betterment. The Claimant is entitled to recover on a like for like basis and nothing more.

Young drivers/ Drivers with Convictions

Young drivers or drivers with previous motoring convictions may find it difficult to hire from a 'spot hire' company due to insurance purposes, even if they are not impecunious and therefore the credit hire rate may apply. If the Defendant disclose 'spot rate' evidence it is important to check with the Defendant whether the 'spot hire' company would have insured such as person to drive the 'spot hire' vehicle.

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Taxi Claims

Taxi drivers will commonly be able to recover the credit hire rate, even if they are not impecunious, due to the difficulty of obtaining a private hire vehicle from a regular 'spot rate' hire company. There are not many companies that provide such vehicles due to the high cost of insurance of insuring private hire vehicles.

If you are presented with a claim for a taxi hire, and it appears that the Claimant may have failed to mitigate his loss, 4-6 weeks of credit hire may be recoverable in any event. In order to put a private hire vehicle back on the road, will normally require the vehicle to involved in the accident to be repaired/ replaced, the credit hire vehicle to be registered with the taxi licensing authority and the Claimant's vehicle then to be inspected again by the licensing authority before it can be used again as a private hire vehicle again. All this takes time.

Any questions?

Andrew Mckie is a Barrister at Clerksroom specialising in claimant and defendant personal injury, credit hire, and fraud.

Andrew undertakes claimant and defendant instructions, for the following types of work:-

- Credit hire small, fast track and multi-track claims.
- Advices in relation to the prospects of success of credit hire claims.
- Pleadings in relation to credit hire claims including Defences and Reply to Defences.

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