Personal Injury

Credit Hire - The Secular War Continues

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In the sphere of credit hire litigation, military metaphors abound. The chain of appellate decisions in this area (stretching back to Dimond v Lovell [2002] 1 AC 384) were famously described by Aikens LJ as constituting a 'secular war' between credit hire organisations and insurance companies, and the most recent judgment in the series begins with Flaux LJ's recognition of the *"long running battle between the motor insurance market and the credit hire companies".* In that judgment - *McBride v UK Insurance Ltd; Clayton v EUI Limited* [2017] EWCA Civ 144 - the tide of battle appears to have turned the way of the motor insurers. Heard on 22 February 2017 and handed down on 15 March 2017, it is already altering the position in County Courts throughout the land. Now that the dust has settled, how does the battlefield lie – and who has survived?

Strategy of the Appeals

The strategy behind these conjoined appeals, which related to credit hire agreements provided by Accident Exchange Limited ("AEL"), was both to make a direct attempt to knock down the insurer citadel of *Stevens v Equity Syndicate Management* [2015] EWCA Civ 93 and, in any event, to limit the effect of that decision by establishing precedents through which it could be undermined or avoided in a significant number of cases. For those who aren't engaged in credit hire on a daily basis, it is perhaps worth recalling that only claimants who are found to have been impecunious, so that obtaining credit was their only option, are able to recover the full credit hire rate. Claimants who were pecunious may only recover the 'basic hire rate' ("BHR"). Stevens was the judgment which held, amongst other things, that the BHR should be equivalent to *"the lowest reasonable rate quoted by a mainstream supplier for the basic hire of a vehicle of the kind in issue to a reasonable person in the position of the claimant"* (per Kitchin LJ). Unsurprisingly, the restriction of the BHR to the lowest reasonable rate has caused significant difficulty for credit hire Claimants and the industry which provides their vehicles.

Unable to argue that Stevens is simply wrong in the lower courts, counsel representing claimants in credit hire cases at first instance have become used to relying on arguments which seek to establish that the rates evidence adduced by the Defendant is inadequate and not capable of leading to any finding as to the BHR. Two of the most popular methods of undermining rates evidence are either to argue that the BHR has been calculated using hindsight (most notably by applying a discount for monthly hiring when the Claimant could not have known how long he/she would have needed to hire) or that it includes elements which would have placed the Claimant in a worse position than the credit hire agreement (most usually, by either obliging him/her to purchase excess waiver insurance or imposing a non-negotiable excess). The latter argument most commonly relies for its foundation upon the judgment of Morrison J in *Bee v Jenson* [2006] EWHC 3359 (Comm).

First Instance Facts

Neither of the conjoined cases disclosed facts which would come as a significant surprise to regular credit hire practitioners. In McBride, the Claimant had hired a Jaguar with a nil excess over a period of 77 days at a total cost of £40,215.11. Whilst both parties produced evidence of the basic hire rate, there was no proof that a nil excess would have been available other than through the credit hire agreement. District Judge Brookes ignored the Defendant's rates evidence entirely, given that it did not allow him to know what the cost of reducing the excess would have been. He was

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prepared to accept that the companies cited by the Claimant were 'mainstream', and as a result calculated the lowest reasonable rate in accordance with Stevens notwithstanding the non-availability of a nil excess, awarding a total of £19,980.

In Clayton, the claimant had hired both a BMW M3 and a Mercedes E350 at a total cost of £24,823.20, for a period of 52 days. The Claimant's basic hire evidence was irrelevant to the claim (embarrassingly, it referred to car hire in York, rather than in Colchester where the claim was being heard), and was therefore ignored by District Judge Mitchell. The Defendant's rate evidence was also problematic, in that it was calculated with respect to the cost of hiring over a 28 day period, and not the cost of hiring over 7 days. In addition, it did not reflect the fact that the credit hire agreement had allowed the Claimant to hire with a nil excess, but it did provide evidence about the cost of purchasing a separate excess reimbursement insurance policy. Despite the paucity of evidence, the judge adopted a figure from the Defendant's BHR report of £10,505.33 and then added a 25% uplift to reflect both the sums payable for excess insurance cover and the difference between the 28 and 7 day calculations (10% for the former and 15% for the latter).

Grounds of Appeal

Unsurprisingly, neither of these decisions were to the liking of AEL, and both were appealed. No time was wasted, as the first instance trial in McBride occurred just one week after Stevens was handed down. The judgment in McBride was appealed on three grounds, namely:

1. That the decision in Stevens was wrong, and inconsistent with previous Court of Appeal authority.
2. That the judge was wrong to rely on the evidence adduced by the claimant, as none of the rates were from mainstream suppliers.
3. That in the absence of a BHR quote with a zero excess, the defendant had failed to discharge the burden of proving there was a comparable BHR which was less than the credit rate; therefore the judge was wrong to award the BHR and the hire charges should have been awarded in full. In an alternative 'ground 3A', it was submitted that the judge should at least have uplifted the BHR so as to allow for an excess waiver to have been purchased.

The judgment in Clayton was also appealed, with the substantive ground being that the adjustments made by the first instance judge went further than was permissible, and amounted to nothing more than guesswork with no basis in the evidence.

Outcome of the Appeals

If the credit hire landscape is a battlefield, then the first ground of appeal in McBride was something of a Charge of the Light Brigade. The *"uphill struggle"* faced by the Appellant on this ground of appeal was readily acknowledged by leading counsel, who made submissions that Stevens had been decided per incuriam but, largely, constrained himself to asking for permission to appeal to be granted so that the inevitable Court of Appeal dismissal of the first ground could be taken to the Supreme Court if felt appropriate. Such permission was granted and then, in short order, Flaux LJ found that Stevens was good law.

That frontal assault on Stevens having been beaten back, the Court of Appeal then deliberated even more concisely on the second ground of appeal. Flaux LJ held that the conclusion that the suppliers in question were 'mainstream' was one open to the first instance judge, and should not be disturbed on appeal. This ground of appeal was not even dismissed, as permission to appeal was not granted.

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Battle was then joined on the 'main' question of the appeal – the third ground in McBride, and its overlap with the ground in Clayton. Rejecting the arguments of the Appellants, Flaux LJ held that *"where a nil excess is not available from car hire companies, the correct approach is to treat the nil excess separately from the comparison exercise between the default credit hire rate and the basic hire rate with an excess".* In a small sop to the credit hire industry, however, he did also state that *"it will almost invariably be the case that it was reasonable for the claimant to seek a nil excess…and, on that hypothesis, the only question for the Court will be how much should be recoverable as the cost of purchasing a nil excess".* As a result, the third ground was dismissed but 'ground 3A' was allowed, granting the Appellant an uplift in the princely sum of £10 per day (being the amount he was paying to AEL for his excess waiver).

In Clayton, whilst the Court of Appeal engaged in significant criticism of the first instance judge (whose approach was memorably described as *"even-handedly offensive"),* further solace was given to the motor insurance industry through Flaux LJ's finding that the exercise of arriving at the BHR *"was necessarily an approximate and artificial one"* and that appeal courts should not be too ready to intervene with experienced county court judges in such matters. The trial judge was justified in using a rough and ready reduction to arrive at an appropriate daily rate for the BHR, and had sufficient evidence before him of the appropriate excess waiver rate to make the decision he did.

The Way Forward

Given the almost complete rout of the Appellants in this latest skirmish, it might be thought that every Defendant in a credit hire case is now sat comfortably in a defensive position. What could possibly be done to dislodge them, with the Claimant labouring under both Stevens and McBride? In my view, however, lawyers acting for credit hire claimants should not despair and defendants should certainly not become complacent. Whilst the most recent decisions by the Court of Appeal have not been helpful to Claimants, one key paragraph in McBride/Clayton should not be overlooked. At paragraph 83, Flaux LJ states that *"the burden is on the defendant to demonstrate that the credit hire rate exceeds the basic hire rate and thus includes irrecoverable elements which need to be stripped out",* reaffirming the existing position in Stevens (paragraph 21, per Kitchin LJ). Whilst this might seem obvious to regular practitioners, Flaux LJ was forced to make this plain as the judge on first appeal had placed the burden of proof on the Claimant – something that even experienced judges are still wont to do.

In other words, the Defendant's BHR evidence must still come up to proof. The default position, in the absence of BHR evidence, is that the credit hire rate is reasonable. Whilst it is no longer a claimant's 'knockout blow' to argue that BHR evidence is based upon an overly discounted total number of days or does not provide the possibility of a nil excess (if it ever was, with different first instance judges taking widely varying positions on the issue), the BHR evidence must still satisfy the Stevens criteria of proving that the rates offered by a mainstream or local reputable supplier were lower than the credit hire rate.

Rates evidence which purports to rely upon availability in another part of the country (a relatively common occurrence in specialist vehicle hire claims) will still be vulnerable to attack, as will rates evidence which does not make it clear that the particular Claimant could actually have hired the vehicles in question (if they are a young driver, for example, or if the hire required a minimum period or a very substantial deposit). Crucially, those acting for claimants in credit hire cases should understand that whilst Stevens set out an objective test for the BHR (in other words, it is not relevant what the particular claimant would have been willing to pay), paragraph 35 of Kitchin LJ's judgment makes it clear that the personal circumstances of the Claimant are relevant inasmuch as they affect the decision of a supplier to hire a vehicle to them at all. As that paragraph states, *"the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle* ***to a person such as the claimant*** *is a reasonable approximation to the BHR".*

Legal soothsayers have been predicting an end to the 'secular war' for the last decade and more. Thus far, new fronts of conflict have always opened up, often shortly after the Court of Appeal has handed down judgment which has closed down another. It seems unlikely that peace will break out in credit hire litigation anytime soon.

Matthew Sellwood regularly appears in the County Court on credit hire matters, and has provided training to solicitors and paralegals on the topic. For more information on his latest case highlights or Devereux's leading personal injury and clinical negligence team, please contact our practice managers on 020 7353 7534 or email clerks@devchambers.co.uk.

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