Practice and Procedure for Claimants and Defendants in Credit-Hire Cases

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Adapting procedure to credit hire

Credit hire cases are of course subject to the standard rules of practice and procedure and this article does not attempt to be a review of the Civil Procedures Rules. What it is intended to do is to focus on particular issues that a credit hire dispute is likely to throw up and to explain how to apply the rules of procedure to the advantage of the relevant party, claimant or defendant.

The starting position is to ask what is the case that the relevant party has to prove. Once the points to be proved, and where the burden lies, are established, the rules of procedure can be adapted accordingly. Helpfully, the Court of Appeal has set out a guide in the form of the eight principals expressed by Aikens LJ in *Pattni v First Leicester Buses Limited; Bent v Highways and Utilities Construction,*[i] at paragraphs 30 to 41 of his judgment. I will summarise these briefly before turning to how they impact on practice and procedure.

The 8 principles in *Pattni*

- ***First Prin*ciple** [ii]

The first principal lays out the basic ground: an innocent claimant can recover damages for loss of use of his or her car even where a car is a non-profit earning chattel. Further, it is the duty of the claimant to mitigate that loss. Hiring a replacement car is such mitigation. Where the claimant has mitigated the loss of use by hiring a car, the cost of such hire will be the measure of damages.

- ***Second Principle*** [iii]

There is a real loss recoverable in damages even though under the hire agreement the claimant does not have to pay until a judgment: in those circumstances the hire is not "free". The hire charges are recoverable as "special damages". However, if the claimant was not justified in hiring a replacement car to mitigate his or her damages for loss of use, recovery will be limited to recovering only "general damages" for loss of use. It is for the claimant to prove that justification.

- ***Third Principle*** [iv]

When mitigating loss, claimants must act reasonably: "*The need for a replacement car is not self proving*" (Lord Mustill in *Giles v Thompson*).[v] The claimant must therefore prove three things:

a) a reasonable need to hire a car at all;
b) a reasonable need to hire it for the period for which it was hired;
c) a reasonable need to hire a car of that size or quality.

- ***Fourth Principle*** [vi]

To recover the cost of hiring the car on credit at the Credit Hire Rate, the claimant must prove a need to hire the car on credit rather than "cash" terms. This is commonly referred to as evidence that the claimant was "impecunious". A claimant is not impecunious if he or she could pay in advance and not on credit terms (without

having to make unreasonable sacrifices)[vii]. If not impecunious, the claimant can only recover the "Basic Hire Rate", the rate formerly known as the Spot Rate.

- ***Fifth Principle*** [viii]

If the claimant cannot show impecuniosity, only the Basic Hire Rate ("BHR") can be recovered. The BHR is usually less than the Credit hire rate ("CHR"), as the CHR usually covers additional services, but it is for the defendant to prove that there is a difference between the CHR and the BHR, so as to establish that the damages to be awarded to someone who could afford to pay upfront are to be reduced to the BHR. The defendant must do this by evidence.

- ***Sixth Principle*** [ix]

If the claimant can prove that it was reasonable to hire a car, the car hired was of a reasonable size and type, and that he or she was impecunious, the claimant can recover the whole of the credit hire as special damages (and this will be so even though the CHR includes additional benefits or if the CHR was at the top end of local credit hire rates).

- ***Seventh Principle*** [x]

Interest on deferred hire charges is not recoverable. Because the hire is on credit, the claimant has not expended the money to pay for it and is not out of pocket. In so far as interest on the hire charges is provided for separately in the credit-hire agreement, it is not recoverable as interest is not part of the damages for loss of use – it is the price for deferring payment, which is an additional benefit to be stripped out. However, it can be noted that if there is no separate provision of interest and the hire company has simply increased the CHR to cover its costs of deferred receipt, **t**here is no stripping out exercise: an impecunious claimant can recover the CHR (see principle 6 above) and one who is not will only recover the BHR to the extent that the defendant establishes that by evidence (see principle 8 below)

- ***Eighth Principle*** [xi]

The BHR, i.e. a rate stripped of additional services and the benefits of credit, has to be proved by the defendant by direct evidence of local basic hire rates. The defendant cannot do it by attempting to break down the CHR into its constituent parts or by applying a "reasonable discount" to CHR. The evidence of local BHR rates can either be taken from the claimant's hire company's own basic hire rates for the car or the basic hire rates charged by other car hirers in the area for the type of car. However, a claimant only has to act reasonably: what is reasonable depends on the circumstances, but it means that a claimant can recover even if the hire charge is at the top end of the hire rates (see *Burdis v Livsey*).[xii]

On this last point, as shown by the judgment of Aikens LJ in the appeal of *Bent* (conjoined with the appeal of *Pattni)*, evidence of the BHR need not relate to the exact car hired and the exact time of the hiring. Further, if the claimant has hired at a cost at the top end of credit hire rates, then the equivalent BHR should also be taken from the top end of BHR rates, provided that the claimant acted reasonably.[xiii] Moreover, the exercise for the defendant is a fact–specific matter, and if a defendant cannot establish on the balance of probabilities that there is a difference between the CHR and a particular BHR, the defendant will have failed to discharge the burden of proof and the claimant will recover the CHR.[xiv]

With those principles in mind, the structure of what each party to the action has to establish becomes clear, and the CPRs can be applied accordingly.

Pre-action procedure

Where there has been a personal injury as a result of the accident, the pre-action protocol for personal injury will apply. In that case, as well as any hospital details, the points to be included in the Letter of Claim include details of the claimant's insurers and such information as is sufficient to allow the defendant's insurers to put a broad value on the risk. Until and unless there is a response disputing liability (which can take up to 3 months), there should be no further investigation on liability until a response disputing liability. Once there is a response to the Letter of Claim, a schedule of special damages and supporting documents should be sent as soon as practicable.

Allocation

The next issue is to which track the claim should be allocated under CPR 36, the small claim track or fast-track? The claim will be a fast-track case if the claim is for £5,000 or more, there is a claim for damages for personal injury cases where general damages exceed £1000, if experts are required or if the case involves complex issues. As far as the average credit-hire claim is concerned not involving personal injury, the claim is likely to be less than £5,000; it is unlikely that expert evidence is necessary (see below under expert evidence) and recent cases have largely resolved any complex credit-hire issues; so the small-claim track will be appropriate.

With a small claim, there is limited recovery of costs, with an entitlement only to court fees, witness attendance expenses and a small fixed sum for solicitor's costs. If unusually permission for an expert is given, there are restrictions for recovery of an expert's fees. Extracting accurate information from a claimant is more difficult. There is no formal disclosure procedure, although copies do have to be provided and the court may have its own standard directions as to documents to be disclosed in credit hire cases (for example if impecuniosity is in issue), and the provisions for Requests for Further Information under CPR 18 do not apply.[xv]

Disclosure

Standard disclosure under CPR 31 requires disclosure of the documents on which a party relies and of documents which adversely affect its own case or support the other party's case (as well as any documents required to be disclosed by a relevant practice direction). As noted above, the local court may have its own standard direction as to disclosure in credit-hire cases. Disclosure is a duty that continues throughout proceedings, so that if circumstances change, or documents emerge, such new documents must be disclosed.

"Documents" includes anything in which information is recorded. It can therefore include on-line material such as bank statements or credit reports. Not all documents need to be disclosed however. The party need only make a reasonable search. What must be disclosed depends in part on the ease of retrieval and the nature and complexity of the

proceedings. The documents are also limited to documents in a party's control. This does not include documents in the hire company's control. Where there are multiple copies of the same document, further copies of the same document need only be disclosed if materially marked. Privileged documents are not disclosable unless privilege is waived. Privilege is not waived simply by referring to a document (for example to the fact that an advice has been received from counsel) but it can be waived where a party relies on the contents of a document that would otherwise be privileged (for example by saying counsel has advised the claim should succeed).

Parties may also see documents mentioned in a statement of case, a witness statement and an expert's report and references to statements of case include Further Information, even if given voluntarily. However, for the rule to apply there must be a specific mention of the document.

Disclosure is likely to be a greater burden for the claimant than the defendant in a credit-hire case. Perhaps most importantly the claimant should disclose the hire contract (with signature). He should also disclose any documents showing a need (or lack of it) for a car in the first place, and in particular a need for a car of the type and size actually hired. There should be disclosure of any documents showing the period for which hire was necessary. Any documents showing the steps taken to arrange hire will need to be disclosed to show that the claimant acted (or failed to act) reasonably in the hire (other competing quotes for example). Most importantly, there must be disclosure of any relevant financial documentation going to whether the claimant is "impecunious". Documentation as to whether the claimant has a credit card (with available credit), for example, is important, as it has been suggested by Lord Hope in *Lagden v O'Connor*[xvi] as one test of impecuniosity (although in *Pattni* it was said not to be determinative)

What if when on review of the case by the claimant's advisor it appears that the claimant may fail to show a need to hire a car? In such a case, the damaging documentation must be disclosed. Such situations are not uncommon, from the claimant who is in hospital because of the accident for longer than his vehicle was off the road to the claimant who has decided to go abroad for a holiday without a car.

Equally, any documentary evidence supporting the level of general damages which may be awarded should be disclosed. In *Beechwood Birmingham Ltd v Hoyer Group UK Ltd*,[xvii] the claimant owner of the damaged car was a company with fleet cars. The Court of Appeal recognised that for individuals the award of general damages will be assessed on the basis of compensation for the lack of advantage and inconvenience caused by not having the use of a car ready at hand and at all hours for personal and/or family use. It follows that if there are documents showing the usage of the car, they should be disclosed. For companies/ business vehicles, however, the position was different.

> "*The position was that over the period reasonably allowed for repairs the claimant was deprived of deployment and use in the course of its business of one of its Audi A6 vehicles with the result that the capital value of such a vehicle was neutered/in fructuous over that period, thus meriting not an award of the costs of outside hire but an award of interest at an appropriate rate upon the capital value involved over the*

period together with a modest, if not minimal, sum in respect of depreciation over the period allowed for repairs."

However, the Judge in that case was unable to make any such award because the relevant figures were not before him.

The defendant's position is different. In order to establish a difference between the BHR and the CHR, the defendant will require evidence of basic hire rates available at the time and from the local area. These are likely to be in documentary form and therefore disclosable.

Bearing in mind the fact that, as *Pattni* shows, the burden of proving impecuniosity lies on the claimant, where disclosure by the claimant on this issue is inadequate there is little benefit for the defendant of seeking specific disclosure to fill the gaps, unless the claimant claims impecuniosity and there are real grounds for suspecting there are concealed assets.

Expert evidence/Rates evidence

The difference between calling a witness of fact and a witness of opinion, or expert, is that permission is needed for expert evidence. Expert witness can be paid a fee. However, evidence of competing hire rates, even where the evidence is given by a professional witness with access to historical records, is not expert evidence: it is evidence of fact (albeit hearsay fact), not opinion. In order to avoid any argument that such a witness is treated as an expert it is important to make sure that opinion evidence is avoided in the witness statement.

Rates evidence often takes the form of print-outs of historic records. It can be on a simpler level of internet searches by a solicitor. However, with the latter, care needs to be taken that the search is accurate – offers on the internet can appear a bargain when, on enquiry, they are in fact unavailable.

The Association of British Insurers has so called General Terms of Agreement (GTA) tables. These show rates agreed for different cars grouped by equivalent models and sizes. While the tables can be used to support challenges on the basis that the car hired is not of a similar type and size to that damaged, they should not be used to establish alternative hire rates as they are not rates available to the general public.

Witness statements

It follows from the points made above that the witness statements must reflect the case the relevant party has to make. Thus the claimant's witness statement must have evidence of the hiring and the signing of the hire contract. It must explain the need for a car generally (no available alternative transport, regular use of the car etc), and specifically of that size and make and for the period of hire claimed. It should set out the steps taken to make a hiring (to show the claimant acted reasonably in mitigation, making local enquiries to obtain a reasonable rate) and it must show impecuniosity. The witness

statement should also provide evidence supporting any (alternative) claim for general damages. In addition to the claimant's evidence about his or her actual position, it is wise to have additional evidence showing favourable local competitor rates.

Witness statements are meant to be in the witness's own words. A generic statement, not specifically based on a witness's own words and recollection, is incorrect and can lead to the claimant being caught out at trial.

The position on the defendant's witness statement is more straightforward. The defendant's witness statement must demonstrate unfavourable hire rates (both CHR and BHR rates). If the size and type of car hired are challenged, evidence of the cost of the appropriate alternatives is required.

Further Information

A request for further information under CPR 18 is a useful weapon in a defendant's armoury. A party can request clarification or additional information and this is best used by the defendant for challenging claimed impecuniosity, need or period of hire (e.g. asking about attempts or ability to borrow). A request should be made informally before any order is sought from the Court. As stated above, the Part 18 procedure is not available in small claims

Part 36 Offers

Parties can offer to settle in other ways than using the CPR 36 procedure, but a claimant then loses his or her entitlement to costs on acceptance of an offer (CPR 36.10) and to payment within 14 days (CPR 36.11) and the defendant loses the entitlement to cost protection (CPR 36.14). Part 36 does not apply to small claims.

The formalities and procedure are set out in CPR 36 and the rules do not have any special application to credit hire cases, and are therefore not repeated here.

More significant is the approach to assessing the amount of probable recovery in order to determine how high to pitch any offer. Again, what each party has to prove is important. If the claimant cannot establish need, only general damages will be recovered. If the size and type of car hired cannot be justified by the claimant, only the cost of an appropriate alternative will be recovered. If the claimant cannot establish impecuniosity, only the BHR will be recovered. Separate interest will not be recovered. However, in assessing what the BHR is likely to be found to be, the defendant must remember that, as *Pattni* established, it is a fact-specific question, and if no clear BHRcan be established, the CHR will be recovered.

As to what costs are recovered, the claimant has an entitlement to costs on the standard basis on acceptance of an offer (CPR 36.10). It should be noted that Section II of CPR 45 provides that where a road traffic accident claim is settled before action with damages agreed not exceeding £10,000 and which would not have been a small claim, costs are fixed by CPR 45.9-11. Where Section II of Part 45 applies, the provisions of that Section prevail over CPR 36.10.

Further, given the nature of credit-hire claims, it should be noted that *Solomon v Cromwell Group*[xviii] decided that steps taken in contemplation of proceedings are to be regarded as "proceedings" for the purpose of CPR 36.10(1) ("costs of proceedings"). The claimant's acceptance of Part 36 offer made before the claim is issued means the claimant is entitled to recover pre-action costs.

Conclusion

If settlement fails, then the case must go to trial. Practice and procedure in credit hire cases, whether fast-track or small claim, is very much the same as for any other trial and no special points need to be made in that regard. By applying the principles in *Pattni*, it should by now be apparent whether the case is a winner or a loser, and if a loser, it should have been settled before the door of the court.

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[i] [2011] EWCA Civ 1384
[ii] Paragraph 30 of the judgment
[iii] Paragraph 31 of the judgment
[iv] Paragraph 31 of the judgment
[v] [1994] 1 AC 142
[vi] Paragraphs 33-34 of the judgment
[vii] The words in parenthesis are from *Lagden v O'Conner* [2003] UKHL 64, paras 9 and 34
[viii] Paragraph 35 of *Pattni*
[ix] Paragraph 36 of the judgment
[x] Paragraph 37 of the judgment
[xi] Paragraphs 38-41 of the judgment
[xii] [2002] EWCA Civ 510
[xiii] Paragraph 76 of the judgment
[xiv] Paragraphs 85 to 89 of the judgment
[xv] CPR 27.2(1)(f)
[xvi] [2003] UKHL 64
[xvii] [2010] EWCA Civ 647
[xviii] [2011] EWCA Civ 1584