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## “Spot-on” Credit Hire?

By Craig Budsworth

I thought I'd better start with a brief history of case law for credit hire but you find that cases that you think are about credit hire then go back to basic contract issues and so span centuries. This made me think that the best place to start is with the case of [Dimond v Lovell \(2002\) 1 AC 384 HL](#). This case was all about enforceability under the Consumer Credit Act 1973 and it was found that the hire agreement was not enforceable or exempt in accordance with the Consumer Credit Act (Exempt Agreements Order) 1989 and so the hire was not recoverable. In itself a straight forward conclusion, however, guidance was sought, by way of obiter comments, about other aspects of hire, namely what rate was recoverable. The court commented that they felt that the 'spot' rate was recoverable and this is where the battle ground was laid down for the majority of the future cases.

Perhaps one of the next logical steps to consider is what the spot rate is and what if you can't afford to pay the spot rate, otherwise known as the impecunious hirer? This was part of the decision that needed to be made in the case of [Lagden v O'Connor \(LTL 4/12/2003 : \(2004\) 1 AC 1067 : \(2003\) 3 WLR 1571 : \(2004\) 1 All ER 277 : \(2004\) RTR 24 : Times, December 5, 2003\)](#). In this case Lord Hope stated that "He (the defendant) is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted."

I think that this implies that the onus is on the defendant to demonstrate if there is an alternative before the claimant has to show whether or not he had the money. However, in my experience, courts will tend to give an order that **the claimant** must prove that he is impecunious before the defendant has to produce evidence that there is an alternative. To combat this, when filing an allocation questionnaire, I quote this paragraph to the court and then ask that the defendant provide evidence as to an alternative before the claimant deals with impecuniosity. The decision in Lagden suggests that the claimant should provide bank/building society statements and credit card statements to show that funds were not available. If they do then, arguably, the full amount of hire is recoverable.

When proving alternatives, defendants rely on reports from firms such as Autofocus which show comparable vehicles that the claimant could have hired. Interestingly, all the reports I have seen on spot rates are retrospective and one way to discredit the reports is to make enquiries on day one of the hire to see who could actually provide a similar vehicle and at what rate. Another is to query the questions raised by the likes of Autofocus, such as the amount charged by the big hire firms to reduce the excess or additional drivers. From a personal experience in July I hired a Clio for 3 days for £90, by the time my wife had been added as an additional driver and I had paid for the excess to be reduced to the same as my own policy, the cost was then £130, dearer than ABI GTA rates! This said, I wonder what response you would get from an insurer if, on

behalf of a claimant, you advise the insurer of the hire rate they are currently being charged and asked them to provide an alternative if they could provide one cheaper?

When Lord Hope suggested making cost effective choices, does this extend to a courtesy car which *is* free but means a claimant (who has an insurance policy that provides a courtesy car) has to use his insurance? One of the points the court considered in *Rose v The Co-Op Group* (LTL 21/3/2005) was what Lord Hope was insinuating in the above quote. It would appear to suggest that to mitigate, the claimant should be going through his insurer as this was a choice that the claimant didn't make. However, on appeal, the court found that this was an unfair situation, and that actually, the claimant's argument that, based on *Parry v Cleaver* ((1970) AC 1) "why should the plaintiff be left worse off than if he had never been insured?", was accepted by the court and therefore the hire was recoverable. Indeed, in the case of *Daniels v Farish* (C.L.Y. 942, 2003) the court decided that the defendant did not have the right to dictate to the claimant whether they pursued their claim in tort or contract.

Perhaps the next logical step for the courts to consider is what happens if the defendant offers a replacement car. Is this free? There has been a decision in the county court in the name of *Coles v Passmore* (C.L. December Digest 94, 2007) where the court found that when the defendant's insurer had offered a courtesy car then this was a choice, as per *Lagden*, and to reject it was unreasonable. In this case, no hire charges were recoverable. However, there was an appeal decision in *Evans v TNT* (LTL 20/4/2007) where the court found that even when the defendant provides a replacement vehicle, it is not free. In this case, the amount the claimant recovered was the cost that it would have been to the defendant, not the cost of the credit hire charges. However, this has been challenged in another case by the name of *Steadman v TNT* (LTL 8/7/2008) and the court found for the defendant in the same circumstances as the *Evans* case. This brought us to the cases of ***Copley v Lawn and Maden v Haller* [2009] EWCA Civ 580; [2009] WLR (D) 200**. In brief, this means that if an insurer does make an offer then they must state the cost of the hire to them and not merely state it is free. If this happens then the claimant can make an informed choice. This means that the amount recoverable is the amount it would cost the defendant. However, I understand that despite the Court of Appeal stating that leave to appeal further was not granted, the defendant has lodged a petition to appeal and so it could all be up in the air again.

This then brings us to the Association of British Insurers General Terms Agreement (ABI GTA). Of course, this agreement has never been in front of a court, but one of the principles of the GTA is that first to the hirer keeps the hire. Clearly, insurers are prepared to make the attempt at intervention, and hire companies agree that insurers will then provide the hire and vice versa. Bearing in mind the GTA has been an agreed way of dealing with claims for 8 years, I wonder how such cases, as above, ever get to court. I also wonder what the seemingly mythical 'spot rate' is if it isn't the agreed rate between hire companies and insurers under the GTA.

One final point to consider is the need for a hire vehicle. For this, I would return to Lord Hope who said in *Lagden* (paragraph 27), "... the principle is that [the motorist] must take reasonable steps to mitigate his loss. The injured party cannot claim reimbursement for expenditure by way of mitigation that is unreasonable. So the motorist cannot claim for the cost of hiring another vehicle if he had no reason to use a car while his own car was being repaired – if, for example, he was in hospital during the relevant period or out of the country on a package holiday. If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle. If the defendant can show that the cost that was incurred was more than was reasonable – if, for example, a larger or more powerful car was hired although vehicles equivalent to the damaged car were reasonably available at less cost – the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent."

I find these words are self explanatory but still cases are before the court in relation to mitigation. For instance in *Brain v Yorkshire Riding Ltd* (LTL 19/4/2007), the claimant hired an MGF to replace his damaged Audi TT. He had been offered a replacement Vauxhall Corsa. The trial judge directed himself that the cost of

a prestige car should not be allowed so long as the car hire provided by the defendant was adequate for the claimant's needs. On appeal, His Honour Judge Grenfell, quoted Lord Hope as above, and then added, "The last words indicate the clear assumption that the starting point is establishing the need to hire the 'equivalent' vehicle. (paragraph 15). The law is clear that the defendant has the burden to show that the claimant has failed to mitigate." (paragraph 16) His Honour Judge Grenfell then proceeded to find in favour of the claimant. Another case in support of this principle involved hiring a Porsche in the case of *Tardif v Ireland* (2005). The court found that the claimant was a solicitor undertaking important and valuable litigation and therefore had a legitimate business need. As such, the evidential burden passed to the defendant to show otherwise.

With all the above in mind, it is clear that credit hire is still a major battlefield. The insurers hoped that [Dimond v Lovell \(2002\) 1 AC 384 HL](#) would be the end, whilst the hire companies hoped Lagden would finally conclude matters, but as can be seen, there are still many issues that turn on the individual facts of the case.

#### Craig Budsworth:

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Craig now heads up the Road Traffic Accident department and specialises in the recoverability of credit hire and credit repairs. Craig was short listed for Legal Executive of the year in 2008 and is a trainer for the Motor Accident Solicitors Society.