

Seizing the Initiative for Insurers

28 February 2007

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12 King's Bench Walk
Seminar Programme 2007

Seizing the Initiative for Insurers

Wednesday 28 February 2007
Arundel House, 13-15 Arundel Street,
Temple Place, London WC2R 3DX

5.30pm - Registration
6.00pm - Seminar
7.30pm - Refreshments

This is a free event



Aims and Objectives

This seminar will illuminate some of the current areas of opportunity for the insurance industry in defending claims. It will therefore be of benefit to solicitors and insurers. The seminar will include an up to date view on the re-awakening topic of credit hire and the opportunities to expand Hale LJ's workplace stress threshold criteria into other areas. The talk on Policy Avoidance will illuminate the opportunities and pitfalls in this key area.

Learning Outcomes

This seminar will update and inform as to upcoming opportunities for insurers. Delegates will benefit from:

- New ideas on the deployment of threshold criteria for workplace stress into other areas;
- Practical advice on credit hire;
- Understanding the problems related to policy avoidance;
- Critical analysis of the opportunities available for insurers to gain the initiative.

CPD Points
1.5

CPD reference
AVV/CHRW

Programme

Seizing the Initiative for Insurers
28 February 2007, **London**
5.30pm – 8.00pm

5.30 pm	Registration Tea & coffee
6.00 pm	Introduction by chair Nicholas Heathcote Williams QC
6.00 pm	“How hale and hearty can we be about Hale and Hutton? The scope for extension of Baroness Hale’s guidance beyond workplace stress” Henry Charles
6.30 pm	Keeping up to speed with credit hire Tim Petts
7.00 pm	Practical problems on policy avoidance Ronald Walker QC
7.30 pm	Drinks reception and canapés
8.00 pm	Close



12KBW Seminar: Seizing the Initiative for Insurers
Wednesday 28th February 2007

**‘How hale and hearty can we be about Hale
and Hutton? The scope for extension of
Baroness Hale’s guidance beyond
workplace stress’.**

Henry Charles

CPD Ref: AVV/CHRW

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12

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HOW HALE & HEARTY CAN
WE BE ABOUT HALE LJ IN
HATTON? THE SCOPE FOR
EXTENSION OF HATTON
BEYOND WORKPLACE
STRESS CLAIMS

Henry F. Charles
28th February 2007

12

King's Bench Walk

Contents

- What was Hatton about?
- What is foreseeability about?
- Vague or What?
- Hatton – the tests
- Hatton Blossoms
- Taking Hatton Further

2

12
King's Bench Walk

What Was Hatton About?



3

12
King's Bench Walk

Foreseeability – What's It All About?



4

12

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Foreseeability – What's It All About

- A way of deciding whether or not D owes C a duty: the more foreseeable it is that A will be harmed by the actions of B, the more likely it is that a duty will be imposed.
- A touchstone for deciding whether a Defendant has acted without reasonable care: the more obvious the risk the greater the expectation that care will be taken;
- A longstop with two components: firstly that C must prove that it was a foreseeable consequence that s/he would be harmed, secondly that the kind of harm was foreseeable.

5

12

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THE HATTON HURDLES



6

12

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The Hurdles

Include:

- No special control mechanisms
- No intrinsically dangerous occupations
- Is employee singled out for unreasonable demands?
- Vulnerability
- Taking what the employer is told at face value
- Balancing risk, gravity of harm and costs

7

12

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Hatton Blossoms



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8

12

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Bullying

- ❑ Clark v Chief Constable of Essex Police
- ❑ Tugendhat J found in favour of the Claimant, saying that there was ample evidence to that effect, but felt that he should place reliance on the judgment of Hale LJ in Hatton (he never really explained why).
- ❑ =====
- ❑ Green v DB Group Services (UK) Limited
- ❑ Owen J specifically noted that the Hatton case dealt with workplace stress but felt that it was instructive in respect of the threshold test of foreseeability.

9

12

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BUT BEWARE! PROTECTION FROM HARASSMENT ACT

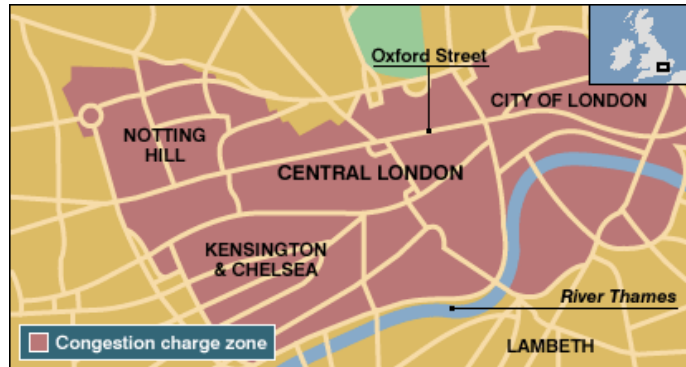
1. The fallback position for a Claimant
2. Easier for a Claimant to prove

10

12

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TAKING HATTON FURTHER



11

12

King's Bench Walk

MANAGEMENT OF HEALTH & SAFETY AT WORK REGULATIONS



12



HOW HALE & HEARTY CAN WE BE ABOUT HALE LJ IN HATTON? THE SCOPE FOR EXTENSION OF HATTON BEYOND WORKPLACE STRESS CLAIMS

Henry Charles

What was Hatton About?

1. Foreseeability.

What is Foreseeability About?

2. Three things:
 - (a) A way of deciding whether or not D owes C a duty: the more foreseeable it is that A will be harmed by the actions of B, the more likely it is that a duty will be imposed.
 - (b) A touchstone for deciding whether a Defendant has acted without reasonable care: the more obvious the risk the greater the expectation that care will be taken;
 - (c) A longstop with two components: firstly that C must prove that it was a foreseeable consequence that s/he would be harmed, secondly that the kind of harm was foreseeable.

Vague or What?

3. The concept of foreseeability “may be criticised as vague; but negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life.” Lord Wright in *Bourhill v Young* [1943] AC 92 at 107.
4. That has caused problems over the years, both in terms of one-off cases and the mass-appeal litigation. Of which workplace stress has been one of the more recent.
5. The problem: for employers stress could mean pretty much anything. For any job can be stressful, so for example should John Prescott be able to sue because it is all been a bit much the past year?

Hatton

6. The following principles were set out by the then Hale LJ in the Court of Appeal in *Hatton v Sutherland* [2002] ICR 613, the House of Lords in *Barber v Somerset County Council* [2004] ICR 457, affirmed by the Court of Appeal in *Hartman v South Essex Mental Health and Community Care NHS Trust* 2005 ICR 790.
 - (a) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer's liability apply (para 20)
 - (b) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25);
 - (c) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal

pressures of the job unless he knows of some particular problem or vulnerability (para 29).

- (d) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health (para 24).
- (e) Factors likely to be relevant in answering the threshold question include: (i) the nature and extent of the work done by the employee (para 26). Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department? (ii) signs from the employee of impending harm to health (paras 27 and 28). Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?
- (f) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers (para 29).
- (g) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it (para 31).
- (h) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk (para 32).
- (i) The size and scope of the employer's operation, its resources and the

demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties (para 33).

- (j) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this (para 34).
- (k) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty (paras 17 and 33).
- (l) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job (para 34).
- (m) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care (para 33).
- (n) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm (para 35).
- (o) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).
- (p) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42).

Hatton Blossoms

7. In *Clark v Chief Constable of Essex Police* (unreported, 18th September 2006). That case involved bullying by Police officers, said to have been negligently permitted. The issue thus turned (as part of the analysis of the tort alleged) whether it was

reasonably foreseeable that the treatment meted out would cause psychiatric injury and hence could be negligent. In fact Tugendhat J found in favour of the Claimant, saying that there was ample evidence to that effect, but felt that he should place reliance on the judgment of Hale LJ in *Hatton* (he never really explained why). It was argued by counsel for the Claimant that *Hatton* applied to cases of workplace stress only - on the basis that such cases have to be dealt with carefully because all jobs involve stress.

8. Owen J in *Green v DB Group Services (UK) Limited* (August 2006, unreported), a claim involving bullying was less immediately willing to feel bound by *Hatton*. He specifically noted that the *Hatton* case dealt with workplace stress but felt that it was instructive in respect of the threshold test of foreseeability.
9. So we are well on the way to *Hatton* applying in fairly stringent terms to bullying cases.

Taking Hatton Further

10. So far we have looked at two categories of case where *Hatton* guidance has floated to the surface: workplace stress claims and bullying.
11. Can *Hatton* go further? Clearly it is in the insurance industry's interests that it does go further.
12. Hale LJ's guidance specifically referred to claims "for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do." These cases were not to be treated specially, but Hale LJ gave guidance as to what would be appropriate. Applying that in reverse, if workplace stress is not a special case then the guidance is of wider value.
13. The next obvious target is statutory breach of the more amorphous regulations, particularly as statutory provisions extend ever further into employer/employee relationships. Prime contender is the Management of Health and Safety at Work Regulations 1999 ("the Management Regulations"), which is now directly actionable.

14. The Management Regulations primarily provide for risk assessments to be carried out:

Risk assessment

(1) Every employer shall make a suitable and sufficient assessment of -

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.

15. A Hatton based analysis would certainly be appropriate where there is risk to mental health to be guarded against, whether in terms of generalised workplace stress per se or bullying, or indeed particular psychological conditions (eg aspects of emergency services work).
16. The challenge will be to take its analytical approach outside the psychiatric context.

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27th February 2007



12KBW Seminar: Seizing the Initiative for Insurers
Wednesday 28th February 2007

Keeping up to speed with credit hire

Timothy Petts

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12

King's Bench Walk

Keeping up to speed with credit hire

Tim Petts
28th February 2007

12

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Coming up...

Topics for tonight

- ❑ Court of Appeal considers impecuniosity – [Binns v TNT](#)
- ❑ Offering replacement cars – [Bee v Jenson \(1\)](#)
- ❑ Insured hire – open to challenge? [Bee v Jenson \(2\)](#)
- ❑ Accident Exchange – the latest news

2

1 - Impecuniosity

Lagden v O'Connor (2003, House of Lords)

- ❑ It is only when C is impecunious that C can recover the credit hire rate as opposed to the spot hire rate
- ❑ Mr Lagden's personal circumstances such that no real doubt that he passed the test.
- ❑ But what is the test?

3

1 - Impecuniosity

Lagden

- ❑ Lord Nicholls – "...inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make."
- ❑ Lord Hope – "In practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card."

4

1 - Impecuniosity

Binns v TNT (2006, Court of Appeal)

- ❑ D's application for permission to appeal (second appeal) refused.
- ❑ "My means were such that I would have been unable to pay for a hire vehicle in advance, as I have a wife and two children to support along with a mortgage. I have therefore no available cash to pay for a hire vehicle. In any event, I am unfamiliar with hire companies ...".

5

1 - Impecuniosity

Mistakes that were made

- ❑ Not reading the directions.
- ❑ Not putting C's means in issue by:
 - Filing an amended defence
 - Asking Part 18 questions
 - Asking for disclosure
 - Getting C there to be cross-examined

6

1 - Impecuniosity

What to do next time

- Read the directions
- Put impecuniosity in issue if C raises it
- Avoid just relying on the point that C's evidence is not very strong
- Avoid telling C how to prepare his case

7

2 - Offering replacement cars

Bee v Jenson (1) – the background

- Claimant has pre-accident policy with DAS to pay hire costs after no-fault accident
- DAS have arrangement with Helphire
- C has accident with D (RSA insured)
- DAS provide car through Helphire
- ABI equivalent rates charged to DAS
- RSA dispute liability for the charges (£610)

8

2 - Offering replacement cars

The pre-accident "offer"

- ❑ 8 months before C's accident
- ❑ Pre-emptive global offer from RSA to DAS
- ❑ RSA offer to provide free replacement cars when RSA insured to blame
- ❑ RSA say that failure by DAS to notify clients of offer will mean that RSA not liable for hire charges
- ❑ DAS reject offer

9

2 - Offering replacement cars

RSA's arguments

- ❑ DAS was C's agent for obtaining replacement car
- ❑ C fixed with DAS's knowledge of RSA's offer
- ❑ C should have taken free car offer from RSA rather than hire from Helphire through DAS
- ❑ Failure to mitigate loss, no charges recoverable
- ❑ Alternatively, 55% maximum (effective cost to RSA of supplying car to C)

10

2 - Offering replacement cars

The decision

- ❑ DAS was C's insurer, not C's agent
- ❑ C had no choice but to accept DAS's choice of car hire company, car and period of hire.
- ❑ C had no imputed knowledge of RSA's offer
- ❑ Global offer wasn't an offer of free car to C anyway

11

3 - Insured hire

Bee v Jenson (2)

RSA's remaining arguments

- ❑ DAS should give credit for any commission from Helphire
- ❑ Damages should be limited to corporate rates to reflect DAS's "bargaining power"

12

RSA's arguments

Issue 1

- ❑ In a subrogated claim, DAS could not recover more than its outlay
- ❑ Therefore DAS had to give credit for commission received

Issue 2

- ❑ DAS should have been able to hire at better rates than ABI rates
- ❑ Therefore DAS should be limited to such rates

13

DAS's arguments

- ❑ DAS paid Helphire £610 and should recover £610
- ❑ C was not entitled to any payment from Helphire and did not have to give credit for it
- ❑ If DAS has made a profit, that is irrelevant and DAS do not have to give credit for this to RSA
- ❑ As it is C's claim, not DAS's claim, the reasonableness of the rates claimed is judged from C's perspective

14

3 - Insured hire

The decision

- ❑ RSA's arguments rejected
- ❑ "Simply wrong and apparently misunderstand the nature of subrogation..."
- ❑ This was a contractual subrogation claim, not subrogation to prevent unjust enrichment
- ❑ If charges were reasonable, RSA had to pay them whatever C's insurance arrangements were and whatever arrangements DAS made
- ❑ C's claim, not insurers'. Rates good value for money and recoverable in full.

15

4 - Accident Exchange

The three company scheme

- ❑ C hires a car from company 1 on "spot hire" basis
- ❑ C finances payment using credit agreement with company 2
- ❑ C ensures repayment of company 2 by entering insurance agreement with company 3

16

4 - Accident Exchange

The problems with the terms and conditions

- ❑ Version 1.1: companies 2 and 3 do not exist
- ❑ Version 1.2: companies 2 and 3 are dormant

17

4 - Accident Exchange

Debbie Merc & Accident Exchange Ltd v Travel West Midlands (NEG)

- ❑ Test case proceeding in Birmingham CC
- ❑ Version 1.2 disclosed – eventually admitted that version 1.1 applied.
- ❑ 18th December 2006 – Accident Exchange discontinue and pay D's costs on an indemnity basis

18

4 - Accident Exchange

Further challenges

- ❑ Johnson v Botosh 9th March 2007 – C's application to strike out allegations of unenforceability
- ❑ Further test case in April 2007?
- ❑ Cases often being adjourned

19

4 - Accident Exchange

Unenforceability arguments

- ❑ If companies 2 and 3 don't exist, or are dormant, finance / insurance agreements don't come into effect.
- ❑ Hire agreement, which is conditional on the other two, not effective / unenforceable
- ❑ Company 1 agent for non-existent principals and so pays itself – claimant never has a liability
- ❑ Sham / misrepresentation
- ❑ C given regulated period of credit

20

4 - Accident Exchange

Enforceability arguments

- ❑ There is a valid hire agreement at the root of the claim
- ❑ Each agreement is separate
- ❑ Agreements with dormant companies are not ineffective and the court should not carry out an “audit search” looking for payment
- ❑ Courts should be slow to find “shams”

21

And finally...



22



KEEPING UP TO SPEED WITH CREDIT HIRE

Tim Petts

This paper provides a basic introduction (or a “refresher”) to the credit hire field. The talk will concentrate in more detail on some recent developments.

Introduction

1. Credit hire organisations (CHOs) provide a replacement car to someone whose car had been damaged in a no-fault accident (C), and then they charge the insurers (D) of the driver at fault. Without CHOs, many drivers would not bother to hire, not would they trouble the courts with a small claim for compensation for having to manage without a car during repairs.
2. This market is now worth millions of pounds every year to the CHOs. It has also been the subject of major legal battles, going to the House of Lords on three occasions¹. Insurers had several notable victories. However, CHOs have refined not only their terms and conditions of agreement but also their methods of operating in the light of these decisions.
3. The ABI agreement (2005 version) provides the day-to-day method of operating between many (not all) insurers and CHOs. Where the agreement does not apply, or the parties go outside the agreement, the common law / statutory principles apply.

Common law principles of tort

4. Here are some basic points to bear in mind when looking at a credit hire claim:
 - (a) C is entitled to be put back into the position he was in, as if the accident had not happened (e.g. damaged car: cost of repair / written-off car: pre-accident value)

¹ Giles v Thompson, Dimond v Lovell, Lagden v O'Connor – all mentioned later in the paper

- (b) If C loses the use of his car in an accident, and has to make do without a car, then C is entitled to general damages for loss of use.
- (c) If C has hired a substitute car, C is *prima facie* entitled to the cost of that substitute.
- (d) However, C has to act reasonably in hiring – he cannot recover damages for losses which he reasonably could have avoided incurring. If C hires unnecessarily, C will not get the cost of hire; if C hires at unreasonable cost, C will only get a reasonable cost. C is said to have a “duty to mitigate” his losses, although this is potentially misleading terminology. What must be remembered are these two points:
- (i) the burden of proving that C has not take reasonable steps to minimise his losses is on D (so it is up to D to provide evidence of this); and
 - (ii) the court will generally be sympathetic to C in such circumstances, since C is only in this situation because of an accident that was not his fault.
- (e) If there is no loss to C, C does not get damages. So if C is not liable to pay for the hire, because the hire agreement is unenforceable, C has suffered no loss and D therefore does not have to pay C for the hire: Dimond v Lovell². The unenforceability of the agreement was not *res alios inter acta*. Nor could a trust mechanism³ be judicially developed to create another common law exception⁴ to the principle that C must give credit for benefits received from third parties.

The usual points to consider

5. These are:

- (a) Is credit provided to C?
- (b) If so, is the agreement enforceable?
- (c) Did C reasonably need to hire at all?
- (d) Did C reasonably need to hire for as long as he did?
- (e) Did C reasonably need to hire the type of car that he did?

² [2000] QB 216, Court of Appeal; [2002] 1 AC 384, House of Lords

³ Compare where C obtains damages for gratuitously provided care: C then holds them on trust for the carer (Hunt v Severs [1994] 2 AC 350)

⁴ The other two being the fruits of insurance policies and benevolence of third parties

(f) Is the rate of hire too high?

(g) Is C impecunious?

6. Some comments on each point follow.

(a) Is credit being provided to C?

7. The Consumer Credit Act 1974 only applies if credit is being provided. There are various formulations or definitions of “credit” in the leading cases, in particular Dimond v Lovell, but they all effectively get to the same point. Payment for the car would have been due, normally, at the latest by the end of the hiring but C was allowed to defer payment until a later date (in the old days, until the conclusion of the litigation; more recently for a period of normally no more than 51 weeks, for reasons explained in a moment). That will amount to credit and thus the agreement will be within the scope of the Act.

8. However, some hire agreements are drafted in such a way as to say that no credit is being provided, but payment is due on return of the car; any subsequent delay in asking for payment is merely (it is said) a “non-contractual / discretionary indulgence” rather than a contractual entitlement to credit, so the CCA mechanism does not apply.

9. These arguments usually fail. The scheme will usually have been explained to C in such a way as to reassure him that he will not be expected to pay and that D will pay. If pressed in cross-examination, C will usually say that he would not have hired a car if he had been expected to pay for it straightaway at the end of the hire, and he understood before taking the car, on the basis of the explanation given to him, that he wouldn’t be asked for money at that stage. From this, it should not be too difficult for a judge to say that there was an agreement for credit⁵.

(b) Is the agreement enforceable?

10. These days, if credit is being provided, the agreement is almost certainly enforceable. CHOs have learnt from experience.

⁵ See e.g. Evans v Herrington Haulage (HHJ Hammerton, 10th February 2006, Lawtel)

11. There are various types of credit agreement with complicated definitions⁶. The type of credit agreement involved is only likely to be an issue where it is alleged that a “consumer hire” agreement is involved (see later).
12. CHOs can legitimately escape the Act’s requirements if the agreement is an “exempt” agreement under Article 3(1)(a)(i) of the Consumer Credit (Exempt Agreements) Order 1989. For credit hire agreements, that means having:
- (a) An obligation to pay “within a period not exceeding 12 months beginning with the date of the agreement”;
 - (b) Payment in no more than 4 instalments.
13. After a few trips to the Court of Appeal on what this meant⁷, CHOs finally learned how to make their agreements exempt, or went bust and sued their legal advisors for poor drafting.
14. If the agreement is regulated, then there are various technical requirements imposed by the Act, most notably the Consumer Credit (Agreements) Regulations 1983 and the prescribed terms set out in Schedule 6. If an agreement does not comply with these requirements, it is “improperly executed”, in the words of the Act. Breach of these technical requirements can be divided into two categories: serious breaches that make the agreement irredeemably unenforceable against C and lesser breaches, where the agreement can only be enforced against C with a court order.
15. One possible area where the type of credit agreement involved is still a potential issue arises in these circumstances. In long periods of hire, C sometimes signs two (or more) hire agreements, or that the length of hire has exceeded the maximum period stated in the agreement. Does this affect recoverability? First, a quick reminder of part of the definitions section of the Act. Section 15(1):
- “A consumer hire agreement is an agreement made by a person with an individual (the “hirer”) for the bailment ... of goods to the hirer, being an agreement which—*
- (a) is not a hire-purchase agreement, and*

⁶ *Dimond v Lovell* [2000] QB 216, Court of Appeal; [2002] 1 AC 384, House of Lords decided which categories of agreement defined in the Act credit hire agreements fall into.

⁷ E.g. *Ketley v Gilbert* [2001] 1 WLR 986 (payment due on or after the period expires – not exempt); *Zoan v Rouamba* [2000] 1 WLR 1509 (credit period for 12 months “after” the date of the agreement, not “beginning with” the date of the agreement – not exempt)

(b) is capable of subsisting for more than three months, and

(c) does not require the hirer to make payments exceeding £25,000.”

16. The phrase “capable of subsisting for more than three months” has been interpreted (by the Court of Appeal in Burdis) as referring to the period of hire only, and not to the rest of the obligations under the agreement (which, in the case of the time to pay, can extend for nearly 15 months post-agreement). Hence virtually all credit hire agreements limit the period of hire to less than three months.

17. What happens if this is not what actually happens? Two potential situations, often caused by delays in repairs:

(a) Situation 1: the hire agreement specifically states that it cannot last for more than 89 days. In fact, it lasts for 97 days with no second agreement being signed.

(b) Situation 2: under the same terms of hire, C hires for 89 days and then signs another agreement which lasts for 20 days. It is the same car.

(c) Situation 3: as situation 2, but different cars

18. Does section 82(2) of the Act apply?

“Where an agreement (a ‘modifying agreement’) varies or supplements an earlier agreement, the modifying agreement shall for the purposes of this Act be treated as:

(a) revoking the earlier agreement, and

(b) containing provisions reproducing the combined effect of the two agreements,

and obligations outstanding in relation to the earlier agreement shall accordingly be treated as outstanding instead in relation to the modifying agreement.”

19. Surprisingly, there is very little authority on this point⁸. Colleagues in chambers report that they have not successfully run this argument on a defendant’s behalf, but it does seem to be a point which worries some CHOs. Modifying agreements are horribly complicated in terms of compliance with the technical requirements of the Act: they are also likely to go into “consumer hire agreement” territory, with

⁸ Goode Consumer Credit Law and Practice, the “bible” of consumer credit commentary, says “The phrase ‘variation of an agreement’ is not free from ambiguity.” (How true...)

added levels of complications. If the section applies, then the result should be that nothing is recoverable as the agreement(s) will be fatally unenforceable.

20. Some thoughts:

- (a) Where there is no second agreement and the hire just runs on (Situation 1), there may have been an oral agreement to extend the hire – in which case, the CHO is in difficulty. However, it can be argued (and I have seen this argument put forward in a Schedule of Special Damages as one alternative route to recovery) that C was in breach of contract in not returning the car earlier and so is liable to pay damages for breach at the contractual rate of hire, which he can recover in turn from D. Will this work? Or is this too remote a consequence from the tort?
- (b) Does a written further hire agreement for the same car (Situation 2) amount to an agreement which “*varies or supplements an earlier agreement*”? My own view is that there is a good argument that it does “supplement” the earlier agreement by allowing C to have the same car for longer; but this is by no means clear-cut. A judge that is tempted to find in C’s / CHO’s favour will say that each agreement can and does stand separately; in which case, the trigger for operating s.82(2) is not pulled.
- (c) Situation 3, with different cars, is much less likely to be caught by s.82(2).
- (d) Where the amount of credit at the end of agreement 1 exceeds the limit of CCA regulation (£25,000) – which may well happen when the car in question has a very high daily rate⁹ – then any modifying agreement would provide credit over the statutory limit and so be unregulated anyway.

(c) Did C reasonably need to hire at all?

21. Going back into “ancient history”, Lord Mustill (giving the only speech) said this in Giles v Thompson¹⁰ (emphasis added)

“The need for a replacement car is not self-proving. The motorist may have been in hospital through the accident for longer than his vehicle was off the road; or he may have been planning to go abroad for a holiday leaving his car behind; and so on. Thus, although I agree with the judgments in the Court of

⁹ E.g. £250 per day plus VAT for 89 days would be £26,143.75 – before CDW, delivery charges, etc.

¹⁰ [1994] 1 AC 142, at 167

Appeal that it is not hard to infer that a motorist who incurs the considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as the result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might otherwise arise”.

22. As he anticipated, in practice it takes very little for C to prove that he reasonably needed a replacement car whilst his own was being repaired. That said, there will occasionally be cases where C does not need to hire – e.g.

(a) Where C has another car that he can use instead without difficulty;

(b) Where C cannot drive a car because of his injuries even though not in hospital – medical reports sometimes provide useful material.

23. The test of reasonableness applies: would a reasonable person have hired in the circumstances at all / for the whole period?

24. Where C is entitled to a courtesy car under his insurance policy, can insurers run this line of argument? “C has a duty to mitigate his loss; C can get a car free from his insurers under his policy; this is a benefit of his policy for which C has already paid; a reasonable person would use this benefit rather than put himself under an obligation to pay hire charges to CHO, however theoretical that obligation might be”.

25. The argument is superficially attractive but runs head-long into an established principle of compensation that you do not take into account insurance policies that C has in calculating what his loss is (Parry v Cleaver etc) and so most courts now will reject this argument.¹¹

(d) Did C reasonably need to hire for as long as he did?

26. C is entitled to hire for a reasonable period, which will usually be until repairs are complete or (where a write-off) until D pays the pre-accident value. Often there are delays. Can D refuse to pay some of the hire on the grounds that there were avoidable delays?

27. At one stage, the general approach of the lower courts was to say that if the repairs were estimated to take 5 working days, but took 10 working days, then D would only have to pay for the 5 working days. The Court of Appeal rejected this

¹¹ See Rose v Co-operative Group (HHJ Meston QC, 7th February 2005, Lawtel).

approach in Burdis v Livsey¹² (also known as Clark v Ardington). D can only successfully reduce the length of hire where C or C's agents are to blame. Delays at the garage because of lack of parts etc are entirely foreseeable and should not be held against C, it was decided. The judgment makes it very difficult for D to reduce the recoverable hire period. There is a suggestion by the Court of Appeal that D should seek contribution from those responsible, although this would not be straightforward and rarely (if ever) happens.

28. Under the ABI agreement, where a CHO is hiring to C, there are various provisions on how often the CHO should keep in contact with the garage about how the repairs are coming along, and how often the CHO needs to report to D.

29. Where insurers are in control of the hire, clearly it is in their interests that the hire is for as short a period as possible – chasing the garage is one area where some economic muscle may be useful. Again, insurers should be encouraged to keep good notes.

30. Making liability decisions quickly and getting cheques out in settlement of total losses are two further key areas where delays can be cut. Where the insured is failing to respond promptly to letters on issues of liability, the prospects of the insured being blameless but tardy are probably low.

(e) Did C reasonably need to hire the type of car that he did?

31. A frequent thorny issue is when C has an expensive sports car / prestige car etc. Hire of a replacement is normally very expensive. Can D get away with only paying for a less expensive vehicle?

32. The overall question is whether C has acted reasonably. The burden is on D to show that C is acting unreasonably. Judges, many of whom will have very pleasant cars given their high salaries, tend to be sympathetic to claimants. Our experience in chambers is that arguments that C has not acted reasonably in type of car are very hard to win as a defendant. C's arguments go along the lines of:

(a) "I choose to drive an expensive car, and I was paying for this luxury pre-accident. Why should I have to use a less expensive car to keep D's bills down?"

¹² [2002] EWCA Civ 510

(b) “If D hadn’t hit me, I would be in an expensive car. Putting me back in my pre-accident position means that I should be entitled to hire such a car.”

33. One argument often raised by C / CHO is C’s desire to have a prestige vehicle to maintain his business reputation. Again, it will not take much for a judge to decide that this is a sufficient reason to have a similar replacement. (NB if it is a business car, C’s employers may have other fleet cars that he can use, or the VAT may be reclaimable by the business and so not chargeable to D.)

34. Attempts to say that C should have hired a Mini to replace a Ferrari are doomed to failure. However, if D has a good argument that C could have hired an *equivalent* car (e.g. high-spec BMW for high-spec Mercedes) for less, then this may reduce the damages. However, D should get decent evidence not only of the rates (see below) but also evidence to show that the cars really are comparable. *E.g.* in Berg v Loftus Road plc (2001 Current Law) C’s car was a Porsche 911. He spot-hired a Mercedes SL320. D said that C should have hired a cheaper but still prestigious car. The judge said that the test of reasonableness was not high and was satisfied on the facts. However, he said that if it could be shown that the amount of use that C wished to make of the car was small, C would not be entitled to the full claim.

35. This is one area where “getting to C first” and making a reasonable offer can pay dividends for insurers. Each insurer has to make a decision about where to draw the line. Insurers will need to get as much information from C as possible about why that particular car is needed, in order to make a speedy decision and a reasonable offer. The same points apply when considering what to allow as a counter-offer to the CHO’s rate. The shorter the proposed period of hire and the lower the proposed amount of use, the more reasonable it would be for C to accept / to have accepted a substitute. However, each case will turn on its facts.

36. Where working under the ABI agreement, D should be consulted by the CHO in the event of a dispute about the class of vehicle to which C is entitled.

37. For a cautionary tale about making offers clear, see Player v Rowe (2006 Current Law).

(a) R’s insurers wrote twice to P within 2 weeks of the accident: (1) offering P the use of an approved repairer scheme, including a free courtesy car; (2) admitting

liability and giving the address of the garage, saying that P should ask the garage about a free car and if no car was available to get in touch.

(b) P hired from a CHO, apparently thinking the CHO was connected with the garage / insurers.

(c) Cost of hire allowed: P had not refused a car; his actions were reasonable; the offer from R's insurers was not a final and definitive offer; there was in any case no evidence from the insurers to show that a comparable car would have been available, or what the terms of use would have been.

(f) Is the rate of hire too high?

38. Ordinarily, the recoverable amount of hire will not be credit hire rates but "spot hire" rates i.e. what C would have had to pay a traditional hire company for hiring that car for that length of time in that area. These are generally lower than credit hire rates. The reason for the reduction is that the credit hire rates include payment for services by the CHO for which D is not liable to compensate C (including the claims service, provision of credit, control of the litigation, bearing risks of costs etc) – Lord Hoffmann in Dimond v Lovell (at 401):

"My Lords, I would accept the judge's finding that Mrs Dimond acted reasonably in going to 1st Automotive and availing herself of its services. I am sure that any of your Lordships in her position would have done the same. She cannot therefore be said not to have taken reasonable steps to mitigate her damage. But that does not necessarily mean that she can recover the full amount charged by 1st Automotive. By virtue of her contract, she obtained not only the use of the car but additional benefits as well. She was relieved of the necessity of laying out the money to pay for the car. She was relieved of the trouble and anxiety of pursuing a claim against Mr Lovell or the CIS. She was relieved of the risk of having to bear the irrecoverable costs of successful litigation and the risk, small though it might be, of having to bear the expense of unsuccessful litigation. Depending upon the view one takes of the terms of agreement, she may have been relieved of the possibility of having to pay for the car at all. My Lords, English law does not regard the need for any of these additional services as compensatable loss."

39. He said that these additional services had to be taken into account in the assessment of damages (at 402, emphasis added):

"How does one calculate the additional benefits that Mrs Dimond received by choosing the 1st Automotive package to mitigate the loss caused by the accident to her car? The hiring contract does not distinguish between what is attributable simply to the hire of the car and what is attributable to the other benefits. But I do not think that a court can ignore the fact that, one way or another, the other benefits have to be paid for. 1st Automotive have to bear the

irrecoverable costs of conducting the claim, providing credit to the hirers, paying commission to brokers, checking that the accident was not the hirer's fault and so on. A charge for all of this is built into the hire.

How does one estimate the value of these additional benefits that Mrs Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay 1st Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car. As the judge said, 1st Automotive charged more because they offered more. The difference represents the value of the additional services which they provided. I quite accept that a determination of the value of the benefits which must be brought into account will depend upon the facts of each case. But the principle to be applied is that in the *British Westinghouse* case [1912] AC 673 and this seems to me to lead to the conclusion that in the case of a hiring from an accident hire company, the equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided."

40. After Dimond, some judges used to agree to make a deduction of 30% or so from the credit hire rate to strip out the offending element. This was a superficially attractive solution, but it was entirely vulnerable to CHOs increasing their rates by 42% to end up in the same position. When reviewing the matter in Burdis, the Court of Appeal said it was a matter for evidence.

41. The burden is on D to show that reasonable spot hire rates are less than the credit hire rates being claimed – see paragraphs 147 and 148 of Burdis:

“147. The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use and he establishes a need for a replacement, he is entitled to the cost of hiring a replacement car. He can go round to the nearest car hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances.

148. We do not anticipate that the application of the correct legal principles will lead to disproportionate costs in small cases. The claim will be based on evidence as to the rate charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates.

Thereafter the evidential burden passes to the insurers to show that it would not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate. What is reasonable and whether a loss is avoidable are questions of fact, not law, which District and County Court judges regularly decide.”

42. This needs good evidence, otherwise C will romp home. Someone printing off a few quotes from the internet is rarely good enough. Nor can the ABI rates be used: the Court of Appeal said in Burdis (paragraph 150) that the ABI scheme

rates “cannot be taken in hostile litigation as being the appropriate figures of loss. They reflect a compromise agreed between the parties rather than an assessment of loss.”

43. The investment in a proper report on rates will often pay results. As the burden of proving alternative rates is on D, beware false economies. Rates are more persuasive:

- (a) the closer in time they are obtained to the period of hire – so insurers should be getting reports pre-litigation wherever possible, as soon as it becomes clear that rate is going to be a sizeable issue;
- (b) the more local they are to the place of hire;
- (c) the more alternative rates that are obtained;
- (d) where they are for the same car as was hired, rather than alternatives;
- (e) the easier such rates would have been found for C at the time (e.g. national companies / Yellow Pages, rather than obscure companies).

44. Beware of “inequality of arms” at trial. If C has a CHO director giving “factual” evidence about rates or who comments (or can be expected to comment) on D’s expert report, consider getting permission from the court for oral expert evidence so that the CHO’s comments do not go unanswered.¹³

45. Where a report identifies a range of possible lower spot rates, consider making offers based on the highest rate rather than the average, since some judges will use this rate as being the “highest non-unreasonable” rate (in which case, an offer based on the average will have been beaten by C). Consider allowing for interest (see below).

(g) Is C impecunious?

46. Credit hire rates can still be recovered in some circumstances. Where C is “impecunious” and so would not be able to hire from traditional hire companies such that credit hire is his only option for hiring a replacement vehicle, a majority of the House of Lords (3:2) said in Lagden v O’Connor¹⁴ that C can recover the full

¹³ E.g. in one case, the director served a supplemental witness statement saying that he had never heard of two of the companies approached and his enquiries showed they didn’t exist, and two of the other companies borrowed luxury cars from his company to hire out as they didn’t have any anyway! The judge preferred this evidence to D’s written report.

¹⁴ [2003] UKHL 64, [2004] 1 AC 1067

credit hire rate in such circumstances. Obviously, therefore, there is a considerable advantage to CHOs in establishing impecuniosity.

47. In Lagden, there was no real agreement between the Law Lords as to how to define impecuniosity. It was thought that this issue would not lead to increased litigation.

48. Lord Nicholls said (paragraph 9):

“Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make.”

Lord Hope said (paragraphs 36, 42):

“The full cost of obtaining the services of a credit hire company cannot be claimed by the motorist who is able to pay the cost of the hire up front without exposing himself or his family to a loss or burden which is unreasonable.”

“In practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card. It ought to be possible to identify those cases where the selection has been made on grounds of convenience only without much difficulty.”

49. What about those with high incomes but high outgoings (school fees, mortgages, etc) and poor cashflow (e.g. a stubbornly high aged debt) who have accidents at a financially inconvenient time of the year? On Lord Hope’s version, they would not be impecunious; on Lord Nicholls’s version, they may be able to say that car hire charges would have required an unreasonable sacrifice. Lord Scott, dissenting, foresaw the problems the majority’s approach would cause (paragraph 87):

“What is to be the test of sufficient impecuniosity? The suggestion has been made that lack of possession of a credit card or a debit card might be taken as an indication of sufficient impecuniosity. But there are still many people in this country who keep cash in their houses, would be accounted quite well-off by most standards, but who do not have credit or debit cards. Some people have bank accounts and overdraft facilities. Their accounts may be consistently overdrawn but within the facility. They have no spare cash but the facility to borrow. How, sensibly, can their position be distinguished from that of those like Mr Lagden who, similarly, have no spare cash but have no bank overdraft facility? If Mr Lagden is to be entitled to reimbursement of Helphire’s financing charge, why should the others not be entitled to re-imburement of their bank’s financing charge?”

50. Where rates are being contested, particularly high rates, insurers should get confirmation in good time before trial as to whether impecuniosity is an issue.

Preferences differ, but my practice at the moment is to add a paragraph to the section in the defence along the following lines:

“The Claimant is reminded that the burden of proving impecuniosity is upon the Claimant. If that argument is to be advanced, the Claimant should file and serve a Reply to this Defence, setting out the matters upon which he relies. The Claimant should then give full disclosure of relevant documents and proper details of his impecuniosity in his witness statement.”

51. That should provide some protection against the issue being raised late in the day.
52. If impecuniosity is in issue, then get some information from C about his C's income / availability of credit cards and overdrafts. Ask for supporting documents e.g. bank statements. If there is a lack of co-operation, be prepared to seek court orders. Do not leave this too late. The aim is to avoid being “bounced” at the hearing with evidence and little time to consider it.
53. But beware “overkill” in requests for information and documents. It is for C to prove impecuniosity, not for D to prove that C is not impecunious. It is not for D to tell C how to prove his case and “shopping lists” of documents and information required by D may just help do that. Excessive requests for information risk being rejected wholesale by C and risk being seen by the court as “oppressive insurer tactics”.
54. The Court of Appeal refused permission to appeal¹⁵ in Binns v TNT [2006] EWCA Civ 1468 in the following circumstances. C's witness statement said *“My means were such that I would have been unable to pay for a hire vehicle in advance, as I have a wife and two children to support along with a mortgage. I have therefore no available cash to pay for a hire vehicle. In any event, I am unfamiliar with hire companies ...”*. C hired from Helphire. The case was listed for 30 minute disposal hearing, with the direction that if D wanted to dispute the claim on substantial grounds relating to amount, a Defence had to be filed. D did not do this, or ask Part 18 questions or seek a longer hearing with cross-examination. D simply asserted that this did not discharge the burden of proof on C. Whilst the DJ agreed, the CJ disagreed, saying that D had not made impecuniosity an issue and C's assertion was sufficient to discharge the burden of proof in the absence of it being an issue. Hughes LJ said:

¹⁵ And therefore the decision can't be cited in court: Practice Direction on Citation of Authorities

“I am inclined to agree that there is scope for two views about whether an assertion in this form is sufficient to prove impecuniosity, if impecuniosity be put in issue. It seems to me likely that some short assertions probably would be. For example, a claimant who says that he is out of work, disabled and has been living on benefits for 20 years might find that his assertion is taken as sufficient. Some might take the view that this claimant’s assertion raised more questions than it answered. On the other hand, unless and until an issue is made of the point it really is not and cannot be the law that a claimant has to put in a full affidavit of means of the kind that he would have to in a case of matrimonial ancillary relief.”

55. Leave was refused because, although Hughes LJ said that these issues may be suitable for the CA if a suitable collection of cases was assembled, D hadn’t made impecuniosity an issue and so no important principle sufficient to justify a second appeal was at stake. Watch this space.

Interest

56. C is not entitled to County Courts Act interest (currently 6%) where proceedings have not been issued. Nor should C be given County Courts Act interest where the credit hire charges have not been paid, since C is not out of pocket – Giles v Thompson again. However, Lord Mustill did note that there was no contractual term for interest in the agreement he was considering.

57. CHOs have taken the hint and some have added contractual interest clauses into the agreements, e.g. interest at 2% over bank base rate from 14 days after the end of the hire period. This is then claimed as damages, on the grounds that C is liable to pay this to the CHO and so D should pay this to C. In my view, this interest charge is a naked charge for credit which would not be recoverable if it was included as an element in the hire charge (for reasons given in Dimond) and so it should not be recoverable separately in this way. Some judges will award it anyway (perhaps because, although his view predates Dimond, Lord Mustill seemed to think that this would make a difference; perhaps on the grounds that if the hearing has got this far, most of D’s arguments have been rejected and so this one can be rejected too...)

The ABI agreement

58. This is an agreement (latest version 1st July 2005¹⁶) between various insurers and various credit hire companies to try and provide a workable arrangement for

¹⁶ Previous version 26th November 2001, both available at <http://www.abi.org.uk/tphire>

providing (and paying for) hire cars, partly no doubt in an effort to limit costs on both sides as well as attempting to curb what each side would see as its opponents' "bad habits".

59. In return for insurers co-operating and paying claims quickly, CHOs agree to abide by certain standards of behaviour and limit their rates to agreed levels (below their normal charges). The ABI agreement has schedules of maximum rates in various categories of vehicle. If insurers pay late, there are penalty charges. Outside 90 days, then the CHO can claim at its full non-ABI rate in litigation.¹⁷

60. The ABI agreement provides comprehensive but voluntary guidelines.

"3.1 The overriding principle for the GTA is that whoever is first to a customer and obtains their agreement should provide the service and all subscribers should not seek to intervene. All subscribers must, therefore, not seek to transfer a customer who has agreed to accept a vehicle into an alternative replacement vehicle.

3.2 First to a customer is defined as the receipt by the customer of a suitable offer that they can understand. All subscribers communicating an offer solely by letter stand the risk of it not having been received, understood or being sufficient for the customer."

61. Insurers can most easily control events if they get to C first. However, CHOs will usually be at a considerable advantage in this respect and generally can get C into a hire vehicle before insurers even know that an accident has happened!

62. Where insurers do get to C first, then ideally:

(a) Insurers should make C as good an offer as reasonably possible – one that C cannot reasonably refuse. The alternative to D providing C with a car will be a CHO providing C with a car, probably at greater cost and with the additional problem of D losing control over the hire process.

(b) Insurers should remember Paragraph 3.2 of the ABI GTA: letters can be misunderstood. They should telephone wherever possible. However, they should take very good notes of telephone conversations and confirm the conversation in writing. These notes may need to be disclosed at a later date, possibly backed up by a witness statement.

¹⁷ NB there are some individual deals between insurers and CHOs. In one case I saw, the agreement provided that "like for like" cars would be provided by the CHO (unless C was retired or a housewife) and paid for by insurers and set out schedules of rates. Insurers' scope for objection to like-for-like hire or these rates in an individual case was therefore limited...

(c) Offers should be to C personally, not general offers to claimants' insurance companies, since otherwise it will be difficult to prove as a matter of fact or law that C had knowledge of the offer (see Bee v Jenson, discussed below).

63. There is nothing to prevent insurers intervening where the ABI agreement does not apply in order to offer C a car even when a CHO is already involved. However, in such circumstances, the insurer will have to tread carefully and will have to ensure that the offer of a replacement car is extremely reasonable not only in terms of what the car is but also in terms of how the logistics of delivery / collection will be arranged.

64. Whilst paragraph 3.1 of the ABI agreement prevents one side attempting to swap the hirer into their vehicle from the other side's car, there is in theory nothing to stop an insurer trying to swap a hirer into one of their cars when the ABI agreement does not apply. However, judges will probably be reluctant to say that the hirer acted unreasonably in refusing a swap offer. At the very least, insurers would have to sort out all the logistics with no inconvenience at all to the hirer. Even then, why should the hirer move from one car to another just to lower the insurer's bill? Effectively, it's free for him either way – although it could be argued that C should mitigate his loss by taking a genuinely free car from the insurers rather than carry on hiring at £x per day, however theoretical the prospect of him actually be called upon to pay this is.

Further topics

(1) “Insured hire”

65. Some motor insurance policies include payment of vehicle hire costs post-accident as one of the additional benefits available. Can insurers challenge hiring costs under such policies?

66. The question was recently considered twice by the Commercial Court in Bee v Jenson – once on C's strike-out application¹⁸ and then again at trial¹⁹. D lost on both occasions. The case is a useful discussion of general principles of subrogation.

¹⁸ [2006] EWHC 2534 (Comm) Cresswell J.

¹⁹ [2006] EWHC 3359 (Comm) Morison J

67. C was a CIS policyholder with legal expense and assistance insurance provided by DAS. The policy contained terms such as:

- DAS will pay C's vehicle hire costs following a non-fault RTA;
- C has to accept DAS's choice of vehicle, hire company and conditions of hire;
- C has to agree to DAS using C's name to recover the hire charges.

68. Since 2003, DAS have used Helphire to provide cars at ABI rates and so C was provided with a Helphire car.

The strike-out application

69. Before C's accident, D's insurers (RSA) had made a pre-emptive offer to DAS to supply free replacement cars to DAS customers involved in a non-fault accident with an RSA insured, saying that if DAS failed to pass on the offer to its customers then RSA would argue that claimants had acted unreasonably in hiring. DAS rejected the scheme and did not bring it to their customers' attention.

70. RSA argued that C had a duty to mitigate his loss; he had delegated choice of replacement vehicle to DAS, who were his agent for these purposes; DAS knew that RSA would provide a free car; therefore C was fixed with this knowledge and should recover nothing.

71. C said DAS was not his agent but his insurer and C was simply using his contractual right to have a hire car post-accident. C did not know of RSA's offer.

72. Cresswell J struck out the relevant paragraphs of D's defence, saying:

- C did not have the choice that D contended for, as C was contractually obliged to take DAS's choice of hire company. His choice was that of arranging himself for hiring on the open market.
- C was never told about RSA's offer to DAS and he should not be taken as knowing about it; in any event, there was no offer of a free car to C (whereas there was some evidence that RSA had made direct offers to some other DAS insureds).

The trial

73. At trial, RSA's remaining case was that:

- (a) DAS had to give credit for commissions paid by Helphire – this, it was said, would prevent DAS recovering more than its true outlay and would ensure that collateral benefits were taken into account in the assessment of damages.
- (b) DAS could only recover a corporate rate of hire, representing the reasonable cost to DAS of providing hire cars – this would have been somewhere in the region of £16 to £19 per day, instead of the £29 per day charged by Helphire.

74. Both these arguments were rejected:

- (a) Any payments by Helphire to DAS were *res inter alios acta* and irrelevant in quantifying C's loss. C did not benefit and did not have to give credit. There was no reason why the court should be interested whether DAS were making a profit or loss on their insurance arrangements, and no reason why any profit should be transferred to D or his insurers.
- (b) The claim was C's, not DAS, and the reasonableness of the rates charged had to be judged from C's perspective. Helphire in this instance provided no additional benefits such as credit or the like.
- (c) C was entitled to a replacement car at a reasonable rate and for a reasonable period. D was only concerned with the reasonableness of the charges: if they were reasonable, D had to pay them, whatever insurance arrangements C had and whatever arrangement C's insurers had.

(2) The curious case of the non-existent or dormant companies

75. One CHO group of companies operates the following scheme:

- (a) The claimant hires a car from company 1. He agrees to pay company 1 on a spot hire basis (agreeing to make payment at the end of the hire, so apparently no credit being provided).
- (b) To save C personally having to make the payment at the end of the hire, C also enters an agreement (a finance deal) with company 2 at the outset – company 2 will pay company 1 and C will repay company 2 at the end of the credit period or conclusion of the litigation, whichever is shorter.
- (c) To guard against the possibility of the hire charges not being recovered within 51 weeks, he also enters an agreement (an insurance deal) with company 3 at the outset that, in return for the premium paid, company 3 will pay company 2 if

the hire charges are not recovered within the specified time. The claim would then be pursued as a subrogated claim.

(d) The agreements are all contained on the same piece of paper but are expressed as being separate agreements with each company.

76. The twists are these:

(a) in some versions of the agreement, “company 2” and “company 3” do not exist;

(b) in other versions of the agreement, “company 2” and “company 3” do exist, but are “dormant companies” within the meaning of the Companies Act.

77. Will either scenario mean that C cannot recover damages?

78. The matter was due to be heard in a Birmingham CC test case called Merc late in 2006 but the case collapsed. Further test cases are due for hearing in the next couple of months.

(3) The Consumer Credit Act 2006

79. The distinction between unenforceable agreements that can be enforced by a court order and the more seriously unenforceable agreements that cannot be enforced even by court order was mentioned above. However, when section 15 of the Consumer Credit Act 2006 comes into force, the category of irredeemably unenforceable agreements will be abolished.

80. This is notwithstanding that the House of Lords decided²⁰ that irredeemable unenforceability would not be a breach of credit companies’ rights under Article 6(1) ECHR / Article 1 of the First Protocol (fair trial / peaceful enjoyment of property rights).

81. The consequence will be that all defective agreements will potentially be enforceable by court order. In theory, at least, it would matter less to CHOs if they entered defective agreements with hirers, since they could seek the court’s permission to enforce the agreement and rely strongly on the point that there was no prejudice to the hirer, since the tortfeasor would be paying the damages in any event. In practice, of course, CHOs will be more likely to continue using unregulated forms of agreement rather than risk using regulated but potentially unenforceable terms of agreement.

²⁰ Wilson v Secretary of State for Trade & Industry [2003] UKHL 40, [2004] 1 AC 816

82. What about when the agreement can be rescued by court order, but it has not been rescued at the time of the assessment of C's damages? This was not considered in Dimond since in that case the agreement was irredeemably unenforceable. There has been little judicial consideration of whether present unenforceability of the agreement is a bar to damages being awarded when the agreement could be rendered enforceable at a later date, but those indications that there are so far²¹ lean in favour of recoverability.

83. One further change is that the current statutory limit of £25,000 (above which the Consumer Credit Act 1974 does not regulate agreements) will be abolished when section 2 of the Consumer Credit Act 2006 come into force. This will have little effect on the credit hire field, but it will (for example) remove an argument against the application of s.82(2) when there are "back to back" hire agreements of a very expensive car.

Tim Petts

February 2007

²¹ Hatfield v Hiscock (1998, Current Law) NB the reasoning in other parts of this decision is suspect, which may affect the weight to be given to the decision on this aspect. Also MacLachan v Ace Cabs HHJ Hammerton 7th July 2006 unreported



12KBW Seminar: Seizing the Initiative for Insurers
Wednesday 28th February 2007

Practical problems on policy avoidance

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12

King's Bench Walk

Practical problems on policy avoidance

Ronald Walker Q.C.
28 February 2007

12

King's Bench Walk

Contents

- Is there a right to avoid at all?
- Waiver and reservation of rights
- Should insurers become involved in the defence of the underlying action?
- How can they do so?
- Conflict of interest and how to deal with it

2

12

King's Bench Walk

- ❑ **Is there a right to avoid at all?**
 - **Misrepresentation and no-disclosure**
 - **Breach of warranty – “basis of the contract” clauses**
 - **Condition precedent clauses**

3

12

King's Bench Walk

- ❑ **Waiver and reservation of rights**
 - **“Waiver by election or affirmation”**
 - **Waiver of breach of warranty (estoppel)**
 - **Reservation of rights**
 - **Can rights be reserved indefinitely?**

4

12

King's Bench Walk

- ❑ **Should insurers become involved in the defence of the underlying action?**
 - **When may they wish to do so/**
 - **The risk as to costs**
 - ***Chapman v Christopher***

5

12

King's Bench Walk

- ❑ **How can they do so?**
 - **By exercising their policy rights**
 - **By obtaining the consent of the insured**
 - **By applying to become a party under CPR 19.2**

6

12

King's Bench Walk

❑ Conflict of interest and how to deal with it

- How may conflict of interest arise?
- Instructing separate solicitors and counsel
- Joint retainer and its consequences
- *TSB Bank plc v Robert Irving & Burns*

7



Practical problems on policy avoidance

Ronald Walker Q.C.

Is there a right to avoid at all?

1. The right to avoid an insurance policy (or any other contract) arises where the insurer can prove that he was induced to make the contract of insurance by some material non-disclosure of, or misrepresentation concerning, a material fact. The insurer must prove both that the fact is material, that is to say that it would have affected the judgment of the prudent insurer when deciding whether to accept the risk, and if so on what terms (“materiality”), and that he in fact relied upon it (“inducement”).
2. In addition, as a matter of insurance law, breach of a contractual warranty by the insured entitles the insurer to avoid the policy, irrespective of materiality.
3. In order to give themselves the benefit of this principle insurers commonly include in their proposal forms a “basis of the contract” declaration.¹
4. Finally, where performance of an obligation imposed upon the insured by the policy is a “condition precedent” to the insured’s right to indemnity, failure to comply with that obligation will entitle the insurer either to refuse indemnity in respect of a particular claim, or to avoid the policy (depending upon the wording of the policy).²

¹ “I/We declare that to the best of my/our knowledge or belief the particulars and statements given in this Proposal and any additional information provided are true and complete and that this Proposal and declaration shall be the basis of the contract between me/us and [insurers]”

² But there has to be a “condition precedent” clause in the policy; cf *McAlpine (Alfred) v BAI* [2000] 1 Lloyd’s Rep 487

Waiver and reservation of rights

5. Insurers who believe, or suspect, that they may have grounds to avoid the policy³, but who wish to investigate further before taking that draconian step, need to be careful not to do anything which might subsequently be held to be a waiver of their right to avoid. Typically such conduct involves exercising rights which depend for their existence upon the validity of the policy, for example requiring the co-operation of the insured, or, in the case of liability insurance, taking some step in the underlying action in the name of the insured.
6. Waiver, in its general contractual sense, consists of electing to affirm rather than avoid a contract, knowing of the facts which would entitle the innocent party to avoid. It arises when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them. It is sometimes called “waiver by election” or “waiver by affirmation”.
7. Waiver, as described above, is not a species of estoppel. However, waiver of a breach of warranty requires something more than mere election. It requires that there be (1) an unequivocal representation by the insurer, by words or by conduct, that he does not intend to rely upon the breach of warranty, and (2) reliance by the assured upon that representation.⁴
8. In order to avoid waiving a right to avoid (however that right is asserted to arise) insurers will make it clear from the outset that they are conducting investigations (or doing whatever else they are doing) under a “reservation of rights”, the insurers stating that their enquiries / investigations are continuing but that meanwhile insurers are unable to confirm policy cover and are reserving their rights in that regard.

³ The same principles apply to the right to rely upon failure to comply with a condition precedent

⁴ *The Good Luck* [1992] 1 AC 233

9. Insurers are then in a position to contradict any assertion that they have elected to affirm the policy, when they could have avoided it, or, in the case of breach of warranty, that they have represented to the insured that they do not intend to rely upon his breach of warranty.

10. Although I have not encountered any case in which waiver or estoppel has been successfully asserted in the face of an express reservation of rights, there appear to me to be two potential pitfalls. First, the wording of the reservation of rights may indicate that it is only to last until a specified time, e.g. on a reservation worded as follows

Insurers are reserving their rights under the policy until more detailed information about the incident, sufficient for them to consider liability, arises

it seems to me strongly arguable that, once insurers have completed their investigations into liability, the reservation of rights comes to an end.

11. Secondly, however expressed, I do not believe that insurers can justifiably continue to exercise rights under the policy while reserving the right at any future date to treat it as void. In other words, the reservation of rights must expressly or impliedly be limited in duration. Insurers must have a reason to reserve their rights, the most common one being to enable them to complete their investigations, whether into the insured's conduct, or the merits of the underlying claim, or both. Once those investigations are complete the reservation of rights must, I think, cease to be effective.

Should insurers who may wish to avoid the policy become involved in the defence of the underlying action?

12. Having undertaken such investigation as they have been able to do into the merits of the underlying action, insurers are often faced with the dilemma of either having to step in and conduct the defence of the action, at any rate in the first instance, or simply avoiding the policy and leaving the defence of the action to the insured. If the grounds for avoidance are perceived to be very strong, the latter course is likely to be the preferred one. The downside risk is, of course, that the insured may lack the will or the means to defend the action himself, with the result that the claimant will rapidly obtain a default judgment, bankrupt the insured⁵ and proceed against the insurers under the Third Party (Rights against Insurers) Act 1930. By this time insurers will have lost the opportunity to raise what may have been a well arguable defence, or at any rate arguments on quantum, in the underlying action.
13. The alternative course is to take over the defence of the action on behalf of the insured. Of course the disincentive to do this is that insurers thereby have not only to fund the defence of the action, but they render themselves potentially liable to a costs order against themselves personally. Furthermore, the order may be made even though the sum which becomes payable by the insurers is outside the limit of policy cover. This has recently been confirmed by HH Judge Thornton QC in *Plymouth & South West Co-Operative Society Ltd v Architecture Structure & Management Ltd*.⁶

How can they do so?

⁵ Or, more probably, take an assignment of his rights under the policy

⁶ [2006] All ER (D) 248 applying *Chapman Ltd v Christopher* [1988] 1 WLR 12

14. There are three possibilities:
- (1) They can exercise their right under the policy, while reserving their right to avoid (see above);
 - (2) They can act on behalf of the insured with the latter's consent;
 - (3) They can apply to be joined as a party to the action in their own name.

15. If they adopt the second course insurers must, of course, take care to make it clear that in agreeing to conduct the defence of the claim on behalf of the insured, they are continuing to reserve their rights and therefore do not accept any liability to indemnify him against any judgment that may be obtained against him. They will also need to agree that they may cease to represent him at any time, in which event solicitors and counsel would only continue to act on the insured's behalf if he were prepared to fund his representation. Failure to agree a term to this effect in advance will make it difficult for insurers to refuse to continue the funding of the defence of the action, if and when the action appears to be no longer worth defending.

16. The last option is for insurers to apply to be joined as a party. This is not quite as straightforward as might be supposed. The application is made under CPR 19.2(2). That rule provides for joinder only if

- (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings, or
- (b) there is an issue involving the new party and an existing party which is connected to the matters in

dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

17. Paragraph (a) above will not apply (because policy response is not an issue in the underlying proceedings). Therefore insurers who wish to be joined to the action have to rely upon paragraph (b), but in that event, in order to satisfy the requirements of the rule, insurers are, as it seems to me, obliged to seek a declaration that they are not liable to indemnify the insured.⁷ This may not be a course they would wish to take (because the avoidance may be disputable, and the claimant's solicitors and counsel may be in a position to dispute it more efficiently and energetically than would the insured).
18. On the other hand, if the case for avoidance is a strong one, insurers will probably be well advised to apply to have the issue of policy response determined as a preliminary issue so that, if it is determined in their favour, they can withdraw from the action thereby saving the costs of defending the claim on its merits.

Conflict of interest and how to deal with it

19. A difficulty which may arise where insurers wish both to reserve their right to avoid the policy, and conduct the defence of the underlying action, so as to minimise their exposure should they lose on policy avoidance, is that of conflict of interest.
20. For example insurers may wish to deny negligence on the part of their insured in the underlying action, and yet assert gross negligence for the purpose of

⁷ See *Wood v Perfection Travel Ltd* [1996] LRLR 233, applied in *Chubb Insurance Co of Europe SA v Davies* [2004] EWHC 2138

justifying avoidance, or refusal to indemnify.

21. Similarly solicitors and counsel acting on behalf of the insured in the defence of the underlying action, in circumstances where there is or may be an unresolved avoidance issue, may come into possession of information which is relevant to the avoidance issue. If they are instructed by the insurers, they will be in a position of conflict. This will certainly be the case where insurers are conducting the defence in the insured's name with his consent, and have instructed solicitors and counsel for this purpose. In these circumstances, therefore, it seems to me that insurers' best course is to appoint solicitors and counsel other than those who have been representing the insurers in the avoidance dispute. Those solicitors and counsel are then acting solely on behalf of the insured and owe no duties of disclosure to the insurers.

22. If they do not so, so that solicitors and counsel are effectively jointly retained, the position is that there is an implied waiver of privilege by the insured which extends to (a) all communications made by the insured to the solicitors down to such time as an actual conflict of interest emerges and (b) to all communications made by the insured to those solicitors after the notification by the solicitors to the insured of such conflict and the lapse of such further time as the insured reasonably requires to decide whether to instruct separate solicitors. It follows that, assuming the avoidance issue (and therefore the conflict) has arisen prior to solicitors and counsel being appointed to act for the insured, he must be told of the conflict and advised to instruct his own solicitors if he wishes. If he does not, then he must accept that information received from him is liable to be passed to his insurers, potentially to his detriment.

23. These principles were laid down by the Court of Appeal in the remarkable case of *TSB Bank plc v Robert Irving & Burns*,⁸ in which the court

⁸ [2000] 2 All ER 826

understandably took a dim view of the conduct of solicitors and counsel who, acting on behalf of the insurers and insured in a negligent valuation case, invited the insured to a conference at which he was effectively cross-examined with a view to obtaining answers to justify a refusal to indemnify in circumstances where the insured was unaware that there was a policy issue. The insurers were not permitted to rely upon the answers that he gave.

24. The problem is also present where insurers are joined as a party under CPR 19(2).. In those circumstances their appointed solicitors and counsel are clearly representing them and not the insured. Yet they may need to confer with the insured, take a witness statement from him, obtain instructions on allegations made by the other side, and so on. Supposing, in so doing, they obtain information which may be material to the issue of policy avoidance. Are they under an obligation to disclose that information to the insurers? One might argue not, if that information is not relevant to the defence of the underlying action, because the scope of their instructions is limited to the defence of that action. However, the authorities, culminating in the *TSB* case (above) suggest otherwise.
25. Furthermore, if solicitors and counsel are also instructed to represent the insurers in the avoidance issue which is being determined as part of the same proceedings as the underlying action, it seems inevitable that those solicitors and counsel will be obliged to pass on to insurers any information which they receive which is relevant to that issue.
26. In these circumstances it seems to me that all that the insurers' solicitors and counsel can do is to make it clear to the insured from the outset (a) that they are representing his insurers and not him, (b) that he should obtain his own legal advice, if he so wishes, as to his position generally and as to whether he should communicate with the insurers' legal representatives, and (c) that he understands that any information which he gives to those representatives may be passed on to the insurers.