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King's Bench Walk

A New Approach to Basic Hire Rates: Karl Stevens v Equity Syndicate Management Ltd [2015] EWCA Civ 93

In arguably the most important decision on the calculation of the basic hire rate (BHR) in credit hire litigation since Bent v Highways and Utilities Construction (No. 2) [2011] EWCA Civ 1384, the Court of Appeal has provided a new, simple and Defendant-friendly method for the calculation of BHR. The decision is likely to change fundamentally the way in which credit hire claims are fought.

The Facts

On 10 February 2011, the Claimant's Audi A4 S Line Tdi 140 was struck by the Defendant's insured. Liability was admitted. The Claimant entered into a credit hire agreement with Accident Exchange Ltd ('AEL') for a period of 28 days. The rate was £140 per day in addition to an excess waiver fee of £22.50 per day and windscreen cover of £3.00 per day. The total rate was therefore £162.50, exclusive of VAT.

At first instance, the Recorder awarded a hire rate based on an average of the rates quoted by four mainstream hire companies for vehicles in the relevant group.

The First Appeal

The First Appeal in this case was heard by Burnett J (as he then was), and was reported as [2014] EWHC 689 (QB), [2014] RTR 34.

Much of the Judge's reasoning was based upon the following passage from Lord Hoffman's speech in Dimond v Lovell [2002] 1 AC 384 at 403G:

"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."

Referring to that test, Burnett J provided practical advice on identifying the BHR(at [29]):

"… the search must be for the figure which the claimant was willing to pay [to use Lord Hoffmann's formulation] on the basis that he had in fact gone into the ordinary car hire market to find a temporary replacement for his vehicle. In doing that the evidence of a claimant that he would be disinclined to spend more than necessary on a car would be relevant. There might be evidence of how the claimant has sourced hire cars in different contexts. Some might be fortunate to have access to discounted rates through membership of motoring or professional bodies. As was recognised in Burdis a claimant hiring a vehicle to replace one damaged by a tortfeasor would be under a duty to take reasonable steps to mitigate his loss. That does not mean that a claimant would be expected to telephone every last car hire provider in the locality to seek details of various deals that might be available. But the reality today is that almost anybody seeking to hire a vehicle in any particular locality would be likely to investigate the market by doing a simple comparative search on the internet. The full panoply of different hire rates available to the

credit hire industry through specialist websites (and regularly produced in credit hire litigation) would not be available to an ordinary driver, but one way or another it is not difficult for anyone wishing to hire a car to discover the rates offered by the major hire companies. Cheapest is not necessarily best and for all sorts of reasons anyone may reasonably choose to hire from a company that is not the cheapest available." (emphasis added)

The test was based on an assessment of what a particular claimant would have been willing to pay. In practice, this required counsel to ask hypothetical questions to a usually mystified Claimant on what he would have done had he gone into the ordinary hire market. The Court of Appeal's new approach indicates a shift from a subjective to an objective approach, and will remove the need for such counterfactual questioning by Counsel.

The Second Appeal

The Claimant appealed the judgment of Burnett J, raising the following arguments:

(a) The exercise of finding a basic hire rate is an objective one and cannot depend on what a particular claimant would have been willing to pay;

(b) The law has moved on since Lord Hoffman's speech in Dimond v Lovell, and Burnett J paid too little attention to Burdis v Livsey [2002] EWCA Civ 510, and Bent (No. 2);

(c) As the burden of proving a difference between the credit hire rate and BHR rests on the defendant, and as some of the basic rates in evidence were higher than the credit hire rate, the Judge was incorrect to find that the credit hire company charged an additional amount in respect of irrecoverable benefits.

Giving the only reasoned judgment (with which Floyd and Jackson LJJ agreed), Kitchen LJ set out the legal background in detail and gave the following judgment:

"[34] … I do not understand Lord Hoffman to have been saying that it was necessary to consider what Mrs Dimond would herself have been prepared to pay. The attitude of the driver who is not at fault must be irrelevant to the analysis. For example, it may be that, as in the present case, the person would never have hired at all. The analysis it, as Aikens LJ said in Pattni, an objective one and it is to determine what the BHR would have been for a reasonable person in the position of the claimant to hire a car of the kind actually hired on credit.

[35] Here I think one finds the answer to the questions I have posed. The rates quoted by companies for the basic hire of a vehicle of the kind actually hired by the claimant on credit hire terms may vary. No doubt some are offered on very favourable terms. So also those at the top of the range may reflect particular market conditions which allow some companies to charge more than others. But it seems to me reasonable to suppose that the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the claimant is a reasonable approximation to the BHR. This is likely to be a fair market rate for the basic hire of a vehicle of that kind without any of the additional services provided to the claimant under the terms of the credit hire agreement.

[36] It follows that a judge faced with a range of hire rates should try to identify the rate or rates for the hire, in the claimant's geographical area, of the type of car actually hired by the claimant on credit hire terms. If that exercise yields a single rate then that rate is likely to be a reasonable approximation for the BHR. If, on the other hand, it yields a range of rates then a reasonable estimate of the BHR may be obtained by identifying the lowest reasonable rate quoted by a mainstream supplier or, if there is no mainstream supplier, by a local reputable supplier." (emphasis added)

Therefore, the Court of Appeal found that although Burnett J erred in his reasoning (by failing to apply an objective approach), the result on the facts of the case was sound. The appeal was dismissed.

Comment

The approach set out by Kitchen LJ is new and highly favourable for defendants. It provides sensible and straightforward guidance on the issue of the determination of the BHR. It appears that all defendants need do is survey evidence from mainstream suppliers (or if there are none, local reputable suppliers) for the type of care hired and in the claimant's geographical area. The applicable rate will then automatically be the lowest reasonable

rate.

What this means for defendants is that so long as they source well-prepared rates reports, containing all the relevant terms and conditions, excess waiver cover, and where appropriate, daily rates from major hire companies for cars of the appropriate type, then such evidence is likely to ensure that the Court awards only the lowest reasonable rate. Likewise, in cases such as Equity, where AEL attempts to rely on a report generated by a large database of rates, the evidence may well prove to be extremely helpful to defendants.

Isaac Hogarth.

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This article has just been published on the PI Brief Update Law Journal.

http://www.pibriefupdate.com/content/pibulj-sec/2938-a-new-approach-to-basic-hire-rates-karl-stevens-v-equity-syndicate-management-ltd-2015-ewca-civ-93-isaac-hogarth-12-king-s-bench-walk