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Credit Hire & Fundamental Dishonesty

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Credit Hire - Overview

- Financial disclosure
- Pleading
- Call recordings/enforceability
- Impecuniosity
- Loss of profit
- Illegality
- Non-Party Costs Orders



Financial disclosure – pre-action

- Holt v Allianz [2023] EWHC 790 (KB) (Andrew Baker J).
- Claimant's appeal from HHJ Harrison, who was also the judge in EUI v Charles (Cardiff CC, 21 September 2018).
- Permission to appeal granted because of a «divergence in practice between courts» as to whether PAD orders should be made in this context, and in the the hope that consideration by the High Court «may ... lead to guidance which would be binding at County Court level»: see [7].



Financial disclosure – pre-action

- Appeal succeeds on a «technical» ground, namely that PAD application was made by Allianz, the defendant's insurer, and not the defendant personally: see [60-76]
- On the facts, Allianz could not be said to be «likely to be a party to proceedings» and therefore CPR 31.16(3)(b) not satisfied: see [73-74].
- Rest of judgment on the main merits of the judgment therefore *obiter*, «which could limit [its] usefulness»: see [75].
- Nonetheless likely to be persuasive in the County Court.



Financial disclosure – pre-action

- CPR 31.16(3)(c) – would documents fall within standard disclosure if claim issued?
- [80]: «The question for HHJ Harrison was whether impecuniosity was likely to be an issue if proceedings were brought, in the sense that it might well be an issue» (emphasis added).
- [82]: «Where the typical ground for ... (asserted) impecuniosity is not disowned ... in the face of a ... pre-action request to understand the basis of the putative claimant's claim, the only sensible inference is the one drawn by the judge».



Financial disclosure – pre-action

- CPR 31.16(3)(d) – is PAD desirable in order to dispose fairly of the anticipated proceedings and/or assist the dispute to be resolved without proceedings and/or save costs?
- [84]: «The proper test was whether requiring [PAD] offered a real prospect in principle of assisting the dispute to be resolved without proceedings or of saving costs» (emphasis added).



Financial disclosure – pre-action

- [88]: «I agree with the judge that where claim correspondence indicates that impecuniosity is likely (in the relevant sense) to be an important part of the claim, then it is contrary to the letter and spirit of the Practice Direction not to give serious consideration to it at the pre-action stage».



Financial disclosure – pre-action

- Residual discretion under CPR 31.16: is the private nature of financial disclosure relevant?
- [93]: «The plea to privacy and confidentiality ... is ... misplaced. The appellant invited and required sufficient intrusion into his financial affairs to warrant the order sought and granted by asserting a claim for credit hire charges ...».
- [94]: «The suggestion that a desire on the part of the appellant to protect the privacy of his financial affairs told against ordering [PAD] designed to further the aim of preventing public litigation is in truth somewhat bizarre».



Financial disclosure – dishonesty

- Haider v DSM Demolition [2019] EWHC 2712 (QB)
- Dishonesty in relation to financial disclosure (e.g. dishonest failure to disclose an alternative source of funds) can amount to fundamental dishonesty.



Financial disclosure - dishonesty

Per Julian Knowles J at [59]:

«The importance of the Claimant giving proper disclosure of his financial circumstances needs to be emphasised. Part of the purpose of the statement of truth is to bring home to [a] party signing the solemn nature of what s/he is doing, and [the] importance of telling the truth. [...] By doing as he did, the Claimant prevented the Defendant from carrying out a proper investigation into his claimed impecuniosity. This skewed and distorted the presentation of his claim in a way that can only be termed fundamentally dishonest».



Pleading

- CPR PD 16, paragraph 6.3:

Where the claim includes the cost of hire of a replacement motor vehicle following a road traffic accident, the claimant must state in the particulars of claim—

- (1) the need for the replacement vehicle at the relevant time;*
- (2) the period of hire claimed (providing the start and end of the period);*
- (3) the rate of hire claimed;*
- (4) the reasonableness of the period and rate of hire; and*
- (5) if the claim relates to credit hire, whether the claimant could afford to pay in advance to hire a replacement car, and, if not, why not (“impecuniosity”)*



Pleading

- CPR PD 16, paragraph 6.4:

In paragraph 6.3—

(1) “relevant time” means at the start of the hire and throughout the period of hire;

(2) the obligation to state the matters in paragraph (3) includes an obligation to state relevant facts.

N.B. New PD16 in force from 6 April 2020.

Pleading

- Diriye v Bojaj [2020] EWCA Civ 1400, [2021] 1 WLR 1277.
- Main part of the decision about interpretation of rules as to deemed service.
- Useful section at [47] – [54] about what is required in terms of pleading impecuniosity, including, at [48]:

[The] order required the reply to set out «all the facts» relied on in support of the assertion of impecuniosity. The appellant was a minicab driver, and that was the source of his income. So, the reply needed to set out what his income was and what his expenditure was, and how those figures meant he could not afford to hire a replacement vehicle.



Call recordings/enforceability

- Forster v Royal Sun Alliance (Newcastle CC, HHJ Freeman, 13 May 2022).
 - Appeal from DJ's decision to order disclosure of call recordings between C and CHO, based on D's suspicion that the CHO may have misled C when inducing him to hire the vehicle, either by telling him that he was receiving a courtesy car, or that he would not be liable for the hire charges: see [8].
 - Appeal dismissed, but N.B. was about disclosure, not the merits.
- See also Carson v Tazaki (Central London Mercantile Court, HHJ Mackie QC, 25 August 2005) and Company Call Centre Technology v Sheehan (Birmingham CC, HHJ Worster, 26 February 2009).



Impecuniosity

- Morgan-Rowe v Woodgate [2023] EWHC 2375 (KB)
- C has about £12k in an ISA; hire at BHR would = c.£9k, cost of repairs >£10k.
- Trial judge finds C impecunious; D appeals.



Impecuniosity

- High Court (Julian Knowles J) at [78] cites the dictum of Turner J in Irving v Morgan Sindall [2018] EWHC 1147 (QB) at [36]:

I cannot ignore the fact that by reducing her capital to the bare minimum and increasing her debt, the claimant was would have been exposing herself to the risk of a serious financial challenge in the event of even a modest but unexpected financial reverse might have afflicted her before her claim was satisfied. Impecuniosity need not amount to penury.



Impecuniosity

- High Court finds that the trial judge came to a conclusion that was open to him, and so the appeal was dismissed.
- BUT, are judges asking themselves the right question? See Morgan-Rowe at [79]:

... the [trial judge's] task was to determine whether it would have been unreasonable ... in the circumstances in which the Claimant found herself, to have required her to use her ISA money ... to pay for a hire car for an uncertain period whilst her own car was undergoing major repairs.



Impecuniosity

A *fortiori* Morgan-Rowe at [80]:

... the flaw in [the Defendant's] argument is that it focusses on what actually happened (with the benefit of hindsight), and not on what the Claimant had to decide immediately following the accident, and what it would have been reasonable for her then to have done. ... At that point, no-one, I think, could have known how long her car would have been off the road, and what the hire charge for a replacement might be (either at the spot rate or credit hire rate).



Loss of profit

- Mahmood v Liverpool Victoria [2023] EW Misc 6 (CC) (Bradford CC, HHJ Malek, 6 July 2023).
- Application of Hussain v EUI [2019] EWHC 2647 (QB) in relation to profit-earning chattels.
- Doesn't make any new law, but some interesting observations relevant to professional drivers and partly-profit earning and partly-private use vehicles.



Illegality

- Ali v HSF Logistics [2023] EWHC 2159 (KB).
- Approves Agbalaya v London Ambulance Service (Central London CC, HHJ Lethem, 17 February 2022).
- Decides that a «causation» argument as to loss of use (i.e. that if C's original vehicle could not be lawfully used on the road, then C has been caused no recoverable loss if that vehicle is damaged) is not merely an illegality/*ex turpi* argument dressed up in different clothes.



Non-party cost orders

- Mee v Jones [2017] EWHC 1434 (QB).
- Shahzad v Royal Sun Alliance (Leeds CC, HHJ Gosnell, 6 April 2023).
- Costs orders against CHO obtainable, but not automatic.
- Each case fact sensitive, so think carefully about the merits before making an application.



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Fundamental Dishonesty Update

12.10.23

Roger André



Risky business



Pluses and Minuses

For D + QOCS removal + costs + no damages + policy

For C + compensation + costs + burden on D + Court stance

- damages and costs, respectively.



Judicial interpretation

Dishonesty

Ivey v Genting Casino (UK) Ltd [2017] UKSC 67

Fundamental

Howlett v Davies [2017] EWCA Civ 1696. *LOCOG etc v Sinfield* [2018] EWHC 51

Cojanu v Essex Partnership Uni. NHS Trust [2022] EWHC 197:

- (1) s 57 defence should be pleaded;
- (2) Burden of proof on D to the civil standard;
- (3) a finding of dishonesty is necessary, applying effectively the *Ivey Genting 2* stage test;
- (4) that dishonesty must relate to a matter fundamental to the claim; and
- (5) it must have a substantial effect on the presentation of the claim (relating to a incidental or collateral matter is insufficient).

Recent examples of FD at trial

Cojanu v Essex Partnership Uni. NHS Trust [2022]
EWHC 197

Denzil v Mohammed & anr [2023] EWHC 2077

Muyepa v MOD [2022] EWHC 2648

Mantey v MOD [2023] EWHC 761 (KB)



Claims Layering

Khan v Aviva [2022] 11 WLUK 663 DJ Lumb (handed down February 2023)



Similar fact evidence, see also ***Kerseviciene v Quadri*** [2022] EWHC 2951 (KB).

Discontinuance and QOCS

Excalibur and Keswic Groundworks Ltd v McDonald [2023] EWCA Civ 18



Pleading / putting FD

Cojanu v Essex Partnership Uni. NHS Trust [2022] EWHC 197:

(1) s 57 defence should be pleaded

Howlett v Davies [2017] EWCA Civ 1696

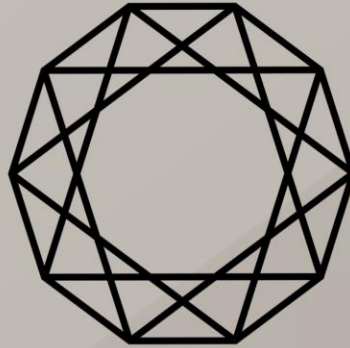
Jenkinson v Robertson [2022] EWHC 756 (QB)



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Thank you for your attention.

Questions?



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