Latest Court of Appeal Credit Hire Judgment:McBride v UK Insurance Ltd [2017] EWCA Civ 144

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James Marwick provides an analysis of the latest credit hire case before the Court of Appeal.

Judgment has been handed down in the latest appellate skirmish between credit hire providers and insurers. The Judgment at first blush looks like it will have a significant impact on the day to day determination of credit hire matters in the County Court.

In its judgment the Court of Appeal has held that the question of the cost of a nil excess is a separate and distinct question to assessment of a basis hire rate. Thus, the potential knockout blow for a Claimant where the BHR evidence comes with an excess (particularly a significant one) has been nullified. Further, the Court of Appeal has upheld the judicial tinkering with BHR evidence to allow a 28 day rate provided by a Defendant to be uplifted (by 15%) to reflect the disparity between 7 day and 28 day rates where a 7 day rate was more appropriate. Again, the typical Claimant argument had been that the Defendant's BHR evidence ought simply to be rejected in those circumstances with the burden not discharged.

McBride v UK Insurance Ltd [2017] EWCA Civ 144 (reported, 15th March 2017) concerned conjoined appeals in the cases of claimants named *McBride* and *Clayton* relating to the consideration of BHR evidence.

Challenges were made by the Claimants to, *inter alia*, (i) the approach to be taken where the BHR evidence did not allow for a nil excess, (ii) the adjustment upwards by a percentage figure to allow for the differential between 7 day and 28 day rates where the Defendant had relied upon 28 day hire evidence and (iii) a finding that certain providers were mainstream suppliers within the meaning of the established test. There was also a bold challenge to whether *Stevens v Equity*

was good law in so far as it provided that the test was one of "the lowest reasonable rate quoted by a mainstream supplier."

The Court gave short shrift to the challenge to *Stevens v Equity* which was presented on the basis that there was conflicting authority which provided that the top of the range of BHR evidence should be looked to rather than the lowest rate. It will have to have to be seen whether the case will be pursued to the Supreme Court (permission to appeal was granted on this issue before its dismissal to allow for this possibility).

The Court dealt equally quickly with the suggestion that certain high end providers of hire vehicles were not mainstream suppliers refusing to interfere in the findings of fact of the first instance judge. This is consistent with other reported decisions which allow for a wide interpretation of mainstream or local reputable supplier encompassing brokers.

The more relevant issues for everyday purposes were the challenges in respect of a nil excess and 28 day rates evidence.

The argument is often raised at first instance that where the BHR evidence adduced by a Defendant includes an excess that the Defendant has failed to discharge the burden upon it if the claimant has hired a credit hire vehicle with a nil excess, particularly where the excess is a significant one. There have been County Court appellate decisions which suggest that the question will be one of reasonableness in the particular circumstances of the case. For example, HHJ Freedman in *Lawson v Mullen* in Newcastle CC, unreported, dated 12th June 2015 found no error in a DJ's decision to allow BHR evidence which carried a £500 excess as the credit hire rate was so much more significant regardless of its nil excess.

In the Court of Appeal, the claimants argued that where a nil excess had been obtained in relation to the credit hire vehicle, the appropriate comparator was BHR evidence with a nil excess. The Court of Appeal found that the correct approach was to treat the nil excess separately from the comparison exercise as to the BHR with the relevant question being how much additional cost should be recoverable as the cost of purchasing a nil excess. The Judgment goes further and endorses the use of freestanding products offered by entities such as Insurance4carhire.com often relied upon by Defendants but dismissed as non-mainstream products by Claimants.

Another argument typically taken in the County Court is that where the Claimant reasonably believed the hire period to be short or unascertainable he would be entitled to hire on a daily or short term, say, 7 day rate. Thus, if hire proves longer and the Defendant adduces 28 day rates or for some other period, the Claimant will argue that the Court is comparing apples with oranges given it is well known that the longer the period of hire the lower the average daily rate. This argument will be used to urge the Court to reject the Defendant's evidence.

In *Clayton* the Judge below had adjusted the Defendant's BHR evidence upwards by a 15% percentage to allow for the fact that it was 28 day rate evidence and not 7 day evidence (the Claimant's evidence in re-examination was that he understood repairs would take about 7 days; in fact they ultimately took over 50 days).

This approach was challenged in the Court of Appeal but the decision was upheld on the basis that the Judge was entitled to use his considerable experience to reach that decision with particular regard to the fact that the task at hand was one of reasonable approximation.

This is undoubtedly another blow for credit hire providers and it appears for now that the grounds for challenging BHR evidence at trial are further diminished.

James has a nationwide credit hire practice and regularly acts for both Claimants and Defendants in high value and test cases.

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