Opoku v Tintas: end of the road for impecuniosity?

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Opoku v Tintas **[2013] All ER (D) 81 (Jul); CA (Civ Div) (Patten LJ, McCombe LJ, Beatson LJ) 05/07/2013.**

For defendant insurers and solicitors credit hire can appear to offer slim pickings in terms of quantum. In many cases, defendants faced with an impecunious client have few options to attack the hire claim.

A defendant can seek to knock out or reduce a credit hire claim based on a claimant's failure to reasonably mitigate his loss. This is the case where there is no need for the vehicle (a matter which is not self-proving: per Lord Mustill at 167B-G in *Giles v Thompson* [1994] 1 AC 142, [1993] All ER 321, [1993] RTR 289), or because a bigger or better vehicle has been hired (*Lagden v O'Connor* [2004] 1 AC 1067 at 27 per Lord Hope of Craighead).

But in its landmark judgment in *Lagden v O'Connor* [2003] UKHL 64, the House of Lords held that faced with an injured party whose expenditure in mitigation had been augmented by his impecuniosity, a judge was entitled to take into account the claimant's lack of means applying the principle that a defendant had to take his victim as he finds him. The defendant has to bear the consequences if it is reasonably foreseeable that the claimant would have to borrow money or incur some other kind of expenditure in mitigation. The ratio introduced the principle that claimants who are unable to afford an ordinary hire vehicle (and are therefore impecunious) are entitled to recover more than simply the cost of basic hire (old school "spot hire" rate; now "Basic Hire Rate" or "BHR" per *Pattni v First Leicester Buses Ltd; Bent v Highways and Utilities Construction and another* [2011] EWCA Civ 1384). Impecunious claimants are also entitled to recover the "additional benefits" (of case management etc) incorporated in the credit hire rate.

In his very useful review of impecuniosity in *Pattni*, Aikens LJ stated:

> *"If it was reasonable for the Claimant to hire a replacement car but he could not afford to hire a replacement car by paying in*

advance...then, prima facie, he is entitled to recover the whole of the credit hire rate he has paid, provided that it was otherwise a reasonable rate to pay in the circumstances."

Period of hire is then the next target for defendants. When *Lagden* reached the Lords, Lord Hope made clear the burden is on the defendant seeking a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. He can only require that a claimant acts reasonably. So where delays in repair are down to the repairer or motor insurer in carrying out or arranging repairs, providing the claimant acted reasonably in placing his vehicle in their hands and there are no supervening events, the extra loss caused by the delay falls on the tortfeasor (*Clark v Ardington* [2002] EWCA 510 at 115; *Mattocks v Mann* [1993] RTRT 13)

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But what about the impecunious claimant who, having hired a credit hire vehicle, keeps the said vehicle for a long period of time?

Lord Mustill in Giles reminded us:

"*What matters is that judges should look carefully at claims for hiring, both as to their duration and as to their rate. This will do much to avoid the inflated claims of which defendants' insurers are understandably apprehensive*" *(at 167).*

Time to go back to basics. And, for those with a passion for vintage cars, back to the Lea Francis 1951 shooting brake in *Darbishire v Warren* [1963] All ER 310. Mr Darbishire's much loved shooting brake was damaged. The market value was £85 (how times change). His insurers paid him £80. Despite being told repair was uneconomic he insisted on having it repaired at a cost of £192. Other similar cars could be bought on the open market for £85-£100. It's a simple point which Pearson LJ made well:

"*In my view it is impossible to find from the evidence that the plaintiff took all reasonable steps to mitigate the loss, or did all that he reasonably could to keep down the cost. He was fully entitled to have his damaged vehicle repaired at whatever cost because he preferred it. But he was not justified in charging against the defendant the cost of repairing the damaged vehicle when that cost was more than twice the replacement market value and he had made no attempt to find a replacement vehicle.*"

These days it is not unusual to come across cases where claimants do not off-hire for months, even years, running up credit hire bills into the tens of thousands of

pounds. At a time when we are all suffering the consequences of the Age of Austerity it seems somewhat unfair that credit hire companies appear to have virtually a free run at recovering such sums of money. Surely (I hear you cry), if Mr Darbishire acted unreasonably in running up many times the value of his car in repair costs, so too do claimants who run up credit hire bills many times the value of their vehicles?

The Court of Appeal in *Opoku* has now put up a big red "Stop" sign in such matters (or at the very least a large "Give Way" sign).

Mr Opoku was involved in a road traffic accident. The defendant drove his van into the back of Mr Opoku's car which suffered too much damage to be driven but was not written off. Mr Opoku had sometimes used the car as a mini-cab to supplement his income. The defendant denied liability for the accident and asserted that there was pre-existing damage in addition to that caused by the accident.

The Claimant instructed a claims management company which stored his car pending repair and extended credit hire to him to cover the cost of a replacement car. Soon after the accident the cost of repair was estimated to be £3,400 plus VAT. Mr Opoku claimed damages for £130,000 for the cost of hiring a replacement car over a period of almost two years and £19,000 for storage of his damaged vehicle.

The judge held that the defendant caused the accident, that the damage was entirely caused by the accident, and that Mr Opoku was impecunious and could therefore recover from the defendant the cost of his replacement at the higher rate charged rather than the basic hire rate ("spot rate"). But she also found that Mr Opoku failed to mitigate his loss by not having his car repaired sooner. She awarded him £63,000, finding he should have had his car repaired once the defendant insurer had inspected it whereas in fact he did not remove it from storage and have it repaired until the defendant insurer paid him £3,400 on a without prejudice basis more than a year later.

The claimant appealed, arguing there was an inconsistency between the judge's findings in relation to hire rates that Mr Opoku was impecunious and that he had failed to mitigate his loss by not using credit and savings to repair his car earlier than he did.

The Court of Appeal held that the judge was right. The courts had to exercise particular control in relation to credit hire claims. There was no inconsistency in the judgment. The question of whether a loss was avoidable was a question of fact (*Lagden v O'Connor* [2002] EWCA Civ 510, [2003] Q.B. 36 applied). The judge did not say that it was reasonable for Mr Opoku to repair his car right after the accident; rather that there came a time when it was reasonable for him to do so. There had been plenty of evidence of his finances before the judge. She had accepted that he was not living extravagantly. She had not gone outside the wide margins that trial

judges had. She had been entitled to conclude that Mr Opoku could reasonably have been expected to find the means to pay for the repairs through credit cards and saving. The one-off cost of the repair, of about £3,400 had to be put in the balance against the cost of the credit hire accruing at the rate of £5,000 per month. It was not outside the judge's legitimate scope to find that Mr Opoku's election had not been reasonable (*British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2)* [1912] A.C. 673, *Giles v Thompso*n (supra) , *Lagden v O'Connor* UKHL and CA (supra), *Dimond v Lovell* [2002] 1 A.C. 384 considered).

The clear implication is that claimants incurring spiralling credit hire costs need to consider whether there may be points where they should reasonably off-hire and get on with repairing their car or purchasing an alternative vehicle.

Opoku makes it clear the outcome will depend on the facts of each case.

Unfortunately for Mr Opoku (or at least for his credit hire company), he was reasonably able to save or obtain credit to replace his vehicle within a few months and hence the huge discount on his pleaded loss.

It is the norm to obtain financial records from allegedly impecunious claimants and those should now be scrutinised with renewed vigour by both claimants and defendants. In future it will also be vital for defendants to cite *Opoku* in negotiations or at trial where the financial evidence may permit the running of such an argument. It may well also persuade claimants to view early Pt 36 Offers from defendants in some credit hire claims with new enthusiasm.

The full text of *Opoku* will not be available for a few weeks and it is not yet clear if the claimant will seek to appeal. It does not spell the end of the road for credit hire by a long way, but it should give claimants and defendants pause for thought.

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