Case No: HO0CF897

IN THE CARDIFF COUNTY COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 3 December 2021

Before:

HIS HONOUR JUDGE HARRISON

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Between:

ALLIANZ INSURANCE PLC	**Applicant**
- and -	
JONATHAN HOLT	**Respondent**

- -

Edward Ramsay (instructed by **Keoghs**) for the **Applicant**
Robert Marven QC (instructed by **Principia Law Ltd**) for the **Respondent**

Hearing dates: 18th October 2021

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HARRISON

His Honour Judge Harrison:

1. This judgment relates to another skirmish between the insurers and credit hire companies in what was famously described by the court of appeal in *Bent v Highways and Utilities Construction No 2 2012 RTR* as a saecular war. In 2012 the war had been joined for 20 years, it is now nearly 30.

2. The Applicant's application, appearing at TB 1, seeks pre action disclosure (PAD) of the following documents namely:

   i) Statements in respect of all bank, credit card and savings accounts covering the period of hire and 3 months before:

   ii) Wage slips or other proof of income covering the period of hire and 3 months before.

3. This application was one of a number of such applications issued in the Cardiff County Court by the same applicants. At TB 208 District Judge Morgan recognised that there may be generic issues in the applications made and concluded that those generic issues should be resolved. The applications all related to respondents who had hired vehicles from Auxillis Services Limited and who in turn had instructed Principia Law Limited as solicitors. Consequently the learned district judge invited the parties to select a lead case and Mr Holt claim was so selected.

4. There were before the court witness statements from solicitors namely Mr Herring of Keoghs for the applicant dated 17th June 2021 and two from Mr Howson for the Respondent dated 21st June 2021 and 22nd September 2021 respectively. In addition the applicant sought to rely upon the statement of Mr

Barr. In relation to his statement objection was taken by the respondent because the statement was not from a solicitor as envisaged by the direction order of District Judge Morgan. Following application I ruled the statement admissible, although for reasons that will become apparent it is perhaps not crucial to the overall determination that I have made.

5. Mr Holt's accident occurred in late summer 2020. In pre action correspondence the amount of credit hire claimed on his behalf was some £10,387.50 for 25 days hire.

6. **General principles relevant to credit hire.**

In *EUI v Charles and others* (2018) EW Misc B7, I heard a similar application and made on order for pre action disclosure. At paragraph 8 to 11 I summarised the relevant principles of credit hire litigation in so far as they are relevant to an application of this sort. I approach this case on the basis of a similar analysis.

7. Put shortly credit hire companies operate by hiring vehicles to drivers whose vehicles have been damaged in road traffic collisions where it is believed the other driver to be at fault. The credit hire company extends credit to the driver and provides a vehicle. The driver agrees to cooperate in subsequent litigation to recover the hire charges.

8. Generally credit hire companies charge for the additional cost of providing credit and case management.

9. In *Dimond v Lovell* (2002) 1 AC 384 the House of Lords held that recovery of hire charges was limited to the actual cost of hire with the additional costs removed (often referred to as the Basic Hire Rate or BHR). However, in *Lagden*

v O'Connor (2004) 1 AC 1067 their Lordships created an exception to the principle established in *Dimond* if the claimant was impecunious. If a claimant is impecunious then he is not restricted to the BHR and can recover the full cost provided the credit hire cost is not unreasonably high when compared to other credit hire providers.

10. In very general terms therefore the impecuniosity of a claimant opens the door to a different approach to valuing a claim.

11. **The background to these applications**

Auxillis and their solicitors Principia are both part of the Redde Northgate Group Plc. Unlike in the case of *Charles* there is no evidence of a particular policy within the group of targeting impecunious claimants. The Respondents submit that this distinguishes the two cases sufficiently to allow a different approach.

12. The relevant factual background to the individual case can be seen from a limited perusal of the correspondence.

13. On 4th September 2020 Auxillis wrote to Motor Trade Claims Allianz (the applicants) making a request for payment. The letter contains the following information. Firstly the letter identifies the claimant as being Mr Jonathan Holt and Allianz as the relevant insurer of HSL Construction who's vehicle was being driven by a Mr Kitchen in the course of his employment.

14. The letter states:

"*Please find attached a summary of charges and supporting documentation in relation to the hire and repair charges our client has incurred following the*

above incident between our client and your insured. The circumstances of the accident make it clear that your insured is wholly responsible for this accident."

15. The letter seeks hire costs and additional charges of £8,656.25 plus VAT. It invites payment of the charges by return in default of which solicitors will be instructed to bring proceedings.

16. The supporting documentation included at TB 16 includes a statement of hire charges (25days x £343.05 daily rate= £8576.25) for a BMW 530d M sport 4dr Auto. At TB 10 the Vehicle Hire Agreement and at TB 13 the "Mitigation Questionnaire".

17. The questionnaire includes the following namely;

"Prior to agreeing to enter into the hire agreement the Hirer's duty to keep it's losses to a minimum has been explained."

However the questionnaire makes no reference to the financial means of the hirer and/or therefore impecuniosity. Indeed it was confirmed in argument on behalf of the respondents that there was no attempt at this stage to make any enquiry into the means of the hirer and that any such investigation would be left to a later date should it become relevant.

18. On 1st October 2020 MKS Motor Claims (Allianz UK) "Allianz" sent an email to Claims at Auxillis which appears at TB 325. It contains the following;

"6. Impecuniosity (we would appreciate your immediate confirmation of the claimant's position in relation to the issue).

WE intend to manage the exchange of documents and information in line with the Pre-Action Conduct Practice Direction.

The Practice Direction requires that the parties narrow issues and exchange documentation that would be required to be provided in litigation, so as to determine disputes without the need for litigation. In order for us to be able to

consider the claim we require copies of the following further information and/or documents from your client:

.....

6. If the claimant is to claim to be impecunious, provision of the following documents for a period of three months prior to the start of the repair/replacement of the vehicle or 3 months after the hire period has ended:

a) all bank, building society and credit card statements (including joint and business accounts);

b) All loans and overdrafts available to the claimant.

c) Proof of earnings

19. There is a further email on 13th October 2020 TB 320. The email sets out the assertion that the authorities governing the assessment of damages in credit hire cases are clear and well established. It sets out a summary of its interpretation of the relevant principles including the relevance of "impecuniosity" and "Basic Hire Rate (BHR)". Attached to the letter is a collection of "BHR" searches on the internet. The letter asserts that as follows:

"We believe that the collection of the BHR based on an internet search .....replicates what a reasonable person in the position would do if hiring a vehicle following an accident. The quotes obtained and evidenced within the report therefore represent the best evidence of the BHR in the relevant area."

You will note that the lowest reasonable BHR quote is £61.94per day, inclusive of excess waiver.

Auxillis are invited to agree the BHR and then the letter goes on to say

"This letter is sent in accordance with the pre action practice direction – Conduct and Protocols, with the intention of resolving the dispute without proceedings. If your client does not agree the BHR in the terms set out above, then we out you on very clear notice that we expect him to provide either of the following documents before proceedings are issued:

1. *Full and complete financial disclosure evidencing his impecuniosity: including all bank, savings and credit card accounts covering the period of hire and three months before; or*

2. *Alternative evidence of the BHR with a full explanation and reasoning setting out why that evidence should be preferred over the evidence we have obtained.*

   Both of the above are "key documents" pursuant to 6c of the Practice Direction to which we have referred.

20. Auxillis replied to these emails on TB 323 in a letter dated 2nd November 2020.

They state:

"In response to your email dated 1/10/21 we confirm that we did not deal with the repairs and therefore cannot send you the repair invoice and images.

We do not send wage slips and bank statements at this stage of the claim.

Our client needed a hire vehicle to conduct their day to day activities.

We are not able to comment on our client's financial position as this is outside of our knowledge. If you believe the rate to be excessive, we invite you to provide evidence of alternative rates, following which we can consider your offer.

21. It is fair to say that the correspondence from both sides of this case has the feel of a pro forma formulaic approach. Nevertheless it demonstrates the drawing of the battle lines in this case. The insurers want to know whether impecuniosity is being raised and if so to be provided with the documents showing the same. The respondents, effectively the credit hire company, do not consider it necessary to address the question of impecuniosity until proceedings are commenced.

22. By this application the applicants argue that the prompt identification of impecuniosity as an issue and the consequent disclosure of the sort of documents sought in this case is plainly consistent with the general pre action Practice Direction – Pre action Conduct and Protocols set out at page 2663 White Bk Vol 1.

23. Conversely, and in addition to raising jurisdictional objection to the application, the respondents characterise the applicant's approach as an impermissible attempt to obtain a "judicially-devised pre action protocol where the rule makers have not made any such protocol."

24. **Applications for pre action disclosure (PAD)**

The general power of the county court to order pre action disclosure arises from section 52 of the County Courts Act 1984 and applications under section 52 are one of the long list of interim remedies within CPR 25.1(1), more specifically identified at CPR 25.1(1)(i). CPR 25.2 (2) (c) places an additional restriction on a defendant seeking any of the interim remedies by stating:

"Unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 25.1(1) before he has filed either an acknowledgment of service or a defence."

25. The rules of court anticipated by section 52 are contained in CPR 31.16. The discretion to make an order for PAD arises when the jurisdictional threshold criteria in CPR 31.16 (3) a) to d) are met. The requirements are:

a) The respondent is likely to be a party to subsequent proceedings;

b) The applicant is also likely to be a party to those proceedings;

c) If proceedings had started, the respondents duty by way of standard disclosure, set out in 31.6, would extend to the documents or the classes of documents of which the applicant seeks disclosure; and

d) Disclosure before proceedings have started is desirable in order to –

i) Dispose fairly of the anticipated proceedings;

ii) Assist the dispute to be resolved without proceedings; or

iii) Save costs.

26. In this case, as I was in the case of *EUI v Charles & Others*, I was reminded of the two stage approach, namely jurisdictional and discretionary, and of the analysis of Rix LJ in *Black v Sumitomo Corp (2002)1 WLR 1562* at 1586 where he said:

82. "Of course, since the questions of principle and of detail can merge into one another, it is not easy to keep the two stages of the process separate. Nor is it perhaps vital to do so, provided however that the court is aware of the need for both stages to be carried out. The danger, however, is that a court may be misled by the ease with which the jurisdictional threshold can be passed into thinking that it has thereby decided the question of discretion, when in truth it has not. This is a real danger because first, in very many if not most cases it will be possible to make a case for achieving one or other of the three purposes, and secondly, each of the three possibilities is in itself inherently desirable.

.....

85. "In effect the judge never stood back, having dealt with the jurisdictional thresholds and asked himself whether this was a case where his discretion should be exercised in favour of disclosure. It cannot be right to think that, whenever proceedings are likely between the parties to such an application and there is a real prospect of one of the purposes under paragraph 3(d) being met, an order for disclosure should be made of documents which would in due course fall within standard disclosure. Otherwise an order for pre-action disclosure should be made in almost every dispute of any seriousness, irrespective of its context and detail. Whereas, outside the example of medical records or their equivalent (as indicated by pre-action protocols) in certain other kinds of disputes, by and large the concept of disclosure being ordered at other than the normal time is presented as something differing from the normal, at any rate where the parties at the pre action stage have been acting reasonably"

27. **Practice Direction-Pre action Conduct and Protocols**

At para C1-001 of the Current Edition of the White Book on page 2663 there is set out a practice direction which by virtue of paragraph 2 applies where no pre action protocol approved by the Master of the Rolls applies. There being no pre action protocol for credit hire cases, the practice direction applies to the pre action conduct of the parties to this litigation.

28. The scheme of the practice direction can be summarised as follows. The objectives are stated at paragraph 3 to include the exchange of sufficient information before the commencement of proceedings to:

    a) *Understand each other position*

    b) *Make decisions about how to proceed*

    c) *Try to settle the proceeding without proceedings*

    d) *Consider a form of Alternative Dispute Resolution ADR to assist with settlement*

    e) *Support the efficient management of those proceedings; and*

    f) *Reduce the cost of resolving the dispute*

29. At paragraph 4 the parties are enjoined not to use the practice direction or protocols to obtain an unfair advantage over another party and

    "*only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues*"

30. Paragraph 6 of the Practice Direction sets out the steps to be taken before issuing a claim at court. Where no specific pre action protocol exists it includes requiring the parties to exchange "*correspondence and information*" so as to comply with the paragraph 3 objectives set out above. The Practice Direction provides that in the first instance compliance would involve the claimant writing to the defendant with concise details of the claim including "*the basis on which the claim is made, a summary of facts, what the claimant wants from the defendant, and if money, how the amount is calculated:*".

    The steps required go on to provide that compliance with the expectation of pre action conduct will usually require the disclosure of "*key documents*" relevant to the issues in dispute.

31. Paragraph 12 introduces the concept of a stocktake before proceedings commenced. The parties should:

> *"review their respective positions. They should consider the papers and the evidence to see if proceedings can be avoided and at least to narrow the issues in dispute before the claimant issues proceedings."*

32. The remaining paragraphs of the Practice Direction are primarily concerned with the consequences of non-compliance and limitation.

33. **The Jurisdictional test**

"likely to be a party in subsequent proceedings"

The first objection from the respondent to the making of an order for PAD is to the very foundation of the application. Unlike in *Charles* where the point was conceded, the respondents here argue that the application should fail because the likely defendant is not Allianz Insurance PLC but HSL Construction who were the insured party. Of course insurers in road traffic accidents are routinely pursued directly under the provisions of the European Communities (Rights against Insurers) Regulations 2002. Equally they are frequently joined as a party to proceedings. In reality it is the insurer who meets the claim and who makes the decisions in the case.

34. The requirement is only one of "likelihood" in the sense that it may well be that the defendant will be a party (see Rix LJ in *Black* at para72). I am satisfied that this threshold is met. To hold otherwise would be to disregard the fact that in vast numbers of cases of this sort up and down the country where proceedings are issued directly on insurers as of right.

35. It follows that the requirements of a) and b) are made out.

36. *"If proceedings had started the documents sought would fall within standard disclosure"*

The respondents submit that again the applicant falls short in establishing an element of the jurisdictional test. The argument advanced is that the documents sought would only fall within standard disclosure if/when impecuniosity is asserted by the prospective claimant. It is submitted that here no such assertion has been made. I again note that it is accepted that the approach of the hire company/Auxillis at this stage is not to enquire as to the financial position of the hirer. As they say in their correspondence it is "*outside their knowledge*". Indeed the respondents' argument goes a little further. It is submitted that even if impecuniosity was raised then the applicants would have to show that any rate claimed was in excess of the BHR before the issue would arise.

37. In reaching a conclusion in relation to this element of the jurisdictional test it is helpful to remember the wording of section 52(2) of the 1984 Act and in particular the reference to "*documents relevant to an issue arising or likely to arise*". In this case the relevant features are as follows:

i) the respondents have claimed credit hire for a period of £345 per day for 25 days.

ii) the applicants have replied suggesting a BHR of £61.94 per day inclusive of excess waiver.

iii) the respondents have declined a clear invitation to indicate whether impecuniosity is an issue or perhaps more importantly is not an issue.

38. Furthermore, whilst the court should regard very few facts as self-proving, the reality is that credit hire rates are generally higher than BHR. That is the whole

point. They include additional charges that are not otherwise recoverable unless the hirer is impecunious. This analysis is consistent with the whole background to credit hire claims and is consistent with Aikens LJ's summary of the principles or hierarchy of questions to be applied by a judge in a credit hire case as set out in *Pattni v First Leicester Buses (2012) RTR 17.*

39. Consequently whilst at any trial there will be a requirement for the insurer to adduce evidence of the BHR relied upon, the relevant features set out above are in my judgment sufficient to allow the court to conclude that the documents sought are relevant to an issue that is *likely to arise* and as such would fall within standard disclosure.

40. As Mr Ramsay contended it would be a surprising result indeed if an application for PAD could be defeated by steadfast avoidance of actually addressing the issue or even asking the hirer about his means.

41. *Disclosure before proceedings have started is desirable...*

The court is required to consider desirability by reference to the following aims, namely to:

i) Dispose fairly of the anticipated proceedings;

ii) Assist the dispute to be resolved without proceedings; or

iii) Save costs.

42. Mr Marven for the respondents argued that the desirability of PAD against a prospective claimant must be seen against the background of the significant interference of such an order with the rights of an individual claimant. It is, he submits, rightly rare for orders of this sort to be made against prospective

claimants. Why, he asks, should it be desirable for a potential claimant to disclose personal and sensitive financial information before they have taken that final decision to issue proceedings and to commit themselves to a claim based upon impecuniosity?

43. Furthermore, he submits, the suggestion that by disclosing such information the claims will settle is illusory. Credit hire claims continue to be defended and on a number of issues including, for example, so called intervention letters whereby a defendant insurer writes an early letter inviting a hirer to obtain replacement vehicle from them again at no cost to them.

44. At this point it is perhaps helpful to deal briefly with the competing evidence filed by both parties. It is a feature of that evidence that each side claims that statistical analysis supports their particular argument. I confess that I did not find the evidence particularly helpful. On the one hand it may be the case that impecuniosity is indeed raised in a great number of cases run by Auxillis and it may also be the case that many cases run on to trial in any event. However, the evidence does not show in how many cases a determination had to be made on impecuniosity. In my view there is a danger in placing too much reliance on the same and the better approach is by way of basic principles.

45. In general terms the answer to the respondents' objection under (d) can be taken shortly. Impecuniosity in the context of credit hire is central. It is central because it governs the basis by which damages are calculated. It is in my judgment plainly desirable for a prospective defendant to know the basic principles upon which a claim is put to calculate any offer. I remind myself again of how Lord

Nicholls in Lagden expressed his expectation for the future. Having sought to define impecuniosity he said:

> "*I am fully conscious of the open ended nature of this test. But fears that this will lead to increased litigation in small claims courts seem to me to be exaggerated. It is in the interests of all concerned to avoid litigation and its attendant cost and delay. Motor insurers and credit hire companies should be able to agree on standard enquiries, or some other means, which in practice can most readily give effect to the test of impecuniosity.*"

46. If "*litigation and its attendant cost and delay*" is to be avoided and if the aims of paragraph 3 of the Practice Direction are to be achieved then in my judgment disclosure as soon as possible of the sort of evidence of impecuniosity that would have to be disclosed if the case were to be issued is in my judgment desirable.

47. **The exercise of discretion**

48. The authorities have recognised the interrelationship between sub paragraph (d) of the jurisdictional test and the subsequent judicial task of standing back and looking at whether discretion to order should be exercised. Mr Marven's objection/point in relation to the interference with a proposed claimant's privacy is of course relevant in respect of both and so also is the applicant's reliance on the contents of the practice direction.

49. I accept the principle that the pre action disclosure of unnecessary personal information from a prospective claimant is wrong and that consequently the court should approach making such orders with caution. However, so too it seems to me is a policy of not addressing the issue of impecuniosity in credit hire cases before issue of proceedings. For the reasons set out above the issue is

central to the calculation of damages. I do not think that the fact that many other issues may arise and indeed be contested is an answer to the need to address this issue. In my judgment the prospective claimant in a credit hire case should not be able to avoid the issue of impecuniosity by saying that the do not deal with the issue at a pre issue stage. To do so would be contrary to the overriding objective and the practice direction for claims in which there is no specific protocol.

50. The problem with Mr Marven's argument that a prospective claimant should not be required to disclose such personal information before he/she makes the final "*choice*" to issue proceedings is that in the context of credit hire litigation the individual is not really choosing anything. After the innocent driver signs up to receive a hire vehicle the litigation, if any, is pursued by the credit hire company. The amount that the credit hire company can recover is directly related to the claimant's financial means, but, on the evidence before me, the policy of Auxillis is that this is never really raised with the claimant until proceedings are issued. How, if he/she is not told about the potential relevance of their financial position, is the individual claimant to exercise a choice? In my judgment there is a clear desirability in the individual being aware of the relevance of his financial situation at the earliest stage possible.

51. **Conclusion**

It is not suggested that the provisions of CPR 25.1 prevent an order being made, but they are a reminder of the unusual nature of such applications. If it is necessary to say so I take the view that this is one of those occasions when an order should be made. Having reminded myself of the same I am for the reasons

set out above satisfied that the jurisdictional requirements for the making of a PAD order are established. I have stood back and asked myself whether nevertheless an order should be made and having done so I am satisfied that I should do so. This, in my judgment, is not an attempt to engineer a pre action protocol for credit hire cases that does not exist, rather it is an attempt to apply the principles of the overriding objective to the use of the relevant practice direction.

52. I will invite the parties to agree a consequential order in default of which there shall be a short hearing.