

Newsletter

April 2010

PREMIER LEAGUE CREDIT HIRE?

Bent v (1) Highways and Utilities Construction Ltd (2) Allianz Insurance plc

The recent litigation involving Premiership footballer Darren Bent has added a touch of glamour to the continuing legal dispute between credit hire companies and insurance companies seeking to minimise the damages in road traffic accidents. Mr Bent has added his name to the illustrious line of authority stretching back to *Giles v Thompson* [1994] 1 AC 142, and including along the way *Dimond v Lovell* [2000] 2 WLR 1121, *Clark v Ardington* [2002] EWCA Civ 510 and more recently *Copley & Lawn v Madden & Haller* [2009] EWCA Civ 580. Whilst Mr Bent may not regard his involvement in this case as highly as his (in)famous beach ball goal, it nevertheless provides some further clarification for practitioners involved in this area of work.

In 2007 Mr Bent had an accident in his £72,000 sports car where liability rested, and was accepted by both defendants to rest, with the first defendant. Although Mr Bent had another vehicle, the Judge at trial accepted his reason for not wanting to use it.

The defendants accepted that Mr Bent was entitled to a replacement car, that such a car

should be broadly equivalent to his own damaged Mercedes and that he was entitled to recover appropriate hire charges. What the defendants did not accept, was that they had to pay the full hire charges for the vehicle Mr Bent actually hired - an Aston Martin DB9 worth around £105,000. That vehicle was provided by Accident Exchange Ltd and the hire charges were claimed at £63,406.90, just under £10,000 less than his damaged Mercedes.

The trial Judge had asked himself this question;

'What was the cost of hiring a Mercedes of Mr Bent's type or an Aston Martin of the type he hired on a daily rate, because nobody knew it was going to last for 94 days, as at February 2007'.

The Judge said that he could not speculate on the basis of the evidence provided by the Defendants - an Autofocus report surveying the spot hire market for a similar vehicle in 2008 - and that therefore the claimant should succeed.

The Court of Appeal said that the heart of the Judge's decision was that evidence of spot hire at a later date was irrelevant.



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PREMIER LEAGUE CREDIT HIRE?

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This, was not something the Court was willing to accept;

'Very often when one is assessing valuation evidence in all sorts of fields, one has evidence of prices of the same or similar things at different dates and has to make appropriate adjustments. Working with comparables and making adjustments is the daily diet of Judges concerned with valuation in all sorts of fields. Clearly evidence of the spot rate a year or so later than the relevant date is likely to throw considerable light on what the spot rate would have been at the time.' (Para 8)

And;

'Normally the replacement need be no more than in the same broad range of quality and nature as

the damaged car. There may be a bracket of spot rates for cars rather 'better' and rather 'worse'. A judge who considered that bracket and aimed for some sort of reasonable average would not be going wrong' (Para 9)

Thus, two points of clarification arise. First, that evidence of last year's spot rate charges are good evidence, albeit capable of rebuttal, of this year's spot rate charges. Second, that an average of spot rates is an acceptable way of finding an appropriate rate as opposed to the highest spot rate available.

Whilst practitioners may eagerly await the next score line in the credit hire game, Mr Bent, one assumes, may have different goals in mind.

Adam Gadd

A DEFENDANT BY ANY OTHER NAME? WHAT IF THE CFA NAMES THE WRONG DEFENDANT

There is no requirement for a CFA to name a Defendant - but it usually does. On occasion, at the time the CFA is entered into, it will not be possible to identify the Defendant precisely so as much detail as possible will be given. None of this should cause any difficulty but what happens if ultimately the CFA names the wrong Defendant, or the Defendant wrongly? Can one recover an uplift from the Defendant against whom one has succeeded? And if not can one at least recover base costs?

In *Law v Liverpool City Council and Berrybridge Housing Association* (2005 - unreported HHJ Stewart in Liverpool County Court) the Claimant (through his litigation friend) entered into a CFA to recover damages for personal injury arising out of a tripping accident at a property owned (or so he believed) by LCC. A letter of claim was sent, a claim form and particulars of claim followed in due

course. Months later LCC realised that they had transferred the property to BHA a matter of a couple of months before the accident. The Claim form was amended and the Claimant settled against BHA - for the princely sum of £980!

The CFA stated on its face *'What is covered by this agreement?' - 'Your claim for damages against Liverpool City Council for damages...'*. And so, said the Judge, it did not cover a claim against BHA. The question was purely a matter of interpretation of the contract. As such, unsurprisingly, the Judge applied *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1988] 1 WLR 896 to reach his conclusion based on the intention of the parties.

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A DEFENDANT BY ANY OTHER NAME? WHAT IF THE CFA NAMES THE WRONG DEFENDANT-

The opposite conclusion was reached by Master Gordon-Saker in *Brierley v Prescott* [2006] EWHC 90062 (Costs). That concerned a road traffic accident where the Claimant was involved in a collision with a vehicle hired from Hertz. Hertz are insured by 'Hertz Claim and Risk Management' and the CFA was expressed to cover: 'Your claim against Hertz UK Limited Car Hire for damages...'. Proceedings were issued against Hertz (UK) Limited and served on solicitors nominated by the insurer. Those proceedings alleged the driver to be Hertz (UK) Limited's 'servant or agent'. The Defendant solicitors pointed out the error of this reasoning and agreed that Mr. Prescott should be substituted as Defendant. The solicitors admitted negligence on his behalf. Thereafter matters were compromised in the somewhat more impressive sum of £101,085.48.

A bill of costs was served and the Defendant solicitors took the preliminary point that the Claimant had not won against 'Hertz (UK) Ltd.' per the CFA and in consequence couldn't recover. Also relying on *Investors Compensation* the Master found that the words: 'your claim against Hertz UK...' in the CFA meant: 'the claim for damages arising out of the accident and which was being handled by Hertz' it was descriptive of the accident not necessarily descriptive of the Defendant. 'The intention of the parties is obvious... There was only ever one claim'.

Why do I find myself reviewing these cases now? Because I have just finished a case where the same point was taken. The Claimant had named his employer's company (the name of his employer with "Ltd" after it) in the CFA but the company had not come into being until after the accident. The Defendant took the point on assessment but we succeeded in recovering costs and the uplift - relying *inter alia* on *Brierley*. It seems to me that there is a crucial distinction between a misdescription - or a case

where in reality there is only ever one Defendant - and a case where there are two or more distinct Defendants and the CFA names one of them correctly. In that latter case one is wise to enter into a new CFA and must be at risk if one does not.

As for base costs? Obviously the question did not arise in the latter cases but it was conceded in *Law* by BHA, that absent a CFA there was a common law retainer in respect of the claim against them, hence the Claimant was entitled to recover reasonable base costs - but no uplift. This, in my opinion, must be right. The authorities relating to illegal CFA's do not come into play. There is no public policy argument to deploy and if there is no CFA covering the litigation there must be a retainer at common law - which, of course, does not need to be in writing. Had *Brierley* gone the other way, however, the Defendant was set to argue that if the CFA did not cover the litigation the Claimant owed the solicitors nothing and hence nor did they under the indemnity principle!

Mark Dubbery

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CONDITIONAL FEE AGREEMENTS CASE LAW UPDATE

The following cases have provided helpful guidance into some of the issues regarding the application and enforceability of Conditional Fee Agreements. Further developments are eagerly awaited.

1. “Advocacy and Litigation Services” under Section 58(1) of the Courts and Legal Services Act 1990

a. Two contrary decisions at first instance are of interest:

i) *Roche v Newbury Homes Ltd* [2009] EW Misc 3 (EWCC) - The Deputy District Judge held that a CFA in Law Society Model Terms does not cover a pre-action application for disclosure. The Court observed that “pre-action” was not “action”. The CFA covered the substantive claim, not a preliminary issue or pre-action matter. A pre-action matter was not intrinsically linked with a post-issue matter that could clearly have been covered by the CFA.

li) Considered by *Smith v Macdonalds* [2009] (Lawtel) - The Claimant who had entered into a CFA was entitled to seek the costs of an application for pre-action disclosure where the Defendant had failed to comply with the protocol. The District Judge held that the decision in *Roche* was not binding on the instant court. The CFA would generally cover damages and costs and would include the costs incurred throughout, including preparation for and in contemplation or in anticipation of proceedings. If a pre-action application proved necessary and was reasonably undertaken then a costs order might be expected particularly, bearing in mind [CPR r.48.3\(b\)](#), where a pre-action protocol had not been complied with. The indemnity principle

was not breached because the Claimant was entitled to recover costs from the Defendant. Accordingly, the Claimant was entitled to recover costs and those costs would be limited to base costs which would need to be assessed.

2. Practice Direction (Pre-action Conduct)

a. From 1st October 2009 the new practice direction has required disclosure of funding agreements pre-issue

“9.3 Where a party enters into a funding arrangement within CPR rule 43.2(1)(k) that party must inform the other parties about this arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim”

3. Success Fees

a) Fixed Success Fees- RTA

i. *Thenga v Quinn* [2009] EWCA Civ 151- In circumstances where the only matter at issue in a road traffic claim had been the assessment of costs, the conduct of a summary assessment at a hearing, without the judge having heard any part of the substantive claim, did not constitute a final contested hearing within the definition of a “trial” under CPR r.45.15(6)(b) for the purpose of determining the applicable percentage uplift on costs under CPR r.45.16.

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CONDITIONAL FEE AGREEMENTS CASE LAW UPDATE CONTINUED

b. CFA at an Early Stage

i. Oliver (executor of the estate of Oliver) v Whipps Cross University Hospital NHS Trust [2009] EWHC 1104 QB- The Claimant's solicitors appealed an order of a cost judge which reduced his success fee under a CFA, in proceedings for clinical negligence. The costs judge reduced the success fee to 67 per cent, which represented a 60 per cent chance of success. He stated that the solicitors must have thought that there was more than a 50 per cent chance of success, otherwise the claim would not have been accepted, and that the appropriate figure was 60 per cent. The appeal court held that the solicitors were entitled to assess the claim as having a 50 per cent chance of success, which allowed it to charge a 100 per cent success fee. The CFA itself noted that the solicitors had not yet had the opportunity to test the credibility of the evidence or assess the relevant fact of expert witnesses. The claim was of a kind that had uncertain prospects, and based on what the solicitors knew when the fee agreement was made, the claim could easily have been assessed as having chances of success lower than 50 per cent.

ii. Kevin McCarthy v Essex Rivers Healthcare NHS Trust Plc (2009) (Lawtel)- The appellant (M) appealed against a decision reducing the success fee payable to his solicitors (S), under a CFA, in proceedings for clinical negligence against the respondent health authority. M's clinical negligence claim had been accepted by S under a CFA with a success fee of 100 per cent,

which represented a notional 50 per cent prospect of success. The agreement contained a termination clause that allowed S to determine the agreement if subsequently the prospects of success seemed unlikely. The Costs master at first instance held that the opportunity to abandon the claim due to the termination clause must be taken into account and found that the success fee payable to S was 80 per cent rather than a 100 per cent. The appeal court dismissed the appeal holding that the master was correct to reach the decision that he did and he was correct to lower the success fee of 100 per cent to 80 per cent. The Court found that the termination clause allowed S to pick out of the basket and discard claims which in fact were properly to be viewed as time went by, as less than 50/50 cases. That would leave S with an improved basket which would again, as a matter of high probability, include claims which would fall into a range of something like 50 to 80 per cent chance of success all of which would still have a 100 per cent uplift.

Tara Lyons

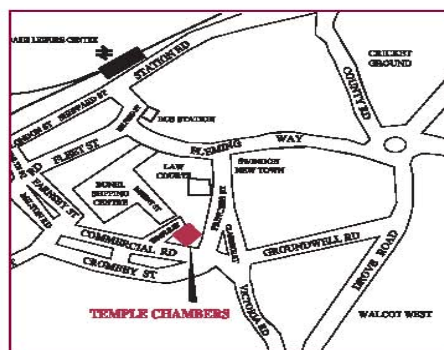
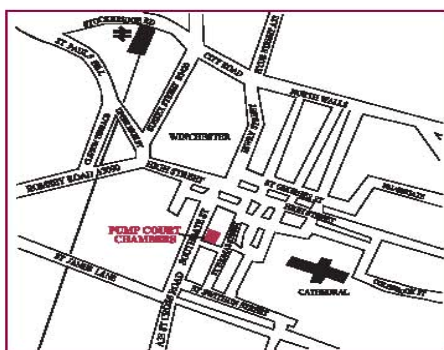
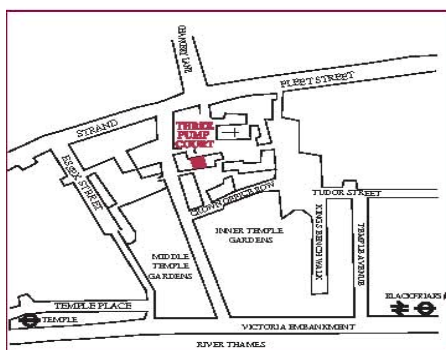
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