# ORDER

**In the County Court at Slough**
**District Judge Glen**

Case number: C06YM365

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| **Parties** | MR RAHUL KANSAL | Claimant |
| | MRS ZENGLI ZHANG | Defendant |

Judgment handed down on 31st January 2017 following a hearing on 14th December 2016 at The Law Courts Windsor Road Slough Berkshire

Counsel for the Claimant: Mr Shale

Solicitor's Clerk for the Defendant: Mr Turner

**Introduction**

1. This is an application dated 8th September 2016 by the Claimant to vary an order made by me in the absence of the parties on 5th September 2016 by which I allocated this claim to the small claims track and gave case management directions to take it to a final hearing.

2. One of those directions related to the mutual exchange of basic hire rates ('BHR') evidence. The Claimant seeks to vary that direction so as to provide for sequential exchange with disclosure of the Defendant's BHR evidence followed by rebuttal evidence from the Claimant. This is an argument rehearsed in very many directions questionnaires that come before this court (and no doubt others), often by the Solicitors acting for the Claimant in this case. I therefore indicated during the hearing that I would be giving a reserved judgment.

**The facts**

3. On 30th July 2014 the Claimant was stationary in a Nissan Qashqai car at the roundabout controlling the junction between the A332 and the A308 at Old Windsor, Berkshire when he was struck in the rear by a vehicle driven by the Defendant. Liability is not in dispute. The particulars of claim seeks damages consisting of repair costs of £3,880.64 and hire charges in the sum of £2,686.80. There is also a claim for an engineer's fee of £60.

4. The particulars of claim give no immediate clue to the fact that the hire charges were the subject of a credit hire agreement; indeed it is asserted that *"The Claimant hired alternative transport at a commercial rate of hire and is therefore not required to address the issue of impecuniosity".* However, it is clear from the agreement exhibited to them that on 5th August 2014 the Claimant entered into a credit hire agreement with Accident Exchange Ltd. for the hire of a Ford S-Max vehicle at a nominal daily rate of £201.90 plus a delivery and collection charge of £144. Curiously, the 'statement of charges' shows that the sum claimed is in fact based on 26 days' hire at £81.50 per day plus a delivery and collection fee of £120.

5. The defence is for once not simply a formulaic recitation of all the possible bases on which the credit hire agreement might be impeached. Uniquely in my experience and that of Counsel for the Claimant who has he tells me appeared in very many such cases, paragraph 7 contains a specific averment that *"The hire charges…are excessive… The Defendant refers to the attached print out from Thrifty which shows that the weekly cost of hiring a MPV would be £295.93".* Paragraph 8 goes on to state that *"The uplift sought by the hire company…is intended to reflect the additional services that the Claimant enjoyed such as assistance with processing his legal claim…and the credit provision, and are not recoverable in the event that the Claimant is pecunious".*

6. The matter came before me on paper on 5th September 2016 for allocation and case management following transfer from the CCMCC. The Claimant's Directions Questionnaire was accompanied by written submissions on the issue of BHR evidence and a transcript of the decision dated 14th March 2016 of District Judge Bloom sitting at the County Court in Willesden in *Gonzales v. Dignity Funerals Ltd.* and other related matters. Having considered both parties Directions Questionnaires and the accompanying documentation, I allocated the claim to the small claims track and made relatively standard directions including provision for mutual exchange of BHR evidence no later than 14 days before the final hearing, subsequently listed for 13th January 2017. An application to vary those directions was made on 8th September 2016.

**The law**

7. The recoverability of hire charges incurred under the terms of a credit hire agreement is an issue that has vexed the higher courts on a number of occasions. For present purposes, it is useful to begin with the decision of the House of Lords in *Dimond v. Lovell [2002] 1 AC 384*. This established that a claimant who hired a replacement vehicle on credit hire terms could not be said to have failed to act reasonably in mitigating their loss. Where however a claimant could have afforded to hire on commercial terms but chose not to do so, the element of the credit hire charge that related to additional services provided by the credit hire company was not recoverable. This was emphasised in the more recent decision in *Stevens v. Equity Syndicate Management Ltd.* at paragraph 33:

> *"…it seems to me to be important to keep well in mind the nature of the exercise. As Lord Hoffmann explained in Dimond, it is to strip out irrecoverable costs of the additional services which the injured party has received. If Mrs Dimond had borrowed the hire money, paid someone else to conduct the claim on her behalf and insured herself against the cost of losing and any irrecoverable costs, her expenses would not have been recoverable. These were therefore additional benefits which had to be brought into account."*

8. The hunt is therefore on for a means of ascertaining the unrecoverable elements of the credit hire rate ('CHR'). In *Pattni v. First Leicester Buses Ltd [2011] EWCA Civ 1384; [2012] Lloyd's Rep IR 577* the court identified three possible methods. The first, an arbitrary discount from the CHR, was rejected. The second possible method is however important for the purposes of this judgment. The Court of Appeal considered whether the credit hire company should be compelled to make disclosure of the various components of their charge. This was ultimately rejected as being disproportionate in the majority of cases because of the modest value of such claims but it remains a possible basis of assessment in appropriate circumstances.

9. The preferred and proportionate method is to ascertain the BHR on the basis that the difference between this and the CHR will provide a reasonable approximation of the value of the unrecoverable additional charges. There is however inevitably in a competitive market a range of possible BHRs. Mr Shale submitted to me that prior to the decision in *Stevens* the highest BHR was generally taken to be that which was recoverable. However, in paragraph 36 of *Stevens* a submission that this was the correct approach was rejected for the following reasons:

> *"I would reject Mr Butcher's submission that in circumstances such as these it is permissible simply to look at the highest figure in the range and, if it is greater than or equal to the claimed credit hire rate, conclude that the defendant has failed to prove that the BHR is less than that rate. That, it seems to me, would be manifestly unjust particularly since the credit hire company is in the best position to elaborate upon and give disclosure relating to its charging structures but has not been required to do so in light of the modest size of the claim."*

10. It is now well established following *Stevens* that the figure for the purposes of comparing the CHR and the BHR is the lowest comparable rate for the vehicle actually hired by the claimant from a mainstream supplier in the Claimant's locality or, if no such supplier is available, from a reputable local one. The burden of proving that the BHR is less than the CHR (and I would add, by how much) lies on the defendant (see *Pattni* and *Stevens*). If it fails to discharge that burden, then the claimant will recover the CHR.

11. Finally, it is also well established that these cases should be approached on what the court in *Stevens* described as a structured basis, following dicta in *Pattni* to the effect that:

> *"…the questions are: (i) did the claimant need to hire a replacement car at all; if so, (ii) was it reasonable, in all the circumstances, to hire the particular type of car actually hired at the rate agreed; if it was, (iii) was the claimant "impecunious"; if not (iv) has the defendant proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the BHR for the model of car actually hired and if so what is it; if so, (v) what is the difference between the credit hire rate and the BHR?"*

12. I should add that there is no decision of the higher courts on the question that I have to decide. Mr Shale has however directed me to *Gonzalez.* In turn, I invited Counsel to address me on the decision of District Judge Bell in *Miller v. AIG*. In *Gonzalez*, District Judge Bloom decided that sequential exchange was appropriate. In *Miller* the opposite view was taken, albeit *obiter.* Neither decision is of course binding on me but as a matter of judicial comity I have accorded proper respect to the carefully considered reasons of my fellow District Judges.

**The parties' submissions**

13. Mr Shale argues that *Stevens* marked a significant change in the landscape of such cases. Whereas previously claimants had a direct interest in adducing BHR evidence in order to establish as high a rate as possible, there is no point in them doing so now. Why, asks Mr Shale rhetorically, should claimants have to provide evidence to prove a defendant's case? On the question of timing, he accepts that the normal rule is that witness statements should be exchanged mutually (although as I pointed out in argument this is not in fact enshrined in the CPR and in particular CPR32.4(2)). He argues however that exchange should be sequential where circumstances require. This is particularly so where one party does not know the case that it has to meet and offered the example of schedules of allegations in private law proceedings.

14. He says that in the vast majority of cases defendants in credit hire cases do not identify the basis (if any) for alleging that the BHR is less than the CHR. He recognises that this case is an exception to a limited extent, in that some BHR evidence is attached. He submits however that it is unsatisfactory and anticipates, no doubt correctly, that the Defendant may wish to rely on other evidence. He argues that the Claimant must be entitled to know what case is being advanced on BHR so that it can meet it. He offered me examples of factual matters which might arise from such evidence, such as terms in the hire rates offered restricting the length of hire.

15. Mr Turner argued that none of this provided a basis from which to depart from the usual rule that exchange of witness statements should be mutual. To allow the Claimant to 'pick off' the Defendant's rates evidence at its leisure would be to confer an unfair advantage on one party. He argued that in practice the accident management firm that in effect stands behind the Claimant is well versed in such matters and knows what case it is likely to have to meet.

**Decision**

16. The starting point must in my judgment be to focus on the essential task of the court as identified in paragraph 33 of *Stevens* and set out earlier in this judgment. Although Mr Shale was not minded to concede that this was the case, it is a fact that the CHR contains elements which are irrecoverable and the purpose of the evidence is to establish a value for those elements. The party that is uniquely in possession of the information necessary to establish that value is the claimant. For reasons of proportionality it is not required to submit that information for analysis (see *Stevens* at [36]). It cannot however in my judgment be then heard to argue that it does not know the case it has to meet on the difference between the CHR and BHR. Nor is it in a position to take 'pleading points' when, in this case and in most others, the Claimant declines to state whether he is impecunious or not.

15. This is not in any way to gainsay the fact that the Defendant bears the burden of proving that there is a difference and what it is. However, the fact that one party or another bears the burden of proof does not lead to the conclusion that it should go first in a sequential exchange of evidence. It may be that claimants in such cases now have no interest in serving BHR evidence but if that is right, there is of course no compulsion on them to do so. They can elect to offer no evidence and hope that the defendant fails to prove its case, or they can choose (as they usually do) to put in their own BHR evidence at rates they regard as properly comparable to the CHR to show that there is no difference.

16. There is a practical aspect to this. The Claimant seeks to adduce 'rebuttal evidence'. Sadly, the experience of this court is that such evidence often amounts to not much more than a quasi-skeleton argument pointing out at great length the deficiencies in the defendant's BHR evidence (*Miller* is a good example of precisely this problem). That is not to say that there may not be rare cases where evidence properly so called is required, for (theoretical) example to show that the terms and conditions of a hire relied upon by the defendant are not those applicable. However, usually the only actual 'evidence' will be BHR rates and there is no good reason why this should not be the subject of a mutual exchange.

17. I have therefore concluded that in substance this application should be dismissed. I do not consider that as a general rule a claimant in a case of this kind should be entitled to the advantage of sequential exchange of evidence of fact. I do not consider that there are any reasons to order such an exchange in this case. It does however seem to me that some changes to the form of order (apart from that which is clearly erroneous) used in this case are required to meet the points made by Mr Shale. In particular:

    (i) In small claims track cases of this kind factual evidence should be exchanged in accordance with a timetable set from the date of the order rather than 14 days before the hearing as is usually the case. This will enable a claimant in those rare cases when it is necessary to seek permission to adduce evidence in rebuttal well in advance of the final hearing.

(ii) Defendants ought to be required to produce the full terms and conditions relating to any hire that they seek to rely upon and to ensure that both a daily and a weekly rate is quoted in order to ensure that a fair comparison can be made.

My proposed directions are annexed to this judgment.

District Judge Glen

31st January 2017