

### **Credit hire – financial losses of self-employed drivers**

Claims concerning credit hire charges appear before the courts on a daily basis. It is vital for litigators in this field to be familiar with the decision of the High Court of Justice in late 2019, in *Humayum Hussain v EUI Limited* [2019] EWHC 2647 (QB); [2019] 10 WLUK 152, (*'Hussain'*). The principles detailed in the judgment are applicable to self-employed drivers, including but not limited to, chauffeurs, delivery drivers and hauliers.

#### **The facts**

In summary, the Claimant's vehicle sustained damage in a road traffic collision. In order to continue working as a self-employed professional driver, the Claimant hired a Mercedes E220 on credit terms for 18 days, whilst his BMW 320D underwent repairs. The claim for credit hire charges totalled £6,596.50.

The Claimant's wife owned a Toyota Yaris, but the Claimant considered that his BMW 320D was required for work, family trips and longer journeys.

At first instance, Her Honour Judge Wall, sitting in the County Court at Birmingham, rejected the claim for hire charges, concluding that it was '*...unreasonable mitigation to expend more in attempting to make a profit than the profit itself.*'<sup>1</sup> The Claimant was therefore awarded £423 for his loss of profit which he avoided by hiring a replacement vehicle.

Further, Judge Wall was not satisfied that the Claimant had discharged the burden of demonstrating that he had a need for a second car, for domestic and social use during the hire period.

#### **The appeal**

The Claimant appealed on two grounds:

1. It was wrong to limit damages to the avoided loss of profit.
2. It was wrong to accept the insurer's evidence on basic hire rates.

#### **The decision**

The Honourable Mr Justice Pepperall dismissed the Claimant's appeal on ground one, holding that the damages should be confined to loss of profits.

Mr Justice Pepperall stated several principles apply to claims for financial losses of self-employed drivers where their vehicle is being repaired or replaced:

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<sup>1</sup> *Humayum Hussain v EUI Limited* [2019] EWHC 2647 (QB); [2019] 10 WLUK 152 (*'Hussain'*), [6]

1. ‘...[T]he vehicle is a profit-earning chattel and that the true loss is the loss of profit suffered while the damaged vehicle is reasonably off the road pending its repair or replacement ...’<sup>2</sup>
2. ‘...[S]uch hire costs are prima facie recoverable. Where, for example, the claimant successfully mitigates his or her loss by hiring a replacement vehicle at a cost lower than the hypothetical loss of profit, the court will award the lower hire charges.’<sup>3</sup>
3. ‘A claimant cannot recover any additional loss suffered by reason of a failure to take reasonable steps to mitigate his or her loss ...’<sup>4</sup>
4. ‘Claimants cannot, however, be expected to weigh precisely their losses.’<sup>5</sup>

It was further stated:

- a. ‘[W]here a claimant acts reasonably in hiring a replacement vehicle at about the same cost as the loss of profit, the court will not ... hold the claimant to the hypothetical loss of profit if it turns out to be a little lower.’
- b. ‘[W]here the cost of hire significantly exceeds the avoided loss of profit, the court will ordinarily limit damages to the lost profit.’<sup>6</sup>

Paragraph b. above is subject to three matters, where the claimant may establish that they acted reasonably and therefore the credit hire charges may be awarded:

- i. If a claimant incurs disproportionate hire costs to avoid a real risk of a greater loss, the claimant will usually be entitled to recover the costs. An example is where a chauffeur avoids letting down a regular client for fear of losing such work.
- ii. Where the claimant proves that the replacement vehicle was needed for private and family use, reasonable hire charges will ordinarily be recoverable.
- iii. It might be reasonable for a professional driver to hire a replacement vehicle as they could not afford not to work.<sup>7</sup>

The Claimant had failed to prove the need for a second car for private use. Mr Justice Pepperall held that the ‘[n]eed for social and domestic purposes is not self-proving and, in this case, cannot simply be inferred from ... acquiring, insuring, taxing and maintaining ... the car ...and there was no evidence that any holidays, family trips or longer journeys were anticipated during the hire period ...’<sup>8</sup> There was also no evidence before the court that the Claimant was impecunious.

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<sup>2</sup> Ibid [16.1]

<sup>3</sup> Ibid [16.2]

<sup>4</sup> Ibid [16.3]

<sup>5</sup> Ibid [16.4]

<sup>6</sup> Ibid [16.5]

<sup>7</sup> Ibid [16.6]

<sup>8</sup> Ibid [11]

Mr Justice Pepperall considered that ground two did not arise, given his conclusion on ground one.

### **Guidance**

*Hussain* clearly demonstrates the importance of a claimant's need to mitigate their loss and give consideration to their loss of profits compared with the cost of a replacement vehicle on credit hire. Although claimants are not expected to weigh their losses precisely, if the credit hire charges significantly exceed their loss of profit and the claimant fails to prove any of the three matters above (i to iii), the claim is likely to be limited to loss of profit.

*Hussain* reminds litigators and legal professionals of the correct approach to calculating loss of profits for self-employed drivers. The true loss of profit is not simply the loss of profit during the period but also any fixed overheads that the claimant was required to pay during the relevant period, despite not working.<sup>9</sup>

If the claimant is seeking to prove a risk of a greater loss or the need of the vehicle for private use, such as a pre-planned holiday, the matter should be detailed in their witness statement. Such details will be of assistance in persuading the court to award the credit hire charges, subject to the other evidence before the court.

In the absence of a claimant proving impecuniosity, defendant insurers will continue to seek to rely on Basic Hire Rate ('BHR') evidence. In the event that a claimant's vehicle is required for towing purposes for business or personal use, the BHR evidence should detail the towing capacity of the alternative vehicles. It is also advisable for the evidence to state whether the alternative vehicles were fitted with a tow bar or one was available for use at the time of hire. The courts are reluctant to be persuaded in the absence of such evidence, given that the vast majority of hire cars are not ordinarily fitted with a tow bar.

Overall, it is believed that the judgment in *Hussain* is welcomed by defendant insurers who are faced with challenging credit hire claims. However, the judgment is also helpful to claimants in clarifying the position on the recoverability of such losses.

Jasmin Shingler  
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<sup>9</sup> Ibid [23]