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A new direction for credit hire

Max Withington believes proposed model directions to be used in credit hire cases are on the right track

The Civil Procedure Rules Committee consultation on proposed model directions to be used in credit hire cases closed in early August and the feedback is now being analysed. There were a number of features in the proposed draft which were encouraging. In particular the proposal that credit hire provisions on disclosure and witness evidence be dealt with early in proceedings as distinct steps from the rest of the directions, and that the order's provisions are to apply to all tracks.

Anything which seeks to reduce the amount and costs of credit hire litigation is to be welcomed. The consultation has incited a hopeful response in that any order introduced would substantially reduce or eliminate the satellite litigation and frictional costs currently being expended on the issue of directions and disclosure. But to do so, the order will need to create certainty and consistency around the evidential requirements on both sides, setting them out in plain language and avoiding caveats or ambiguities wherever possible.

Almost but not quite there

The draft order can be considered as being 'almost there', and suggested changes are designed to improve the clarity and certainty required from a defendant perspective, notably that:

- The early witness statement required by the draft order should also address the reasonableness of the hire period as well as need and impecuniosity. As per *Zurich Insurance v Sameer Umerji* [2014] EWCA Civ 357 (at para [37]), the burden of proof is on the claimant to plead then prove as to the reasonableness of the claim for hire and this applies as much to period as it does to rate. In reality, the hire period is second only to rate as the most commonly contested issue between the parties in credit hire litigation. It would therefore be most desirable to have this point addressed at an early stage.
- The discretion included for the trial judge to allow impecuniosity arguments to be heard where the claimant has not complied with the requirements for financial disclosure should be removed. The trial judge's discretion to waive the sanction can be seen as an unnecessary caveat and departure from the usual position pursuant to CPR 3.8 that a sanction has effect unless the party in default applies for and obtains relief under CPR 3.9, which creates uncertainty. In particular, it leaves the door ajar for claimants who refuse to provide bank statements for inadequate or questionable reasons to attempt to 'get home' on impecuniosity solely on the basis of oral evidence at trial. This is likely to lead to more contested trials than would otherwise be the case and risks leaving the parties in limbo as to the true position right up to the trial.
- In the event that a claimant does not comply with the requirements as to financial disclosure, the reasons for this ought to be set out in an application under CPR 3.9 which is supported by evidence. Despite this it is possible that under the draft in the current form a trial judge may view an apparent lack of immediate possession of the documents as being a reason to exercise discretion to waive the sanction.
- Witness statements should be exchanged simultaneously and not sequentially as in the current draft. Given that basic hire rate (BHR) evidence is evidence of fact, it is suggested that this should be simultaneously exchanged in the usual way. In principle there is no reason why credit hire should be an exception to the conventional wisdom as to exchange of evidence of fact, i.e. that sequential exchange should be avoided for the obvious reason that it gives one party an unfair advantage by allowing the opportunity to amend the content of their statements in response to the statements served by the other side. Sequential exchange is also far more likely to encourage the practice of serving 'rebuttal' evidence. Often claimants will, instead of sourcing BHRs of their own, adduce a witness statement which sets out various objections to the defendants BHR evidence. A fairer and more proportionate approach to the issue is for both parties to source their own evidence as to the BHR and serve this simultaneously.

Responses & recommendations

There is no defined timescale for the committee to respond to the submissions they receive. For most government consultations there is a minimum 12 week period. However, such straightforward proposals can allow the committee to move quicker than this.

In addition to the current consultation suggestions, it may also be recommended to the committee that the steps required by the new directions should, ideally, not be undertaken during litigation but as part of a binding pre-action protocol. Consequently an element of cost would be front loaded to some extent. However, a protocol would be a substantial step forward in reducing the volume of contested credit hire litigation. It will therefore be interesting to see whether such suggestions gain any traction. **NLJ**

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