Case Note

McBride -V- UK Insurance LTD; Clayton -V- EUI LTD

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Ascertaining the BHR: the end of the nil-excess argument?

1. The appeals of *McBride -v- UK Insurance Ltd; Clayton -v- EUI Ltd* [2017] EWCA Civ 144 represent the latest battle in the long-running "*saecular war*"[1] between the credit hire industry and the motor insurance industry: see per Flaux LJ, with whom Sir Timothy Lloyd and Sir Stanley Burnton agreed, at [1].

2. The appeals raised various issues of importance, not least, in the *McBride* appeal, the effect – and propriety – of the decision in *Stevens -v- Equity Syndicate Management Ltd* [2015] 4 All ER 458.[2] This short case note considers the nil-excess argument, which was common to both appeals. The question was whether the Claimant is entitled to hire a vehicle with a nil excess and, therefore, whether to succeed in proving a lower BHR the Defendant must provide hire rates with a nil excess.

3. The argument was predicated on the assumption that "*It will almost invariably be the case that it was reasonable for the claimant to seek a nil excess for the reasons given in* Bee -v- Jenson[3] *and, on that hypothesis, the only question for the Court will be how much should be recoverable as the cost of purchasing a nil excess*": see [76].

4. The parties' respective contentions can be found at [58]-[67]. At [68], Flaux LJ began his analysis by stating that "*the inability to obtain a nil excess from a mainstream supplier or reputable local supplier of hire cars in circumstances where, as in the present case, the evidence demonstrates that there is a difference between the credit hire rate before the application of any nil excess and the basic hire rate without the availability of a nil excess, which demonstrates that the credit hire rate includes the irrecoverable elements identified in Dimond -v- Lovell, should not as a matter of principle, lead to the credit hire company recovering the credit hire rate in full*" (emphasis added). Accordingly:

   (a) "*the Court should ensure that the irrecoverable elements of the credit hire evident from that difference in rates (ignoring the nil excess) are stripped out*"; and

   (b) "*It should not allow the fact that the credit hire company offers a nil excess on prestige vehicles which other car hire companies are not prepared to offer to be used as a smokescreen to enable credit hire companies to recover their charges in full*".

5. In that connection, the credit hire company conceded that "*in cases where the [BHR] evidence was that the excess could not be reduced to nil but only to some modest amount, it might very well not be reasonable to hire through a credit hire company and, accordingly, the full credit hire rate should not be recoverable*": see

[1] *Pattni -v- First Leicester Buses Ltd* [2012] RTR 17 per Aikens LJ at [1].
[2] Subject to a potential appeal to the Supreme Court, *Stevens* remains good law: see [52], [56].
[3] See [58], and *Bee -v- Jenson (No.2)* [2007] RTR 32 per Morison J at [15]-[16].

[69]. However, Flaux LJ considered that to approach the issue from the angle of "*where it is not reasonable to hire from a credit hire company*" was problematic: see [70]-[71].

6. Instead, the issue should be approached from the "*far more principled*" perspective of "*treating the availability of a nil excess and the reasonableness of the sum claimed in respect of it separately from the comparison between … the "default" credit hire rate … and the basic hire rate with a similar excess*". This, the Court held, is the correct approach. It has "*the elegance of simplicity*" and was open to the Court to adopt: see [72], [74].[4]

7. "*[G]iven that the exercise is a hypothetical and objective one designed to ascertain what if any elements of the charges of the credit hire company are irrecoverable, it is permissible to have regard to the charge by the credit hire company for a nil excess as evidence of the cost of a nil excess. Depending on the other evidence, it may transpire that the credit company's charge for a nil excess is a reasonable one and thus recoverable in full*": see [104].

8. As to the availability of stand-alone excess reduction products, such as "*Insurance4carhire.com*", "*it may well be that in a particular case the Court may decide that it was not reasonable to purchase the nil excess offered by the credit hire company at a much higher rate [against the lower rate of the stand-alone product]. This is particularly so because the terms and conditions and the rates for these products are readily available over the internet. Whether it was reasonable to accept the credit hire company's rate or [whether] a claimant should have taken out such a stand-alone excess elimination insurance will depend upon the facts of the particular case*": see [77]. Significantly, Flaux LJ opined at [105] that "*The admission and acceptance of evidence of these stand-alone products should be the norm.*"

9. Finally, where the BHR evidence includes a quote for a nil excess, it should not be necessary to engage in the separate assessment described above: "*any difference between the cost of the nil excess charged by the credit hire company and the rate quoted by the [mainstream or local reputable] car hire company will be brought into account because only the lowest reasonable basic hire rate (including in such cases the cost of a nil excess) will be recoverable*" (see [79]).

10. The approach to ascertaining the recoverable rate is, therefore, now as follows:

    (a) If the BHR contended for includes a nil excess (or if there is no nil excess on the credit hire vehicle), then the assessment proceeds in the ordinary way pursuant to *Stevens* at [35]-[36].

[4] See also [75]: "*the nil excess can be treated separately and … where it suits them, credit hire companies are content to do so*" *cf.* *Stevens* at [29].

(b) If there is a nil excess on the credit hire vehicle but the BHR contended for does not include a nil excess, then:

i. the nil excess on the credit hire vehicle should be left out of account in the first instance – the credit hire rate should then be compared with the BHR in accordance with ***Stevens***; and

ii. a separate comparison exercise should then be undertaken in respect of the nil excess – the court should have regard to the credit hire company's own charge or to the availability of a stand-alone insurance product (see paras. 7 and 8 above).

11. Evidence as to the credit hire company's charge for a nil excess is not always before the Court. This will need to change if such charge is to be contended for or otherwise relied upon.

12. Defendants already often rely upon evidence of stand-alone insurance products (though often as a secondary argument) – such evidence will now become routine.

13. In theory, following the Court of Appeal's reasoning, other waivers and charges (*e.g.* theft damage waiver, underbody waiver, charges for an additional driver *etc.*), should all be susceptible to the same, independent comparative exercise.

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