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Avoiding a BAD credit hire PAD

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Since *EUI v Charles* (2018) was handed down just 1 year ago, there has been an increase in defendant insurers issuing pre-action disclosure applications to compel claimants to provide early disclosure of impecuniosity documentation.

Jamie Hill has recently been instructed in a number of such applications and reviews how to avoid the most common pitfalls.

The decision in Charles

In *Charles* HHJ Harrison heard 7 applications for the pre-action disclosure of impecuniosity documentation, issued against claimants who had entered into credit hire agreements with DAM Ltd. The Judge granted the applications, holding *inter alia*:

1. the disclosure of financial documentation was “significantly less intrusive” than the disclosure of medical records (thus distinguishing from the matters of *Bennet v Compass* and *Wells v OCS*);
2. DAM Ltd specifically targeted impecunious claimants, as was clear from their publicly available investor information. As such impecuniosity was a central issue in all the cases;
3. the claimants had all, by signing the credit hire agreements, agreed to cooperate with the litigation process, which in reality included the possibility of disclosing details of their financial means.

Common pitfalls

1. Liability

One of the strongest arguments in favour of ordering pre-action disclosure is to allow the defendant the opportunity to make an informed Part 36 offer. Plainly this can only be done if the defendant knows the likely position on impecuniosity. This is consistent with the overriding objective and the desire to avoid the need for litigation.

However if liability is still in dispute the likelihood of the matter being resolved without proceedings is much smaller.

A PAD will have a much greater prospect of success if the quantification of the credit hire claim is the only outstanding issue.

2. Establish whether impecuniosity is in issue

This is often overlooked as in Charles it did not arise, given that DAM Ltd deliberately targeted impecunious claimants. However many other credit hire companies will lease their vehicles much less restrictively. Therefore steps should be taken, through correspondence, to ascertain whether the claimant will plead impecuniosity.

A PAD is very likely to fail if the claimant responds to the application by stating that they will not assert impecuniosity at trial, as the documents are unlikely to fall within standard disclosure.

3. Targeted requests

The documentation sought should be targeted and limited to that which is strictly necessary. If the period of hire is short, then bank and credit card statements covering 1 month pre-hire and the period of hire are probably all that are required. Insurers should ensure that the documents requested in correspondence are the same as those listed in draft order they present to the court.

A PAD is likely to fail if the request is too wide, intrusive or onerous. The documents sought should be those readily available to the claimant, such as bank statements.

4. Ask the right person

Often insurers will initially liaise directly with the credit hire company. It may be prudent to ask them to provide the impecuniosity documentation in the first instance. However if they say they do not have it or cannot provide it, ask the claimant for it. It is the claimant who will be the respondent to the application, and not the credit hire company, so it is important they are given an opportunity to comply with the request.

A PAD is more likely to succeed if the claimant has been asked for the information and an explanation has been provided as to why it is necessary.

5. Costs

Pursuant to CPR 46.1 the starting position is that the defendant pays the claimant's costs of and occasioned by the application. Unless the matter is subject to fixed costs, such as pursuant to the RTA Protocol, then costs will be assessed in the ordinary way. Accordingly such applications can be costly, even when they are successful. Care should therefore be taken to ensure the costs involved are proportionate to the difference in the amount of damages the issue of impecuniosity makes.

A PAD must be proportionate, including the costs of making it.

Conclusion

It is now plain that the court might well exercise its discretion to grant the defendant the pre-action disclosure of a claimant's financial documentation in a credit hire claim. Charles is an important decision which should be cited as a persuasive precedent for acceding to such applications.

However all of the strong counter arguments that existed prior to Charles remain, and should not be ignored. Indeed in Charles HHJ Harrison observed that the order he was being asked to make was "both unusual and a step that should not be taken lightly".

Care should be taken therefore to avoid the common pitfalls and ensure any PAD is specifically targeted and proportionate.

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Jamie Hill was called to the Bar in 2016. One of his specialisms is insurance fraud, with a particular focus on credit hire litigation.

He increasingly acts for defendant insurers prosecuting PADs for impecuniosity documentation and is familiar with the post Charles landscape that is emerging.

For more information about Jamie's practice, please see his chambers' profile here.

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