



**4 King's Bench Walk**

## **Civil & Commercial News**

**t: 020 7822 7000 w: [www.4kbw.co.uk](http://www.4kbw.co.uk)**

**Welcome** to the March 2011 4KBW civil newsletter. In this edition, David Sawtell highlights the most recent challenges to credit hire agreements, the so-called 'doorstep regulations' and looks at the strengths of the arguments. Lisa Wright examines the costs case of *Morgan v Spirit* [2011] EWCA Civ 68 and Chris Bryden summarises the recent case of *Everett v Comojo* [2011] EWCA Civ 13, where the scope of a night club's duty of care to fighting customers is examined.

### **Civil seminars**

**David Sawtell** has put together a seminar on fraudulent and exaggerated claims. This comes shortly after the House of Commons transport committee has highlighted the growing problem of 'staged' vehicle crashes and other dishonest insurance claims, and called on the insurance industry to do more. This is an SRA-accredited CPD talk (1 hour). David and a small group of barristers from 4KBW are happy to go to solicitors' offices to present this talk, depending on numbers, or to host it in Chambers. To find out more and to book the talk, please contact the clerks at 4KBW. The seminar itself is free of charge.

Practitioners might also be interested in our forthcoming seminars on the Equality Act 2010 (new parts of which come into force this year) and the new Family Procedure Rules (due in force this April).

**Jerome Silva** has also prepared a talk on the new low-value personal injury regime that came into force last year. Again, for further details please contact the clerks.

**Fraudulent and Exaggerated Claims'. 1 hour CPD. David Sawtell.**

**'Low Value PI Claims: The New Regime'. 1 hour CPD. Jerome Silva**

**Equality Act 2010 Seminar:**

**Family Procedure Rules Seminar. 1.5 CPD. Chris Bryden, David Sawtell, Greg Williams and Tom Bailey**

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### Failing the Doorstep Challenge: credit hire agreements and the 2008 Doorstep Regulations

Practitioners who regularly come across credit hire agreements might very well have already noticed a new argument surfacing regarding their recoverability. Since the House of Lords ruling in *Dimond v Lovell* [2002] 1 AC 384, credit hire companies have had to establish that the credit hire agreement is enforceable against the claimant in order to recover their charges from the defendant. The agreement in *Dimond* fell foul of the Consumer Credit Act 1974; consequently, many credit hire agreements have been drafted to avoid that particular piece of legislation.

However, what was not picked up so readily was the coming into force of the Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations 2008, S.I. 2008/1816 ('the Doorstep Regs'). The predecessor to the Doorstep Regs, the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 ('the 1987 Regs') applied predominantly to an unsolicited visit to the consumer's home or place of work (1987 Regs, regulation 3(1)(a)) and hence did not really concern credit hire agreements, which are classically made after an initial contact has been made by telephone or at the car repairers.

The Doorstep Regs, however, 'apply to a contract, including a consumer credit agreement, between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made... (a) during a visit by the trader to the consumer's home or place of work, or to the home of another individual; (b) during an excursion organised by the trader away from his business premises; or (c) after an offer made by the consumer during such a visit or excursion' (regulation 5). As credit hire agreements are typically entered into when the hire vehicle is delivered, they land squarely within the ambit of the Doorstep Regs. (Sometimes a credit hire company will argue that the agreement was entered into on the telephone beforehand. This argument often falls foul of a term in the written agreement that all previous agreements are excluded. Some credit hire agreements are in fact concluded by post, and would not be caught by the Doorstep Regs.)

Given the fact that the Doorstep Regs only came into force on 1 October 2008, the only 'reported' decisions to date are those of circuit judges on appeal from district judges. Furthermore, each credit hire agreement (and the way in which it was entered into by the claimant) is different. What this summary intends to do is to map out the rough landscape of the contentious areas so that practitioners are not caught completely unawares.

Coincidentally, of course, the Doorstep Regs might very well apply to contracts between clients and solicitors: the Law Society has issued a Practice Note which can be found at <http://www.lawsociety.org.uk/productsandservices/practicenotes/cancellingcontracts/4466.article> .



The arguments about the Doorstep Regs and credit hire agreements revolve around regulation 7 of the Doorstep Regs (with the main points of contention highlighted below):

Right to cancel a contract to which these Regulations apply

(1) A consumer has the right to cancel a contract to which these Regulations apply within the cancellation period.

(2) The trader **must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made** except in the case of a contract to which regulation 5(c) applies in which case the notice must be given at the time the offer is made by the consumer.

(3) **The notice must—**

- (a) be dated;
- (b) indicate the right of the consumer to cancel the contract within the cancellation period;
- (c) be easily legible;
- (d) contain—
  - (i) the information set out in Part I of Schedule 4; and
  - (ii) **a cancellation form in the form set out in Part II of that Schedule provided as a detachable slip** and completed by or on behalf of the trader in accordance with the notes; and
- (e) indicate if applicable—
  - (i) that the consumer may be required to pay for the goods or services supplied if the performance of the contract has begun with his written agreement before the end of the cancellation period;
  - (ii) that a related credit agreement will be automatically cancelled if the contract for goods or services is cancelled.

(4) **Where the contract is wholly or partly in writing the notice must be incorporated in the same document.**

(5) **If incorporated in the contract or another document the notice of the right to cancel must—**

- (a) **be set out in a separate box with the heading “Notice of the Right to Cancel”; and**
- (b) have as much prominence as any other information in the contract or document apart from the heading and the names of the parties to the contract and any information inserted in handwriting.



(6) A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right to cancel and the information required in accordance with this regulation.

A failure to comply with regulation 7 is a criminal offence under regulation 17 (subject to a 'due diligence' defence).

If the credit hire company does not provide anything setting out the claimant's right to cancel the hire, or if its terms fall below those expected by the Doorstep Regs, the credit hire agreement is unlikely to be held to be enforceable. Claimants have run arguments such as unjust enrichment, 'abandonment' of the Doorstep Regs, etc, but these have sometimes proven unattractive. This was the situation in *Wei v Cambridge Power and Light Ltd* (Cambridge County Court, 10 September 2010, HHJ Moloney QC) where the claimant was never served with a cancellation notice. As the credit hire agreement was unenforceable, the sums purportedly due under it were not recoverable as damages. What it is sometimes possible to argue is that a court should not dwell on 'hypothetical' debates and that the court simply has not been provided with enough evidence to show that the contract is in fact unenforceable.

Instead, the principal arguments now appear to revolve around situations where the credit hire company did provide 'right to cancel' notice that complied with the form set out in the Doorstep Regs, but on a separate piece of paper to the 'main body' of the credit hire contract. The issue in these cases is whether the notice is incorporated in the 'same document' as the contract itself.

This was the situation in three cases: *Lawford v Pacey* (Lewes County Court, 26 August 2010, HHJ Coltart) *Guerrero v Nykoo* (Swansea County Court, 25 October 2010, HHJ Vosper); and *Orley v Viewpoint Housing Association* (Gateshead County Court, 7 December 2010, HHJ Armstrong). HHJ Vosper was aware of HHJ Coltart's decision, and likewise HHJ Armstrong was aware of both previous decisions. Unfortunately, the conclusion reached *Orley* and *Lawford* was different to that reached in *Guerrero*, despite the fact that very similar arguments were deployed. The Judges in *Orley* and *Lawford* decided that there was sufficient cross-referencing to hold that the notice was incorporated in the same document. In *Guerrero*, this was held to be insufficient.

How, then, should practitioners approach such credit hire agreement claims? Clearly, it would make sense if the agreements were drawn up in such a way that they were 'bullet proof' to challenges under the Doorstep Regs but by the time litigation ensues this is no longer an option. The next step is to ensure that the evidence is complete, both in the claimant's witness statement but also when it comes to disclosure. It is painful to read about pages of a credit hire agreement, often originally being printed on reverse faces of a single piece of paper, being separated from each other in a trial



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bundle with no indication as to how they were originally presented. The claimant is unlikely to be in a position to assist the credit hire company 'on the day' through oral evidence. I would suggest that claimant practitioners become aware of these arguments being raised on the day of the hearing itself: the matter is not so fresh that it could not have been pleaded in a defence. Likewise, a passing familiarity with the arguments that have been deployed in the past will assist if the court does allow a 'last minute' challenge to enforceability.

What this relatively recent furore has shown is that credit hire agreements are not immune to the changing patterns of consumer protection legislation. If credit hire agreements do continue despite media criticism, practitioners will need to remain aware of what could potentially affect their enforceability.

**DAVID SAWTELL**  
March, 2011

*David Sawtell (2005) is a tenant at 4 King's Bench Walk. His practice includes civil litigation (including personal injury), with experience of trials and applications in the High Court and the County Court at multi track and fast track level. His CV and significant cases can be found at <http://www.4kbw.co.uk/members/david-sawtell-2005.asp> . He has recently prepared and presented a 1-hour CPD-accredited seminar on *Fraudulent and Exaggerated Claims*. For further information, please contact his clerks at 4KBW.*

### **Morgan v Spirit Group Ltd [2011] EWCA Civ 68**

"Greedy", "wholly untenable" and "truly breathtaking" were just some of the adjectives used by HHJ O'Brien when tasked with assessing the costs of this claim. The Claimant, who fractured her wrist when she slipped in the Defendant's nightclub, sought damages in the sum of circa £41,000. HHJ O'Brien awarded the global sum of £13,419.03 inclusive of interest. The costs bill presented totalled £99,206.29 inclusive of VAT, disbursements and success fees. HHJ O'Brien considered that were it not for the inflated damages claim, certain aspects being "*astonishing and wholly unsustainable*", the claim would have been allocated to the fast track and a reasonable level of damages where the Defendant's conduct was beyond reproach, would have been £20,000. In ordering the Defendant's to pay a contribution of £25,000, the contingency fee was taken into account.

Black, LJ, in delivering the principal judgment of the appellate court, applied *Lownds v Home Office Practice Note [2002] EWCA Civ 365* and *Flowers Inc v Phonenames Ltd [2001] EWCA Civ 721* which advocate a two staged approach to the summary assessment of costs, namely, that costs should be considered globally with proportionality



issues in mind and an item by item approach should also be adopted with reference to the detailed breakdown of the bill of costs. It was accepted by the parties in this case that HHJ O'Brien did not consider the detailed breakdown of costs. HHJ O'Brien's approach could not be justified by reference to CPR 44.3(6)(b). Accordingly, HHJ O'Brien's order in respect of costs was set aside. HHJ O'Brien's findings in relation to the conduct of the litigation and the level of damages claimed, were upheld. Black, LJ, directed that the matter be referred for detailed assessment to be assessed as if the case were a fast track claim.

**LISA WRIGHT**

**March, 2011**

*Lisa Wright (2007) is a tenant at 4KBW. She has recently had a number of articles published by the New Law Journal on the CPR's civil costs regime.*

### **Everett v Comojo [2011] EWCA Civ 13**

The decision of the Court of Appeal in *Everett & Anor v Comojo Ltd t/a The Metropolitan & Ors* [2011] EWCA Civ 13, [2011] All ER (D) 106 (Jan) is a valuable addition to the somewhat fuzzy body of caselaw that has built up in recent years in respect of the scope of the duty of care. It appears to take the English law of tort closer towards a system whereby liability is, in effect, imposed upon a party most likely to be insured.

The facts can be stated on a straightforward basis. The Claimants were injured in a knife attack carried out in the Defendant's premises, where they and the assailant were all guests, the Met Bar having access restricted only to members, their guests, and residents of the hotel to which it was attached. A regular at the Bar witnessed one of the group of people to whom the Claimants were attached assaulting a waitress, and made clear his objection to this. He asked that his driver be put on the guestlist, which the waitress did. The waitress, upon having regard to the physical bulk of the driver, went to speak to the bar manager, as she was concerned as to whether the driver would seek to extract an apology from the Claimants' group on her behalf. Whilst she was speaking to the manager, she heard a scuffle; the driver in the course of seeking an apology to her had stabbed both Claimants. The driver was subsequently convicted and sentenced to life imprisonment.

The claim was brought against the Defendant; the regular customer (against whom judgement in default was obtained, but who had disappeared) and the company providing the doormen, who obtained summary judgment against the Claimants. By the time of the trial before HHJ Wakefield, the argument had been condensed. The issues for trial were whether the Defendant owed a duty of care at common law to its guests to take reasonable steps to protect them from dangers from third parties which it foresaw or ought reasonably to have foreseen; and if so, whether there was



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negligence, either in a failure to search, or because the waitress (for whom the Defendant was vicariously liable) should have reported her concerns to the doorman, not the manager.

HHJ Wakefield found that, in proper circumstances, a duty of care such as that contended existed by the Claimants could arise, relying predominantly on the Australian case of *Chordas v Bryant* [1988] 91 ALR 149. However he found that in the present case no duty of care arose, as when the waitress left to speak to the manager, there was no a sufficiently great risk of injury, and thus no duty arose.

Both parties appealed. The Claimants contended that, once it had been established that a duty of care could exist, the Judge should have found that in the circumstances such a duty did exist; the Defendant contended that there should be no such duty of care in any circumstances, or alternatively very restrictive circumstances, imposed on a bar manager in respect of his guests.

Lady Justice Smith, sitting with Rix and Richards LJ, affirmed that the starting point when considering whether a duty of care existed was the three stage test set out in *Caparo Industries plc v Dickman* [1990] 2 AC 605, and proceeded to consider each limb. She considered that the relationship between the management of a night club and its guests was of *sufficient proximity* to justify the existence of a duty of care, based upon elements of control and regulation of entry and ejection, the fact that what is being run is a business, and the expectation of the guest that he will be safe. It was *foreseeable* to any licensed hotelier that there is some risk that one guest might assault another. And it was *fair, just and reasonable* to impose a duty of care, provided that the scope of the duty is appropriately set (my emphasis). Smith LJ stated that control, the economic relationship and the (highly variable) foreseeability of violence were relevant factors, as was the existence of the existing duty under the Occupier's Liability Act 1957. Thus, the court noted, it would be "surprising if management could be liable to a guest who tripped over a worn carpet and yet escape liability for injuries inflicted by a fellow guest who was a foreseeable danger" (at 33). However it was also made clear that the standard of care imposed and the scope of the duty must also be fair, just and reasonable.

The court declined however narrowly to limit the scope of the duty, noting that the common law duty of care is an extremely flexible concept, and that it was not possible to define the circumstances in which there would be liability. Examples were given of night clubs which knew from experience that people tried to enter armed; searches might then be necessary. Security might be needed to be arranged to attend areas where people congregate. On the other hand, in respectable private members' clubs, the extent of the duty would be lower.

The appeal was nevertheless dismissed, as the Court of Appeal agreed that no breach had occurred.



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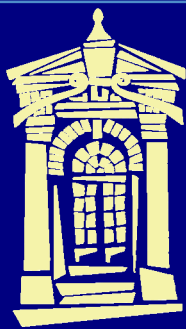
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This case is merely the latest in a long line over the past decade or so in which the law of negligence has been extended so as to provide a remedy against a party with deep pockets (or, more likely, backed by a policy of insurance). This trend arguably was given legs by the decision of the House of Lords in *Lister v Hesley Hall* [2001] UKHL 22 and exemplified in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34. It is a trend foreseen by Professor Atiyah in his 1997 work the Damages Lottery, in which he contended that a move towards a system of personal insurance was the most appropriate development for the law of tort. Rather, a move towards providing remedies that will sound in realisable damages by way of extension of the scope of the tortious duty of care, is the way in which the law is developing. The scope of the application of *Comojo* not just to bars but to, for example, theatres (at least those that serve alcohol) seems clear based on the reasoning of Smith LJ. In the meantime publicans and club owners will nervously be reviewing their security arrangements, and their insurance policies.

**CHRIS BRYDEN**

**March, 2011**

*Chris Bryden (2003) practises across the range of civil law, with a primary emphasis on employment, Chancery and commercial and family law. He is a prolific author of legal articles and papers, which appear in various legal journals. He is a member of the panel of expert authors of the New Law Journal.*



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