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Gough Square Chambers' consumer credit column: June 2024

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Lee Finch, Sabrina Goodchild, Ann-Marie O'Neil and George Spence-Jones are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the June 2024 column, Lee Finch considers the recent judgment in *Parker v Skyfire Insurance Company Ltd [2024] EWHC 1060 (KB)*, which concerned an appeal of a County Court judgment for non-party disclosure under CPR 31.17 in relation to a regulated consumer hire agreement.

Challenging credit hire agreements on grounds of misrepresentation

Introduction

Credit hire agreements often arise following a road traffic accident where one or both parties' vehicles require repair and, during the period of that repair, they need a replacement vehicle. Where the affected party cannot afford to buy or hire a replacement vehicle themselves, they often avail themselves of a credit hire arrangement where a third-party funds the hiring on credit terms. An entire industry has developed to meet that need. When the litigation arising out of the road traffic accident is resolved, the paying party (ordinarily an insurer) is required to meet the costs of the credit hire.

It is an industry that has developed what could generously be described as a "mixed" reputation with regular suggestions of misrepresentation, improper conduct, exorbitant rates and even outright fraud. It is also an industry that, at least in part, has carefully avoided FCA regulation by structuring agreements to fit within the exemption in article 60F(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO).

Very often, issues that arise in credit hire cases have little to do with consumer credit (and consequently, consumer credit specialists are often not instructed). Nevertheless, on occasion, credit hire cases end up as leading authorities on central consumer credit issues such as the very meaning of "credit" (see *Dimond v Lovell [2002] 1 AC 384*).

Over the years there have been a number of attempts by paying parties to reduce the amount recoverable in respect of credit hire or impugn the agreement entirely, most recently in *Parker v Skyfire Insurance Company Ltd [2024] EWHC 1060 (KB)* (3 May 2024), on the grounds of misrepresentation. This column considers the key issues that arose in this case and its potential wider consequences.

Facts of *Parker v Skyfire Insurance Company*

It should be made clear that *Parker* concerned an application for third party disclosure rather than the substantive question of whether the credit hire charges could be avoided on the grounds that the credit hire company had made a misrepresentation to Mr Parker.

Mr Parker was involved in a road traffic accident on 5 December 2021. Immediately following the accident, Mr Parker tried to notify his insurers; to do so, he Googled their name and rang the first number in the list of search results. Unbeknownst to him, he was in fact speaking to a claims management company (CMC), which told him that he would be put in contact with a hire company who could arrange for his car to be repaired and provide a replacement vehicle in the meantime. Following this, Mr Parker entered into a credit hire agreement with Spectra Drive Ltd by signing various pieces of paperwork.

Mr Parker subsequently brought a claim against Skyfire (the insurer of the other vehicle involved in the accident) to recover his losses arising out of the accident, including the credit hire charges and other fees incurred under his agreement with Spectra. Skyfire settled the majority of

Mr Parker's claim but challenged the enforceability of the credit hire agreement and, consequently, its liability for sums under that agreement. Skyfire strongly suspected that during Spectra's conversation with Mr Parker, some misrepresentation was made which would render the credit hire agreement voidable and, if Mr Parker were to avoid it, would relieve Skyfire of any obligation to indemnify him.

Skyfire's difficulty was that in order to advance a positive case on misrepresentation, it required sight of the recordings of conversations between Mr Parker and Spectra. Skyfire therefore brought a non-party costs order against Spectra.

At first instance, Mr Recorder Michael Smith dismissed Skyfire's application. Skyfire appealed, Mr Justice Constable granted permission noting that there were reasonable prospects of success and:

> "the case raises an important principle which may impact other cases of a similar nature in which Claimants have been 'Google-spoofed' into communicating with accident management companies in the belief that they were speaking to their insurers, and as a result entering into credit hire arrangements with entities other than those arranged/sanctioned by their insurers, and in respect of which the Defendants (and/or insurers through subrogation), from whom the hire and storage costs are then sought, seek disclosure of the content of the calls between the Claimant and the (non party) accident management companies;...".

The appeal was heard by Mrs Justice Dias.

Judgment

In terms of the threshold requirements, there was no dispute before the appeal court that when determining whether the disclosure sought was likely to support or adversely affect one side's case, the appropriate test was whether it may well do and that that was a higher degree of probability than that of "real prospect". In this context, Dias J noted that:

> "It is clear from the material placed before me, including various court decisions involving Spectra itself, that it is not uncommon in credit hire cases for the claimant to be told – incorrectly – that he or she will have no personal liability for the hire charges. Other criticisms have also been made of credit hire companies, for example in failing to make clear that they were not the claimant's insurers or acting on behalf of the claimant's insurers. Equally there have been cases where it has been held that no misrepresentation was made."

Spectra and Mr Parker had resisted the disclosure order on the basis that the misrepresentation had not been pleaded and the application was not sufficiently supported by evidence. The judge rejected these arguments, noting that Skyfire: (a) could not advance a positive misrepresentation without sight of the documents sought, and it had done enough in its pleadings to put enforceability in issue; and (b) in light of the forgoing, there was sufficient evidence to show that a misrepresentation claim was by no means implausible such that it was merely speculation without any foundation at all. Dias J therefore concluded that the disclosure sought may well support Skyfire's case.

The problem for Skyfire was the second threshold condition that it had to satisfy: that the disclosure was necessary to dispose fairly of the claim or to save costs. Dias J considered this point and held that "if there is no real prospect that the disclosure can make any difference to the outcome of the claim, it is difficult to see how it could ever be 'necessary' to the fair disposal of the claim".

The difficulty for Skyfire is that, even if it could prove the misrepresentation, that would only make the credit hire agreement voidable; in order for Skyfire to be relieved of liability, Mr Parker would need to elect to avoid it. In this case, Skyfire was unable to point to a real prospect that the contract is capable of being avoided in principle and, crucially, could not point to a real prospect that Mr Parker would seek to avoid it.

Whilst Skyfire pointed to a lack of direct evidence on the point, Mr Parker was advancing a claim based on his contract with Spectra and was, at least since the hearing below, aware that he may be able to void that contract; nevertheless, he still appeared (through counsel) in the appeal and resisted the non-party disclosure order. Dias J therefore concluded that there was no basis for suggesting that Mr Parker would seek to avoid his contract with Spectra. Further, Dias J also concluded that this was not even an option open to Mr Parker as fully performed contracts are not capable of being rescinded (by reference to Chitty on Contracts paragraphs 10-139 to 10-140).

The appeal was therefore dismissed.

Consequences and further thoughts

The case confirms two important principles:

- First, agreements (including credit hire and other credit agreements) which are entered into as a result of a misrepresentation remain valid and enforceable unless and until the innocent party elects to rescind.
- Second, fully performed service contracts (including credit hire and, presumably, other credit agreements) are not capable of being rescinded.

These points, especially the second point, may be of wider importance.

The result of the case, whilst perhaps unsurprising, places defendant insurers in a difficult position. Individuals in Mr Parker's position have little to gain from seeking to avoid the contract with the hire purchase company, even if there has been a misrepresentation by that company or a CMC who was also involved and, by the time cases get to trial (or even disclosure hearings), the contract will have been fully performed. It follows that even where there has been some improper conduct, or even misrepresentation, by the credit hire company, the defendant insurer will not find it easy to avoid liability.

Finally, it is worth mentioning that in post-script, Dias J commented that it was not clear to her that, misrepresentation aside, Google-spoofing involved any legal wrong and:

> "In the absence of any evidence, it is not appropriate for me to say anything more about the legitimacy or otherwise of this so-called 'Google-spoofing'. However, if there is anything objectionable in it, it may well be that this can only be addressed by Parliament, the FCA or one of the other industry regulators."

It remains to be seen what, if any, action is taken.

Gough Square Chambers' consumer credit columns

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