JMK Solicitors

FINANCIAL RESILIENCE

Assessing Impecuniosity in Credit Hire Claims

Introduction

The purpose of this document is to define a method of objectively[1] assessing whether or not a Claimant/ Plaintiff (C/P) in a credit [car] hire claim can positively assert impecuniosity. And, by so-doing, recovering the full cost of a replacement vehicle provided to them by a Credit Hire Company (CHC) after a non-fault accident against the Defendant (D). Hence the hire claim amount will not be limited to the lowest reasonable rate[2] of a so-called mainstream car hire company.

It is assumed that readers of this guide are familiar with credit hire related legal issues so the necessity of a detailed rehearsing of the law pertaining to credit hire cases has not been provided.

A. Impecuniosity: the definition provided in Lagden v. O'Connor[3]

1. As to the actual definition of impecuniosity that comes from Lagden only Lord Nicholls and Lord Hope provided any guidance. Lord Nicholls provided the most concise definition and the one that is often cited in current credit hire litigation:

   "[9] There remains the difficult point of what is meant by 'impecunious' in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make. I am fully conscious of the open-ended nature of this test. But fears that this will lead to increased litigation in small claims courts seem to me exaggerated. It is in the interests of all concerned to avoid litigation with its attendant costs and delay. Motor insurers and credit hire companies should be able to agree on standard enquiries, or some other means, which in practice can most readily give effect to this test of impecuniosity."

2. Lord Hope said, however,:

   "[42] … In practice the dividing line is likely to lie between those who have, and those who do not have, the benefit of a recognised credit or debit card. It ought to be possible to identify those cases where the selection has been made on grounds of convenience only without much difficulty."

3. These remarks have been often been taken over the years to suggest a blunt test from that expressed by Lord Nicholls: did the claimant have a credit or debit card? However, the test expressed in the way that it was does not make logical and practical sense. What is the usefulness of a debit card unless the C/P has enough funds in his bank to cover the transaction? In this respect, there is no real difference between a debit card and cash. Similarly, in the case of a credit card, mere possession tells you nothing. A credit card is only usable if (i) it has enough available credit to cover the hire car (and any deposit taken against the risk of damage); and (ii) the claimant has the wherewithal to pay off the credit card when the bill arrives.

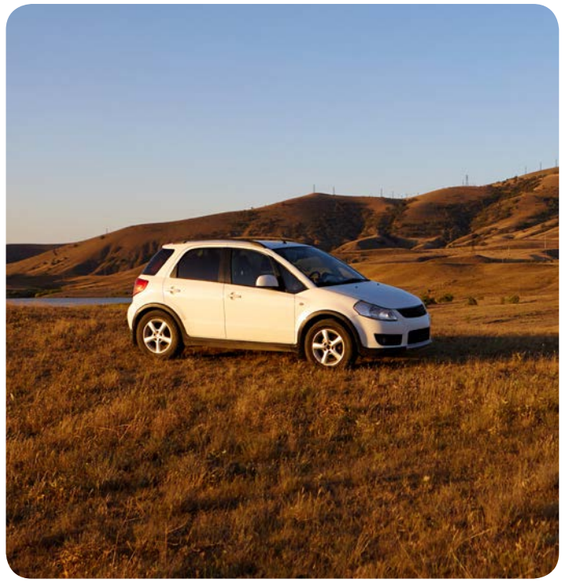
4. It is the more likely scenario that Lord Hope meant to imply that the C/P without a credit/ debit card would be unable to hire from a non-credit hire provider. Certainly in Northern Ireland, credit card facilities are to be discounted from consideration of impecuniosity[4].

5. Despite what Lord Nicholls indicated, there has been no actual attempt made, as far as the author is aware, of CHCs and motor insurers agreeing on standard enquiries. This guide is an effort to take Lord Nicholls proposition forward.

B. The application and development of the test of impecuniosity in the Courts

6. Most recently it is the decisions of Irving v. Morgan Sindall LLP[5] and Putta v. RSA[6] which demonstrate differing approaches to whether a party should use their credit options. In Irving v. Morgan Sindall LLP Turner J addressed the issue of impecuniosity in the second part of his judgment[7]. Miss Irving's motor vehicle had been written-off by the defendant's negligence. She needed her car to get to and from work. The defendant took 4 months to send her a cheque so that she could buy a replacement vehicle. During this time the claimant hired a replacement motor vehicle for which the total hire costs were circa £20,000. At trial, the Judge found that the claimant should have purchased a replacement vehicle using her own funds. Miss Irving's financial resources were modest. Turner J. summarised the Claimant's position as follows:

   "The material before the judge on the issue of impecuniosity was relatively straightforward. The claimant was employed at a modest basic wage of £472 per month. She was able to improve on this figure by working overtime the extent of which fluctuated but which could raise her total income to about £700 per month. Her current account statements reveal a cyclic pattern reflecting monthly peaks upon the crediting of wage payments which are gradually eroded by expenditure over the course of the month which follows. The troughs are marked by a balance in the region of £250. She had an ISA savings account containing about £250. However, the claimant also had a Graduate Bank Account which, although not accumulating interest charges, was overdrawn to the extent of a little over £700 at the material



time. She had a credit card with a limit of £500.

The pre–accident value of the claimant's car was £775.

The judge concluded that the claimant could have raised about £900 by depleting those of her accounts which were in credit and spending up to her credit card limit. Thus she would be able to buy a replacement car of the value of that written off.

What the judge failed to appreciate, however, was that his calculations were based on the assumption that the claimant could be expected to have bought a replacement car immediately after the accident. Such an assumption was untenable. A fortnight had elapsed before her car had been written off. At the very least, the claimant would have needed a further fortnight thereafter within which to buy a replacement. Over this period of four weeks, the claimant would have been entitled, even if pecunious, to have hired a car at the basic hire rate. Such evidence as was before the court revealed that the cost of hiring a replacement vehicle on this basis would have been about £700 over this period. Accordingly, when the hire charges and the capital cost of a replacement vehicle are added together, the sum which the claimant would have needed to raise was far in excess of that upon which the judge based his calculations.

I take into account the fact that the judge had suggested that further sums could have been raised if the claimant had applied to extend the limit on her credit card or had made importunate approaches to her family for loans. Neither option in the circumstances of this case was sufficient to bring the claimant outside the parameters of impecuniosity. Furthermore, I cannot ignore the fact that by reducing her capital to the bare minimum and increasing her debt, the claimant would have been exposing herself to the risk of a serious financial challenge in the event that even a modest but unexpected financial reverse might have afflicted her before her claim was satisfied. Impecuniosity need not amount to penury."

7. So, whilst Turner J did not discount the use of credit, he did not see it as an option for this particular claimant. In Putta v. RSA[8] however, Stewart J took a more robust approach where a claimant did have available to him a credit surplus from available credit cards, an overdraft and sums available in his current account. The estimated repair costs to the Mr. Putta's car was £2,335. The defendant made an interim payment of £1,962. During the time his vehicle was off the road Mr. Putta hired a replacement vehicle for 64 days which was ultimately reduced to 49 days by the trial Judge. The trial Judge did not accept that Mr. Putta was impecunious principally because he had available to him a credit card which had an available balance of £5,585. By using this credit card HHJ Venn decided that Mr. Putta could have paid for the repairs to his vehicle and also the cost of basic hire[9]. This would have resulted in a total cost for alternative hire of £3,332. On appeal Mr. Putta contended that the trial Judge was wrong to have found that he was pecunious and that he should have had to use his credit card facility. Stewart J rejected the argument that the trial Judge was not entitled to look at the available balance on Mr. Putta's credit card specifically citing Opoku v. Tintas[10]. However, the argument on behalf of Mr. Putta as to why he should not have used his credits card was quite compelling:

   "The nub of the Claimant's case is that the Judge should not have required him to have to use every penny of the available credit on his credit cards in mitigation of his loss. It is said that this would require him to bear the burden of expensive credit card debt for an open-ended period, without any real consideration as to how he was to repay the sums spent on his credit cards. Further, there was no consideration as to how he would fund everyday expenditure or deal with unexpected events if he had no available credit to him on his credit cards. The average interest rates across the 3 credit cards was 27.37%. He would have been immediately liable for interest charges. He did not wish to use his credit cards to pay for repairs, as this would have put a lot of burden upon him and he would not have been able to pay back the credit card debt for

[1] A subjective assessment may produce a different outcome, but as far as is reasonably practicable it is expected to be the minority of cases where this might arise.
[2] See McBride v UK Insurance Ltd [2017] EWCA Civ 144 (15 March 2017) [3] See [2004] 1 AC 1067 [4] See Kerr v Toal [2015] NIQB 83 (12 February 2015) para 17 (b)
[5] [2018] EWHC 1147. [6] [2020] EWHC 117. [7] The case was principally fought on the issue of contingent liability.

[8] [2020] EWHC 117
[9] £350 per week plus £126 damage waiver per week
[10] [2013] EWCA Civ 1299 (05 July 2013)

a long period of time. He knew from an early stage that he would have to fund, at least in the short term, the repair costs. It is said that it was unreasonable for him to have to embark upon funding BHR charges from the funds he had available to him. Further, the Claimant gave evidence that anything more than 30% of total credit available on the credit cards over a long period of time could affect his credit rating.

8. The approach of Stewart J. on appeal was to approach the Claimant's available finance week by week apportioning the available credit to the weekly cost of hire. Stewart J. concluded by saying:

   "Therefore, at the beginning of each week, had the Claimant not entered into a credit hire agreement, he would have had substantial funds available to him. The Judge's telescoping of the evidence was in fact not unfavourable to him taking, as she did, a general view of the facts. The lowest amount available to the Claimant would have been at commencement of week 6 when what would have remained was £2,425, out of which £1,000 was the overdraft facility, thus leaving £1,425 available on credit cards. This does not take account of the possible short-term use of the £2,500 put aside for tax."

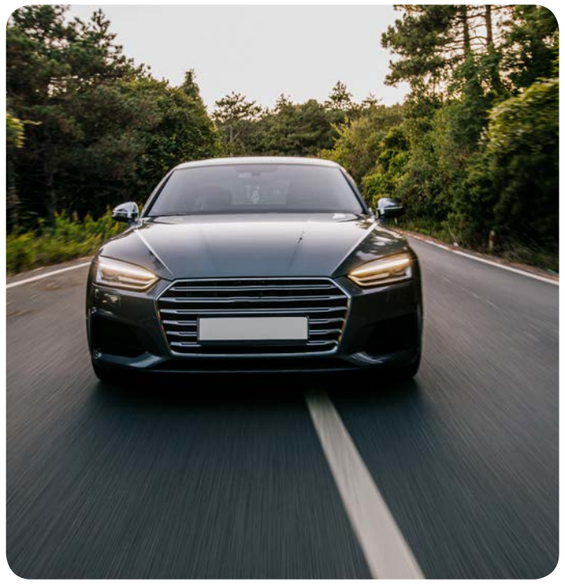
9. Having said that, Stewart J was at pains to emphasise that he was conducting a review to ascertain whether the trial judge had reached a decision that was plainly wrong, notwithstanding the very broad range of decision making open to the first instance judge. As such, the judgement does not stand as a blueprint for the only way of doing things, merely as demonstrating an available way of doing things.

C. What about C/Ps who are married, or in a Civil Partnership or in a Common Law relationship or otherwise non-commercially but economically linked with another person or dependents?

10. It is an often overlooked situation when assessing impecuniosity that the C/P can not be taken as being able to spend all of the funds in their bank accounts by reason of the personal circumstances of the C/P meaning that they are de facto and/or de jure part of a domestic economic partnership with at least one other person.

11. Disregarding the equitable ownership position of joint assets is not something that should be done lightly. Whilst it is certainly an appealing argument to say that a life-partner, or indeed cohabiting adult child(ren), should always be willing to allow the C/P to use community property to meet the costs of the emergency that has befell the C/P this cannot be taken to be the case by default.

12. Indeed it would seem more likely that it would be an unreasonable sacrifice to insist that a C/P expend family resources that are not fully owned by them so as to alleviate the burden on a tortfeasor. In the same way that a D could not insist that a spouse be called upon to give



up their own car for the C/Ps use after an accident so as to avoid a replacement vehicle claim, it cannot be that the D can insist that the joint assets be prayed upon to facilitate the hiring of a vehicle on a non-credit basis.

13. Additionally it is trite law that a spouse/partner is not legally responsible for the other's debts unless they are joint debts or if they have acted as their spouse/partner's guarantor. Whilst paying upfront for hiring a vehicle and awaiting reimbursement might be considered a debtor rather than a debt, a similar principle surely applies. Why should the spouse/partner of a Plaintiff and any of their assets be prejudiced due to the actions of a third party tortfeasor?

14. As far as the writer is aware there are only two reported cases where a partner's earnings were deemed to be relevant to the question of impecuniosity. The first case of Fettes v Williams[11] is of some vintage in credit hire terms and it is doubted whether the principal was ever a strong one and indeed the lack of its further citation would point more to its having been an erroneous, rogue decision. In the later case of Opoku v Tintas, evidence of both the Plaintiff and his wife's earnings and means came before the court in assessing whether the Plaintiff was impecunious.[12] However, evidence of the Plaintiff's wife's means was not determinative in deciding the issue, which would suggest this evidence was not given much weight. Mr Opoku's financial position was as follows: his bank account showed a balance of £1,300, he had debts of £20,000 outstanding on a bank loan and £1,026 outstanding on his credit card. The Court was of the opinion that the Plaintiff himself was reasonably able to save or obtain credit to replace his vehicle over the 9-month vehicle hire period, rather than rely on financial support from dependents:

    "[24] In relation to the hire of a car, the judge concluded that seeking family support or a commercial loan would be an unreasonable sacrifice, but in relation to the repair the judge concluded that, within the eight- month period involved, Mr Opoku could and should have made provision to fund the repairs, particularly when the hire charges were mounting and there was no obvious end point to them."

15. It makes far more logical sense that assets cannot simply be divided in half as might be the starting position if the relationship were dissolving. King Solomon would no doubt agree that there could be no division, notional or actual, that would do justice to the integrity of the joint ownership of the estate.

16. A marriage contract/civil partnership/ verbal agreement by cohabitating couples must also surely fall into the realm of res inter alios actos and the benefits from same have to be disregarded in the same way as a pre-existing insurance contract has to be.

17. The concept was reviewed extensively in Northern Ireland in a Judgement of Keegan J[13], and I believe extracting the relevant passages is important to fully address the similarities, there may well be unintended or unexpected consequences for a C/P's domestic harmony if they must call upon the benefits of their marriage contract to mitigate loss:

    'Consideration

    [30] The issue of credit hire has provided much discussion and jurisprudence emanating from the highest courts. However the three main principles at issue in this case seem to me to be as follows;

    (i) In restutitio in integrum, the plaintiff must be placed back into a position as before the incident.

    (ii) The plaintiff should take reasonable steps to limit loss following an accident.

    (iii) Res inter alia actos, the plaintiff should not have to invoke the benefits accruing from a separate contract.

    [31] This is a damages claim for loss of use of a car. The law has determined that hire of a car is recoverable and that this may validly involve an accident management company acting on behalf of a claimant. The issue is whether or not the plaintiff is entitled to the full credit hire amount. I begin by reciting a number of factors which were uncontroversial in this case. Firstly it was accepted the plaintiff had a need for a car. Secondly it is important to note that the plaintiff was impecunious. Thirdly, there has been no valid argument made that the plaintiff could have borrowed money for the repairs.

    [32] The issue is in relation to the significant hire charges and whether they can be claimed in full against the tortfeasor. The only other option was for the plaintiff to invoke her own policy of insurance. That should be a matter of choice given the privity of contract between the plaintiff and her own insurer. However in this case certain questions arise. Should the tortfeasor be permitted to compel the plaintiff to invoke her own private arrangements to which the tortfeasor is not a party? Should the plaintiff simply claim against the tortfeasor or should the plaintiff invoke her own contractual relationship with her insurer to mitigate her loss?

    [33] I note that this plaintiff was aware of costs because she reduced the storage costs by having the car taken out of storage when she was worried that the costs would rise. I note that the plaintiff also considered invoking her own policy at one stage however she ultimately decided against it. There is a difference between choice and compulsion.

    [34] If I were to find that the plaintiff should have invoked her own policy that leads to a situation where the conscientious person who takes out comprehensive insurance and pays for that is penalised. The person who takes the other often cheaper option of third party insurance may be placed in a better position. I find it hard to contemplate that the law would intend such an outcome.

    [35] I cannot see that the course suggested by the defendant /third party is right in principle. I consider that applying conventional principles the plaintiff''s own insurance is res inter alios acta. I do not consider that I should depart from that. The issue in this case is understandably one of economics. I can see the issue with the hire figure that is now reached in this case. However it seems to me that the real problem with this rests with the tortfeasors rather than the plaintiff. That is on the particular facts of this case. Obviously there may be a different issue if the plaintiff was pecunious as a court would look to see how the repairs or a replacement car could be paid for and within what timeframe.

[11] Fettes v Williams, HHJ Hull QC, unreported, (22nd January 2003)

[12] Para 28, Opoku v Tintas [2013] EWCA Civ 1299.

[13] McCauley v Brennan & Anor [2017] NIQB 41 (26 April 2017)

Or, even if impecunious the court may consider the potential to borrow but there must be clear evidence as to that. That was the position in the Opoku v Tintas case. However in this case there was no argument made that the plaintiff could have raised such an amount of money by her own borrowing.

[36] Notwithstanding the point of principle, there are other factual issues in this case which favour the plaintiff''s argument. It was put to the plaintiff that she could in some way have funded the £200 excess on her own policy. However there was no clear evidence as to how this would happen. It is important not to rush to create a position whereby benevolence from another party is used to assist the tortfeasor. This point was not established in evidence in any event. It is not enough to say that in October 2011 the plaintiff''s father lent her £3,000 from the sale proceeds of a house. It does not necessarily follow that he could have lent her money at the time when she needed it if she was going invoke her policy. There was no evidence adduced that the plaintiff could have saved money over a short period of time. She is clearly a woman on the breadline with a small child at this stage and so impecuniosity is a strong factor in this case. I cannot say that the plaintiff failed in terms of her priorities. She certainly could not afford to pay the car hire so she had to use the credit offered by the car hire company.

[37] Fundamentally the plaintiff must be put back in the position she was in prior to the actions of the tortfeasor. I was not taken specifically to evidence that if the plaintiff were to invoke her own insurance policy she would go back to exactly the same position. It seemed to be accepted that she could recoup her excess. But I was unclear as to whether or not the no claims bonus would definitely remain intact. So there could be other problems for the plaintiff in this case if she were compelled to invoke her own insurance policy. There were some submissions made to the effect that the plaintiff''s insurance premium would not rise in the long term. However, the plaintiff was quoted an increased rate and it is not certain that her policy would not be affected. Even if a rise was short term the plaintiff would not be put back in the position she was at the date of the accident."

D. Why has there not been a consistent approach to assessing impecuniosity?

18. When Ds make allegations of a failure to mitigate against a C/P they argue that the C/P's choices in the aftermath of an accident were flawed, in order to convince the court to reduce elements of the damages being claimed. This strategy is deployed rather than asserting a defence based on the alternative i.e. what the losses would have been had some other course of action been followed by the C/P. Ds invariably escape this burden being imposed upon them.

19. The Northern Ireland Court of Appeal[14] has tacitly endorsed the requirement that when the D successfully discharges its burden of showing a failure to mitigate it must also advance and prove what the amount of the claim would have been had the C/P not elected to do what they did.

20. When the issue of impecuniosity is raised in a credit hire case it is more often than not assessed with the benefit of hindsight at the date of trial rather than being assessed by reference to what would have been the situation and actions of the C/P had credit hire not been an option. There are many who would argue that even if a person were pecunious that without credit hire they would not enter into a hire agreement at all. This being the situation for the period before credit hire reached the level of ubiquity it does in modern society. However, the Courts have so far stated its position that those who could pay for a hire vehicle from a non-credit hire provider should do so, despite the obvious burden that this would place on the pecunious to become experts at accident management at a time of an emergency.[15]

21. The C/P may find that their interests are better served in producing the counter-factual themselves for presentation at Court rather than leaving it for the D to do so, or not do so as the case may be; and relieving the burden from the Court to reduce a claim without having the benefit of such analysis. Imagine Sliding Doors for credit hire claims.

22. For example, a point often missed by C/Ps – is that if judges do find that a credit card financed BHR vehicle should have been used in place of a credit hire vehicle, the court cannot in these circumstances simply limit the claimant to the BHR. It must make an allowance in addition for the finance costs which would still have been incurred to the date of payment if the claimant had used their credit card. Therefore, the necessity for C/P representatives to have a readily available calculator to hand, or having worked out in advance the sum seems blindingly obvious to either prevent an injustice or save Court time.

23. The C/P representative, CHC or some other suitable expert should take on the additional task of setting out in a simplistic manner the basis for making the assertion that the C/P is impecunious, rather than providing en masse financial records and leaving it to the D to make an assessment based on whatever factors they deem appropriate. An exercise akin to trying to complete a jigsaw without the original image, they could try to put all the pieces together but end up with a picture which bears no resemblance to what it should look like.

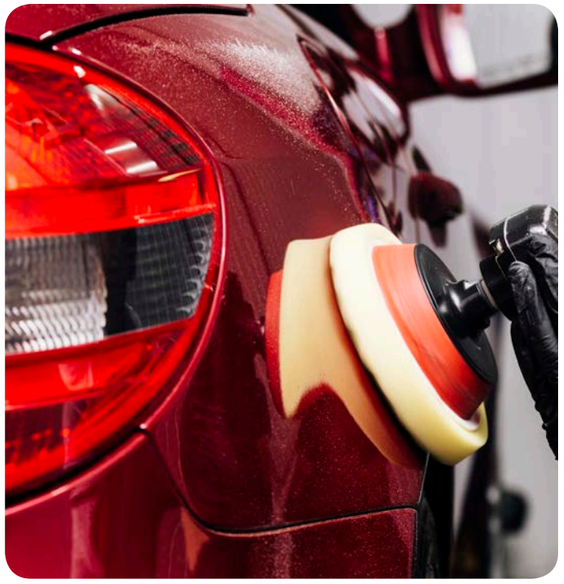
24. The phraseology of impecuniosity does bring with it images of Dickensian poverty such as was experienced by Tiny Tim and Oliver Twist and there is a certain necessity now to look at evolving the nomenclature for this credit hire term in the same way that spot-rate became basic hire rate. C/Ps who outwardly may look to be fiscally secure may in fact be living month-to-month such that they have no actual Financial Resilence - the phrase I would suggest be adopted. This being the phraseology of the Financial Conduct Authority. [17]

25. In 2017 and again in 2019 pre-pandemic, the FCA conducted significant research into the financial views of the public. They have of course now been cognisant that 2020 has changed things for nearly everyone. Publishing details of their findings from July 2020, they paint a stark reality for many. Leading to several stories on the BBC website in Mid-October 2020 which are illustrative of the lack of financial resilience and indeed the mental strain that 2020 has brought about. Headlines such as Payment holidays: 'I can't afford to be out of work' [18]; 'A big supermarket shop feels frivolous now'[19] and 'Coronavirus: NI borrowing and credit card use surged in pandemic'[20] sum up the personal stories that are often forgotten, but which I would implore you to read.

26. There are a number of common themes for those most likely to suffer from a lack of financial resilience for example, those from minority ethnic communities, the young, the old, the disabled, those in minimum wage jobs or the gig economy and non-home owners. However, Covid-19 has thrown vast numbers of people into high risk categories, for example those working in so-called non-essential services including retail, pubs etc. There is also the constant threat of having to self-isolate due to close contact with an infected person, or indeed worse still contracting and becoming seriously ill and incapacitated for long periods of time.

E. So what could the test of Financial Resilience be in the context of impecuniosity and credit hire?

27. Let's assume that an accident occurs on X date and that the hypothetical C/P is not at-fault in the accident and wishes to put themselves back in the position they were prior to the incident, and subsequently make a claim for



those losses from the at-fault party.

28. The first thing to note is that the damaged vehicle has incurred an immediate direct loss[21] although the quantification of that loss will likely not be immediately quantifiable. In order to commence calculation of the loss the vehicle must first be moved from the scene of the accident, if the vehicle is not legally roadworthy.

29. If it is not, then the first expenses begin to clock-up for the C/P, that of Towing/recovery and storage charges which will require to be paid before the vehicle can be retrieved back into the C/Ps custody and control.

30. The C/P might also take the prudent step of appointing a motor engineer assessor. The C/P will have a liability for their fee and potentially a repairer's estimate charge to confirm the costs of repair are reasonable and the works appropriate. In which case the C/P who wishes to repair their vehicle must have this sum at their disposal in order to give instructions to the repairer to proceed with repairs.

31. The assessor will advise on the pre-and-post accident values of the vehicle, should it be unable to be economically or safely repaired. In such a situation a myriad of additional costs may need to be incurred in order for C/P to purchase a replacement vehicle.

32. Depending on whether the vehicle is roadworthy or not and there is a need for a replacement vehicle, the next cost facing the C/P is hire of a replacement vehicle while the C/P has been deprived of using their own vehicle . It stands to reason that in order to decide what period to hire for will be dependent on the nature of the damage and

[14] See Clark v McCullough [2013] NICA 50 (19 September 2013) paras 14-21
[15] See Sliding Doors – 1998 romantic comedy starring Gwyneth Paltrow. The film alternating between two different 'realities'; either of which could have occurred depending on whether or not the lead character caught a certain train.

[17] https://www.fca.org.uk/publications/research/understanding-financial-lives-uk-adults
[18] https://www.bbc.co.uk/news/business-54576518 [19] https://www.bbc.co.uk/news/business-54479043
[20] https://www.bbc.co.uk/news/uk-northern-ireland-54630984
[21] See Coles & Ors v Hetherton & Ors [2013] EWCA Civ 1704 (20 December 2013)

for the accident victim this may well be hard to ascertain.

33. It may be that the vehicle repairer, motor engineer or an experienced expert such as a solicitor specialising in road traffic accidents could provide an opinion. The expert chosen by the C/P will likely also be able to guide them through the pre-qualifiers that might preclude them from availing of a so-called mainstream hire. For example, based on their age, driving history, occupation, likely mileage, etc. Where a private paying client engages a solicitor, there is a liability for the costs of the professional advice which the modern commercially astute solicitor may insist is funded 'up-front' by the C/P.

34. Unlike the retrospective test to calculate the lowest reasonable rate so as to strip out the irrecoverable additional benefits of a credit hire claim, our hypothetical C/P is not obliged to make an exhaustive search of the car hire market to find the cheapest rate. Any reasonable choice is open to them. It would be recommended for parties advising in this field, to research a couple of mainstream providers for the period required at the time instructions are taken from a C/P to have a contemporaneous and reliable record to refer to.

35. As the case progresses it may be discovered that initial estimates proved incorrect due to unknown factors, meaning that additional unforeseen liabilities are incurred. These coupled with the matters listed in the preceding paragraphs are an indication of the amount of money which the hypothetical C/P would have required to have had exclusively available to them, to fund their losses until recoupment from D.

36. In light of Covid-19, the test in Lagden must now be seen against the backdrop of an economy which is highly precarious and unstable. It is also trite law that a C/P need not risk his money too far in mitigation: a principle that lawyers conducting credit hire claims have a duty to emphasise to judges in the future[22]. With this principle in mind the courts must take into account the broader context in which it might be suggested by a D that a C/P ought to risk their own finances imprudently less an unexpected financial reverse afflicts them.

37. Our hypothetical C/P who, as a result of the foregoing, knows broadly the extent of the expenses to be incurred must now look at the money readily available to them to ascertain if self-funding can be comfortably done, without unreasonable sacrifice or even worse; resulting in actual penury. In practice this will be an analysis of the C/P's current account and any instant access savings accounts.

38. The accounts being looked at can only be analysed where the C/P is able to access the funds without any legal or moral recourse to any other party. Where this is not the case, they cannot be said to be unencumbered cash assets of the C/P. At the very least the personal data of the other party will need to be redacted and an allowance made for what is their notional share of the account balances. It is not necessarily going to be as easy as dividing it in half.

39. The current account by its nature will be used for everyday expenses, probably a host of regular direct debits and standing orders in addition to payments for food, leisure etc. The prudent C/P will want to know that they can meet these regular liabilities as they fall due and continue with their normal lifestyle, such is their right to restitutio ad integrum - to be placed in the same position they were in after the accident as they were before.

40. Funds in a savings account may be there for a pre-ordained reason. It may require an examination depending on the purpose and whether there are additional funds available to ascertain what might be called the 'spare' excess balance in the account.

41. The C/P's income post-accident as a result of any injury or loss sustained will also be a factor to be considered, but for the purposes of this exercise I am assuming there is no injury. What will be in the C/P's mind before expending their own money in any case though will be – "for how long might I be without this money awaiting it's repayment back and will I be unable to meet my prior obligations should I lose my source of income?"

42. The C/P will have a relatively simple calculation to make- 'assuming I do not have any money coming in, for the likely period that might be, can I pay for all of my accident related expenses and still have enough left over to cover my normal outgoings and not put myself in a position of running out of readily accessible money or dipping into pre-committed savings?'.

43. If the answer is No then the C/P is prima facie lacking the necessary Financial Resilience and should be awarded the credit hire rate claimed.

44. If the answer is Yes then the C/P is prima facie Financially Resilient. If such a C/P did in fact hire on credit then their award for hire can still be awarded in full if there are some other facts that arise to justify that outcome.

[22] See McGregor on Damages (20th ed) §9-082 and also Lesters Leather and Skin Co v. Home and Overseas Brokers (1948) 64 T.L.R. 569 CA.

F. A model calculator for Financial Resilience therefore would look as follows:

FINANCIAL RESILIENCE EQUATION VARIABLES

RTA Occurs on	X date
C/Ps liabilities incurred:	
Vehicle Recovery and Storage Charges	£A
Immediate Diminution of Loss of Vehicle Value (Assessed via either repair estimate or a motor engineers report).	£B
Liability for BHR charges to include deposit for the estimated period vehicle will be off the road.	£C
Any additional hire periods if initial estimate proves incorrect	£D
If vehicle is written-off there will be costs of changing vehicle eg cost of settling a finance agreement, deposits on new finance agreements, top-up payment over and above £B, to obtain permanent replacement vehicle	£E
There may be other miscellaneous expenses such as legal costs etc	£F
The total of A-F is the sum required to be available to the C/P in Unencumbered Cash Reserves to meet the liability the accident has Occasioned.	£G [£G=£A:£F]
The Balance in the C/Ps Current Account at X date	£H
The 'spare/free' excess Balance in the C/Ps Savings Account At X date (explanation may be required)	£I
The C/P will have fixed regular monthly expenses and outgoings eg mortgage, loans, car finance, credit cards,household bills, etc	£J
'A serious financial challenge' would for the most common situations involve a period of months in which a C/P was without their regular income. It would all be fact specific depending on the C/Ps circumstances; in addition to the Court's sympathies as to the impact on society's way of thinking about money and finance post Covid-19.	K months

FINANCIAL RESILIENCE EQUATION

C/P is:	C/P is prima facie
NOT FINANCIALLY RESILIENT IF:	FINANCIALLY RESILIENT IF:
(£H + £I) is less than	(£H + £I) is more than
(£G + K£J)	(£G +K£J)

Conclusion

45. The economic changes of the first two decades of the 21st Century compounded by the Covid-19 pandemic and to a lesser, but longer term extent, the uncertainty of Brexit, has changed UK society such that it is unrecognisable from the one in which the Court of Appeal made the decision in Lagden that only the impecunious could recover full credit hire rates with its irrecoverable benefits.

46. Additionally, the nuances required to properly deal with the commentary of the Court and the issues arising have not been sufficiently addressed in the years since by the senior courts. It is arguable that the credit hire industry has not done itself any favours in the court of public opinion that would assist the court from wanting to look beyond the companies providing the services to the necessity of the service itself. The primary reason for that being the level of disputes which come before the Court.

47. It is very likely that adopting the principles within this document as summarised in the flowchart in Appendix 1 will go some way to eliminating the vast amounts of disputes over car hire rates in the context of Financial resilience.

48. It is not difficult with access to modern databases and Open Banking reports to obtain the necessary information in a readily accessible manner to complete the above calculation. An example of such a report is exhibited in the Appendix 2 to this document. Two easily readable and digest-able illustrations showing the End of Day balance in the C/Ps account, coupled with the regular in-flows and out-flows in the preceding 3 months prior to the date of accident.

49. The D served with such evidence and presentation of information will find themselves in a more difficult position as they will have to attack the certainty of mathematics rather than the ethereal nature of legal submissions. They will have to respond in advance of trial with a very compelling counter argument should they hope to dislodge the outcome of the above calculation showing the Financial Resilience; or more likely the lack thereof.

50. Court time should be reduced by the provision of this simple basis for CHCs and motor insurers to agree on what financial resilience actually looks like. Hence there will be better outcomes for all concerned. Most importantly the innocent victim of the accident who simply wants to be placed back in the position they were prior to the incident occurring and move on with their life. This is something that can be implied from Chapter 3 of the FCA's July 2020 Financial Lives report where they encourage sympathy towards consumers in difficulty. Insurer's -as regulated parties- should embrace this concept rather than fight every credit hire user into submission.

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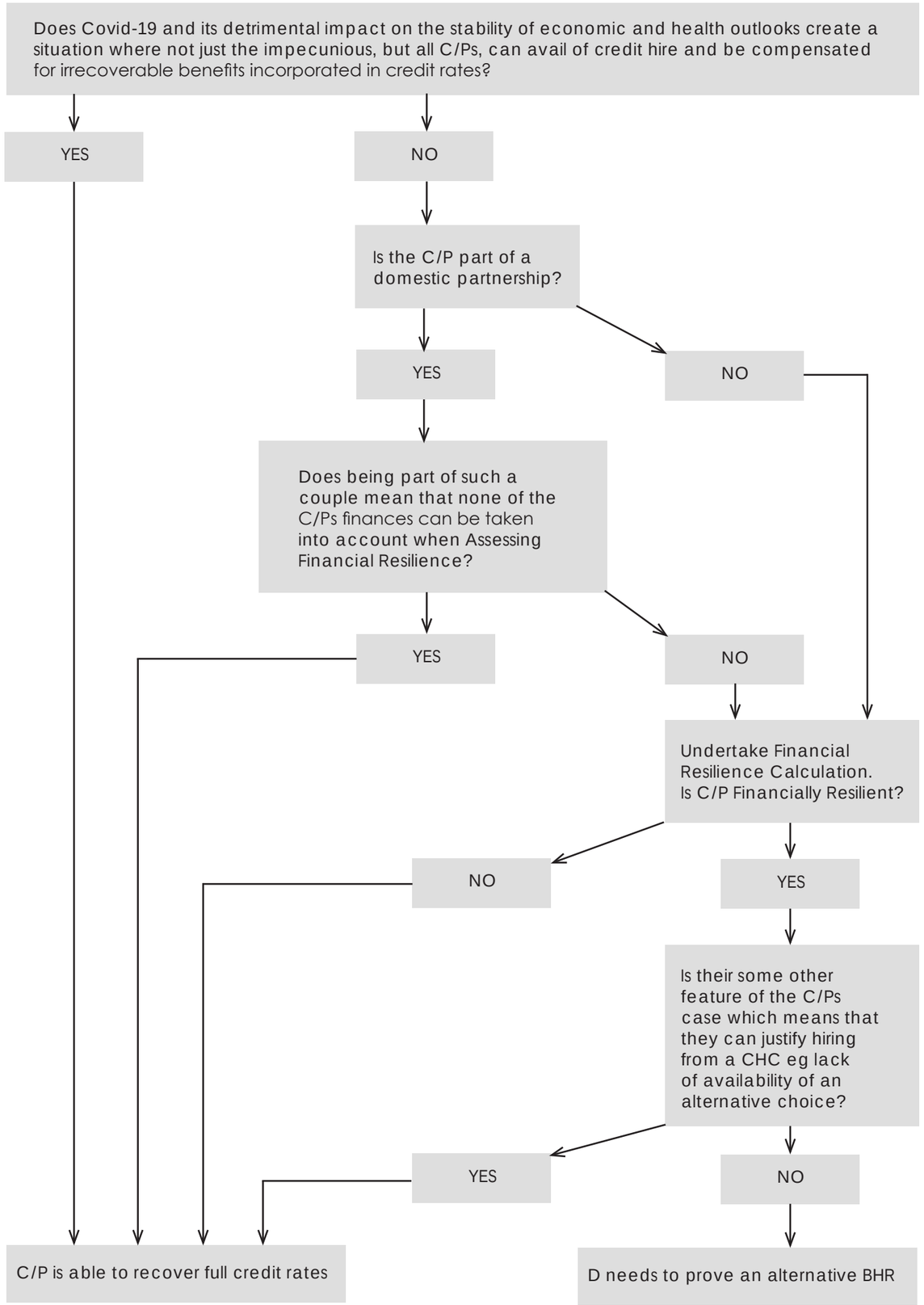
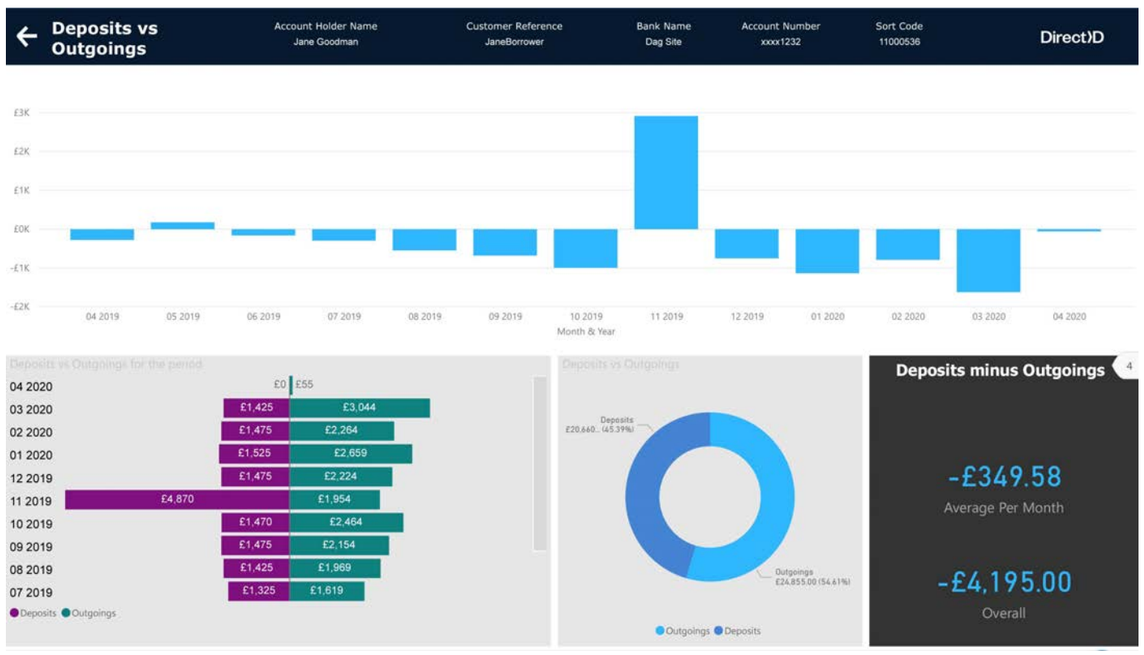
Appendix 1 – Financial Resilience in Credit Hire claims Flowchart



Appendix 2 – Sample Open Banking Report



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