Neutral Citation Number: [2023] EWHC 790 (KB)

Case No: CF002/2022CA

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM CARDIFF COUNTY COURT
HHJ Harrison
H00CF897

Cardiff Civil and Family Justice Centre

Date: 04/04/2023

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

JONATHAN HOLT	**Appellant**
- and -	
ALLIANZ INSURANCE PLC	**Respondent**

- -
- -

Benjamin Williams KC & Helen Rutherford (instructed by **Principia Law Ltd**) for the **Appellant**
Jonathan Hough KC & Edward Ramsay (instructed by **Keoghs LLP**) for the **Respondent**

Hearing date: 22 March 2023

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.
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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The appellant was involved in a road traffic accident on 16 July 2020 that, it is accepted, was the fault of the other driver, liability for whose negligent driving was covered by insurance provided by the respondent insurer. A car was provided to the appellant from 10 August to 3 September 2020 (inclusive), a rental period of 25 days, on credit hire terms agreed between him and Auxillis Services Ltd ('Auxillis').

2. On 4 September 2020, Auxillis presented a written claim to Allianz with a demand for payment of £10,387.50 (£8,656.25 + VAT) in respect of its credit hire charge for that hire period. Proceedings were threatened if payment in full was not received "*by return*". The claim amount was presented in a table with rows also for repair costs, engineer's fee and storage/recovery charges, all of which were stated at £0.00. In short, the credit hire charge of over £10,000 was the only claim intimated. A supporting document sent with the letter showed that the amount claimed represented 25 days rental at £343.05 + VAT, plus delivery and collection charges of £40 + VAT (each).

3. Allianz responded with evidence that it said showed a going rate at the time, to hire an equivalent car on ordinary rental terms (not credit hire terms), of just under £62 per day (including VAT), say £1,550 for a 25-day rental. That was based on rates available for 7-day hire periods, making £434 per week. If four 7-day rentals were used as a measure, that would be £1,736 to cover the 25 days for which Auxillis was claiming that the appellant needed a replacement car because of the accident.

4. Having in mind the *prima facie* irrecoverability of credit hire costs incurred in excess of an ordinary going car hire rate, under *Dimond v Lovell* [2002] 1 AC 384, *Lagden v O'Connor* [2003] UKHL 64, [2004] 1 AC 1067, and the cases that have developed the law since, Allianz asked Auxillis:

   (i) to say whether the case for the appellant was one of impecuniosity, and

   (ii) if it was, to disclose some basic documentation for that case.

5. Auxillis refused to countenance any such thing at the pre-action stage, and insisted on payment of its claimed amount in full if Allianz wished to avoid litigation. Allianz therefore applied for pre-action disclosure of:

   (i) the appellant's bank, credit card and savings account statements covering the period of hire and three months prior to it;

   (ii) wage slips or other proof of income covering the same period.

6. By Order dated 13 January 2022, following argument of the application on 18 October 2021 and the handing down of a reserved judgment dated 3 December 2021, HHJ Harrison granted the application. The judge refused permission to appeal, as did Steyn J on the papers.

7. On oral renewal of the application for permission to appeal, Bourne J granted permission, although he considered that the appeal did not have a real prospect of

success. Bourne J judged there to be a compelling reason for the grant of permission because there was "*a divergence of practice between different courts. On the one hand, such orders for pre-action disclosure serve a clear and benevolent purpose. On the other hand, they are exceptional, especially when granted to defendants … [and] the reasons for making the order in this case could apply in many, if not most, other credit hire cases. In those circumstances, I consider it proper for the matter to be considered at High Court level because that may, I stress may rather than will, lead to guidance which would be binding at County Court level.*"

8. The reference by Bourne J to a divergence of practice between different courts derived from examples he was shown or told about of County Court decisions in factual circumstances similar to those of the present case variously allowing or refusing pre-action disclosure applications.

9. The appeal hearing came before me, leading now to this judgment.

10. One of the appellant's arguments was that under CPR 52.21(1)(b), I should say that it was in the interests of justice to re-hear the CPR 31.16 application *de novo*, rather than limit myself in the normal way to a review of the decision below. I explored that idea with Mr Williams KC, but rejected it, at the hearing. It seemed to me its premise, in substance, was that what I might say as to the applicable law, or the approach to the exercise of the pre-action disclosure power, would be more authoritative upon a re-hearing than upon a review, or that how I chose to exercise my discretion in this case upon a re-hearing would be authoritative rather than only being, as in truth it would be, an exercise of a discretion by a judge on a particular occasion. I think that premise is false.

11. I therefore turn now to the law relevant to the application before HHJ Harrison and therefore to this appeal, before summarising the claim correspondence that gave rise to that application and reviewing the judge's decision on it.

The Law

12. The County Courts Act 1984 provides, by s.52(2), that:

"*On the application, in accordance with rules of court, of a person who appears to the county court to be likely to be a party to subsequent proceedings in that court, the county court shall, in such circumstances as may be prescribed, have power to order a person who appears to the court likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim–*

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order,–

(i) to the applicant's legal advisers; or

(ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or

(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant."

13. The leading authority on the scope of that power is *Black v Sumitomo Corpn* [2002] 1 WLR 1562, which considered the High Court's exactly similar power under s.33(2) of the Supreme Court Act 1981 (as it was then). The decisive point was that the judge had not given consideration to whether, as a matter of discretion, the pre-action disclosure sought in that case should be ordered, as a matter separate from and additional to his assessment that the conditions for the exercise of the power were satisfied.

14. The analysis and interpretation of the statute in the judgment of Rix LJ (with which May and Ward LJJ agreed), even if not *ratio*, was fully considered and so is strongly persuasive authority. It was relied on by Allianz in the argument before me and I was not invited by the appellant not to treat it as correct.

15. Rix LJ concluded that the requirement that the parties to the pre-action disclosure claim are "*likely to be*" party to subsequent proceedings requires only that they may well be party to proceedings if proceedings are later commenced (*ibid* at [71]-[72]). Mr Hough KC submitted, and I agree, that the other statutory requirements defined in that way must be construed similarly. Thus:

(i) the requirement that the respondent is "*likely to have or to have had*" documents requires only that they may well have, or have had, documents; and

(ii) the requirement that such documents be relevant to an issue "*likely to arise*" in the proceedings requires only that the issue, to which the documents would be relevant, may well arise.

16. The rule of court governing applications for pre-action disclosure, and under which Allianz made its application in the present case, is CPR 31.16. That rule applies where an application is made under any Act for disclosure before proceedings have been started (CPR 31.16(1)) and requires that the application must be supported by evidence (CPR 31.16(2)). CPR 31.16(3) sets conditions to be satisfied before pre-action disclosure is ordered, CPR 31.16(4) requires certain terms to be included if it is ordered, and CPR 31.16(5) identifies some terms that may also be included, all as follows:

"*(3) The court may make an order under this rule only where–*

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to–

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must–

(a) specify the documents or classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents–

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) An order under this rule may–

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection."

17. The conditions set by CPR 31.16(3)(a)-(b) obviously echo the statutory requirement concerning the parties (paragraph 15 above).

18. In *Black v Sumitomo*, nothing turned on CPR 31.16(3)(c), because there had been an agreement in that case to limit the documents to be disclosed by reference to standard disclosure, which "*tended to obscure and perhaps to obliterate any argument as to whether any of the categories of documents requested were inherently outside the regime of standard disclosure*" (*per* Rix LJ at [74]). At [76], however, Rix LJ emphasised that "*the extent of standard disclosure cannot easily be discerned without clarity as to the issues which would arise once pleadings in the prospective litigation had been formulated*", and endorsed the observation of Waller LJ in *Bermuda International Securities Ltd v KPMG* [2001] Lloyd's Rep PN 392, at 297, that the focus of the rule is on "*what the issues in the litigation are likely to be i e what case the claimant is likely to be making and what defence is likely to be being run*".

19. That all conforms, with respect, with my reading of CPR 31.16(3)(c). I do not consider that, as Mr Williams KC contended, it is intended to require more than that on an issue likely to arise, documents the respondent is likely to have or to have had, would be within the regime of standard disclosure. In other words, the "*would be*" language of CPR 31.16(3)(c) is not apt to introduce a requirement as to the putative litigation issue stricter than that it may well arise if proceedings are commenced, which would be inconsistent with the statute as interpreted by Rix LJ in *Black v Sumitomo*. Rather, CPR 31.16(3)(c) is focused on the relationship between the documents that the respondent may well have or have had and the issue that may well arise. They must be, to echo Rix LJ, documents that would be within the regime of standard disclosure in relation to the issue in question if it arose in litigation.

20. In the present case, the appellant's skeleton argument proposed a ground of appeal complaining that it had not been shown that the documents sought would be within

the scope of standard disclosure if impecuniosity were in issue. However, Mr Williams KC made clear in oral argument that that point was not pursued.

21. It follows that, subject to satisfying HHJ Harrison as to CPR 31.16(3)(d), the pre-action disclosure sought by Allianz was within the scope of the statutory power and the rule of court, such that it could be ordered, if Allianz might well be party to any proceedings later issued by the appellant and impecuniosity might well be an issue in any such proceedings.

22. As regards CPR 31.16(3)(d), in *Black v Sumitomo* at [81], Rix LJ construed the notion of 'desirability' as connoting only that there be a "*real prospect in principle*" that requiring the disclosure sought to be given before proceedings had been commenced would have at least one of the stated outcomes, *viz.* disposing fairly of the prospective proceedings, assisting the dispute to be resolved without proceedings, or saving costs.

23. It follows that the pre-action disclosure sought by Allianz in this case was disclosure HHJ Harrison had power to order if (and only if):

    (i) Allianz might well be party to any proceedings later issued by the appellant;

    (ii) impecuniosity might well be an issue in any such proceedings; and

    (iii) requiring the disclosure to be given before proceedings had been commenced offered a real prospect in principle of disposing fairly of the prospective proceedings, assisting the dispute to be resolved without proceedings, or saving costs.

24. Mr Williams KC drew attention to CPR 25.2(2)(c), by which "*unless the court orders otherwise, a defendant may not apply for any of the orders listed in rule 25.1(1) before he has filed an acknowledgement of service or a defence*". The orders listed in CPR 25.1(1) include: "*(i) an order under section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (order for disclosure of documents or inspection of property before a claim has been made)*".

25. I agree with the Editors of the White Book, who say in note 25.2.5 that in the case of a pre-action application by a putative defendant "*it will be easy to obtain leave so as to disapply the operation of the rule where the defendant can show a sufficiently strong case for obtaining relief*", although I would say, more precisely, that it will be easy to persuade the court to order otherwise, as permitted by the rule. In the case of pre-action disclosure, under the detailed regime of s.33 of the 1981 Act or s.52 of the 1984 Act, and CPR 31.16, I find it difficult to envisage circumstances in which a defendant's application could satisfy the requirements of that regime, and persuade the court that in the exercise of its discretion, bearing in mind *inter alia* that the application was brought by the putative defendant and not by the putative claimant, the order sought should be made, and yet the court might refuse the application under CPR 25.2(2)(c).

26. I should now say a little more about the underlying substantive law, under *Dimond v Lovell, Lagden v O'Connor,* and subsequent cases, to the extent it informs the debate over the likelihood that impecuniosity would be an issue in any proceedings brought

by the appellant seeking to recover the credit hire cost of £10,387.50 claimed by Auxillis.

27. A detailed review or analysis of the case law is not required. Suffice it to say that the question, overall, if the cost of a temporary replacement car on credit hire terms is claimed, is one of causation, whether the claimant was caused to incur that full cost by the negligent driving for which the defendant is liable. Where a suitable replacement car would have been available on ordinary terms, the negligent driving will not have caused a materially greater car hire cost to be incurred, unless the claimant reasonably could not have accessed that ordinary car rental market.

28. The cost of hiring a comparable car from a conventional car hire company has become known in this field as the "basic hire rate" or "BHR", as to which see *Pattni v First Leicester Buses Ltd; Bent v Highways & Utilities Construction (No.2)* [2011] EWCA Civ 1384 at [30]-[41] & [73], *Zurich Insurance plc v Umerji; Umerji v Khan* [2014] EWCA Civ 357 at [37], *Stevens v Equity Syndicate Management Ltd* [2015] EWCA Civ 93 at [35]-[36], and *McBride v UK Insurance Ltd* [2017] EWCA Civ 144 at [49]-[56]. Where a credit hire company such as Auxillis asserts and threatens litigation to pursue a claim for over £10,000, and the response is to assert, in terms or effect, a BHR of less than £2,000, the credit hire company must have in mind either (i) a case that the asserted BHR is wrong, and the £10,000+ claimed will not be shown to have been materially greater than the true BHR (as in *Bent v Highways & Utilities*), or (ii) a factual case specific to the particular claimant that renting at the BHR was not a realistic option for them, or (iii) both ((ii) in the alternative to (i)).

29. As regards case (ii) – hiring at the BHR not being a realistic option for the claimant – the most common claim in credit hire cases is impecuniosity, that is to say a claim that the claimant could not have afforded to pay up front for a temporary replacement car without making sacrifices it would be unreasonable to expect. The soundness of such a claim in principle, whereby to justify recovery of more than the BHR, potentially up to the full amount claimed, was established by *Lagden v O'Connor*.

30. In *Diriye v Bojaj and another* [2020] EWCA Civ 1400, the Court of Appeal dismissed an appeal against a refusal to grant relief from sanctions in relation to an unless order debarring the claimant from pursuing an impecuniosity claim in a credit hire case. The law and practice under *Lagden v O'Connor* had by then reached the point that Coulson LJ (with whom Nicola Davies and Rose LJJ agreed) could say, at [4], that:

> "*It is well-established that a claimant in a road traffic accident ("RTA") claim is entitled to recover the reasonable cost of hiring a replacement vehicle: see Lagden v O'Connor … . Reasonableness will be assessed by reference to need, rate and duration: see Umerji v Zurich Insurance plc … . A claim to recover the significantly higher credit hire rates (as opposed to basic hire rates)* ***will usually depend on the claimant demonstrating that he or she was not in a position to pay the ordinary rates upfront; that the claimant was, in the jargon used in the cases, "impecunious"*** *(see Lagden, and Zurich at para 9(3))*" (my emphasis).

31. Coulson LJ later noted the importance of the claim of impecuniosity, if it was to be pursued, when considering the nature and seriousness of the breach of the unless order in that case, as follows:

"*48. I consider that, on analysis, the reply, even when served, did not comply in substance with the unless order. That order required the reply to set out "all the facts" relied on in support of the assertion of impecuniosity. The appellant was a minicab driver. So, the reply needed to set out what his income was and what his expenditure was, and how those figures meant that he could not afford to hire a replacement vehicle. Yet all the reply said on this topic was at para 5, which stated that "As he earned cash as a minicab driver, he expended the same on bills and daily living allowances for his family". Nothing else of relevance was provided. No figures for income were pleaded at all.*

…

50. … If I am right and the reply did not comply with the substance of the unless order …, the significance of the breach could hardly be greater.

51. Mr Peter … repeatedly drew a distinction between a pleading and the evidence required to support it. Stripped of its repetition, that argument was to the effect that a claimant in the position of the appellant was entitled to assert impecuniosity by way of a bald statement, and then to seek to adduce evidence later on to embellish it. He said that, although that might mean the case would go badly for the appellant at trial, he should not be shut out from pursuing his claim for credit hire in court.

52. I consider that there are a number of fundamental errors in that submissions. The first is that it seeks to get around the clear wording of the unless order … . Secondly, the submission seemed to be based on the incorrect notion that a claimant was entitled to advance a rubbishy case in stages, from pleading to witness statement to trial, presumably in the hope that, by the time trial came on, there was a commercial imperative on the part of the respondent to settle the case.

53. Thirdly, Mr Peter's approach ignored the respondent's position. They are entitled to know the case they have to meet. They should not be expected to have to prepare for a trial where the critical item of claim depends on a one line assertion, and hoping that, as a result of the cross-examination of the appellant, the judge will reject the claim. That is not how civil litigation is supposed to work post-CPR. And fourthly, the argument was unsupported on the facts … [because] the reply did not in fact herald a witness statement with more detailed support for the impecuniosity claim.

…

61. Even if the breach in this case had been confined to the delay in service, that would not make it insignificant. Parties to civil litigation need to make clear the important elements of their respective cases at an early stage. Gone are the days of ambush and keeping important points up your sleeve. The aim of much civil litigation is to bring about a cost-effective settlement. If a claimant delays in providing critical information, particularly where he has been ordered to provide it by way of an unless order, that delay adversely affects the other side's ability to take a view about the strength or weaknesses of the claim they face. The effect on the litigation in question should not be measured simply by whether or not the trial date can still be met; in properly run litigation, the aim must be to avoid having a trial date altogether."

32. Those observations concerned the need properly to plead, with supporting factual particulars, a claim of impecuniosity, if such a claim was to be pursued in litigation that had commenced. The assessment that it was the 'critical item of claim' and an 'important element' of the claimant's case on which making only a bare assertion would be a failure to provide 'critical information' did not depend on that specific context, however. It followed from the basic facts of the claim asserted, "*a relatively modest amount for whiplash injury, together with a claim for special damages in the sum of £15,728.28, of which the largest single item was a claim for the credit hire costs of a replacement vehicle in the sum of £12,048.29*" (*per* Coulson LJ at [3]).

33. The importance in a credit hire case of the claim of impecuniosity, if made, and thus the importance of knowing whether it is to be made and, if so, upon what basis, properly particularised, is now reflected in:

    (i) the rule in CPR PD16, para 6.3, that if a claim includes the cost of hire of a replacement vehicle following a road traffic accident, the claimant must state in the particulars of claim: "*(1) the need for the replacement vehicle …; (2) the period of hire claimed …; (3) the rate of hire claimed; (4) the reasonableness of the period and rate of hire; and (5) if the claim relates to credit hire, whether the claimant could afford to pay in advance to hire a replacement car, and, if not, why not ("impecuniosity")*";

    (ii) the associated rule in CPR PD16, para 6.4(2), that the obligation to state the matters set out in para 6.3 "*includes an obligation to state relevant facts*";

    (iii) the practice, reflected in cases such as *Umerji* and *Bojaj*, *supra*, of granting unless orders to debar the pursuit of an impecuniosity claim not properly particularised or in respect of which basic disclosure has not been given;

    (iv) the Ministry of Justice's model directions for use in cases of "*RTA credit hire impecuniosity*" requiring a pleaded reply, typically within 14 days of the directions order, setting out all facts in support of any assertion that the claimant was impecunious, and disclosure of the basic documentation sought in this case by way of pre-action disclosure, typically within 28 days of the directions order, in default of either of which the claimant will be debarred from relying on impecuniosity for the purposes of determining the appropriate rate of hire.

34. I do not accept a submission by Mr Williams KC that those provisions reflect an understanding, or create a legitimate expectation, that the required level of particularity, and associated basic disclosure, does not need to be given until the pleading and disclosure stages of litigation that has been commenced. That submission was made in support of a ground of appeal attacking the judge's exercise of discretion in the present case, contending that the specific requirement for particulars of claim to state and particularise any plea of impecuniosity "*confirms that a claimant is not required to state his case, let alone provide disclosure, at an earlier stage*", and that the model case management directions "*confirm [that] these matters are expected to be addressed after court proceedings have been issued*".

35. The gist of that argument and ground of appeal was that the specific matters of established procedure summarised in paragraph 33 above serve not merely to ensure

that any claim of impecuniosity is dealt with properly and with the priority required when proceedings have been brought, but imply a general rule that it is not to be considered seriously until then. In my view that is not right. Indeed, if anything, the implicit justification for demanding that a claim to impecuniosity is made and fully particularised as early as possible within proceedings, if brought, and especially that basic, initial case management directions should normally be on unless terms in relation to any such claim, is that in general it is not to be imagined that the issue will not have been considered seriously, and explored between the parties, well in advance.

36. Turning, then, to the pre-action context with which I am directly concerned, there is no pre-action protocol in relation to claims for credit hire costs following a road traffic accident. So the general Practice Direction – Pre-Action Conduct and Protocols ('the Practice Direction') applies, under which:

"*3. Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to–*

(a) understand each other's position;

(b) make decisions about how to proceed;

(c) try to settle the issues without proceedings;

...

(f) reduce the costs of resolving the dispute.

4. A pre-action protocol or this Practice Direction must not be used by a party as a tactical device to secure an unfair advantage over a party. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues.

5. The costs incurred in complying with a pre-action protocol or this Practice Direction should be proportionate ...

6. ... Where there is no relevant pre-action protocol, the parties should exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate. The steps will usually include–

(a) the claimant writing to the defendant with concise details of the claim. The letter should include the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated;

(b) the defendant responding within a reasonable time ... . The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim; and

(c) the parties disclosing key documents relevant to the issues in dispute."

37. Where a claim arising out of a road traffic accident is intimated the sole or major element of which is credit hire charges of over £400 per day, concise details of the basis on which the claim is made will not be given unless it is explained whether the claim is that the charges claimed were not materially greater than the BHR, or that the claimant realistically could not have hired at lesser cost due to impecuniosity or due to some other factor, identified in the explanation, or (perhaps) both. Where the response to the intimation of such a claim is that the BHR was greatly lower (here, it was said, only £62 per day) and asks for assistance to understand how it is proposed that the much higher credit hire charges will be recoverable:

    (i) confirmation of whether impecuniosity or some other factor particular to the claimant, if so what other factor, is said to render the asserted BHR irrelevant, would be no more than the most basic of information to provide so that the claimant's position can be understood and an initial idea of what will be involved in the claim can be obtained as part of making a decision as to how to proceed and/or to try to settle without the need for litigation;

    (ii) provision of some basic documentary evidence supporting the asserted BHR would be no more than the disclosure of key documents relevant to the issues in dispute; and

    (iii) provision of some basic documentary evidence supporting a claim of impecuniosity, if made (see (i) above), would likewise be no more than the disclosure of key documents relevant to the issues in dispute.

38. I agree with an observation of HHJ Harrison in the present case, made as part of explaining why he considered it right, as a matter of discretion, to make the order, that "*the prospective claimant in a credit hire case should not be able to avoid the issue of impecuniosity by saying that [they] do not deal with the issue at a pre issue stage. To do so would be contrary to the overriding objective and the [Practice Direction]*." To be clear, the sense of that is not that the prospective claimant can somehow be required to claim impecuniosity if that is not their case. Rather, HHJ Harrison was expressing the view, with which I agree, that the claimant (probably, in practice, the claimant's credit hire company) cannot, by reason that litigation has not yet been commenced, properly refuse to have a position on whether the basis of the claim they have chosen to assert and threaten to litigate is or includes a claim of impecuniosity.

39. To be clear again, that is not to say that it will always be the case that the claimant ought sensibly to grapple with whether their case is or includes impecuniosity, as it must ultimately depend on the circumstances of each claim. But I consider that it will generally be the case where, as here, the intimation of a claim based on credit hire rates is met with a serious response suggesting that those rates are very much higher than the BHR.

The Claim Correspondence

40. By letter dated 4 September 2020, Auxillis presented to Allianz a 'Request for Payment'. The letter identified the appellant as Auxillis's client and identified Allianz's insured (a company), the driver (a named employee of the insured), the

vehicles involved (giving their registration numbers), the date of the accident, and the Allianz policy (by policy number). The body of the letter was in these terms:

"*Please find enclosed a summary of charges and supporting documentation in relation to the hire and repair charges our client has incurred following the above between our client and your insured. The circumstances of the accident make it clear that your insured is wholly responsible for this accident.*

Summary of Charges	
*Hire Cost including Additional Charges**	*£8,656.25*
Repair Costs	*£0.00*
Engineers Fee	*£0.00*
Storage and Recovery Charges	*£0.00*
Total (excluding VAT)	*£8,656.25*
Vat @ applicable rate	*£1,731.25*
Total	*£10,387.50*

**** Please see attached sheet for a breakdown of the hire charges.***

You can make payment by the following methods:

[methods specified]

Any payment received in settlement will be banked on an interim basis, so as not to prejudice any other elements of the claim which may arise from this accident.

If full payment is not received by return our appointed solicitors will be instructed to include the costs detailed above in legal proceedings.

Please note that our clients other uninsured losses will be notified separately.

…"

41. Provided with the letter were a copy of an unsigned Vehicle Hire Agreement between the appellant and Auxillis and an unsigned 'Mitigation Questionnaire / Statement of Truth' relating to the appellant and his circumstances, two Auxillis 'Signing Receipt' pages stating that the Vehicle Hire Agreement and the Mitigation Questionnaire / Statement of Truth documents had been "*Signed via https://online.auxillis.com*", and a Statement of Hire Charges for a BMW 5 Series Diesel Saloon 530d M Sport 4dr Auto, for the period from 10 August 2020 to 2 September 2020, detailing the charges I noted at the outset (paragraph 2 above). The Vehicle Hire Agreement stated the appellant's occupation as "*Director*".

42. Allianz responded by email dated 1 October 2020, as follows:

"*We have reviewed your payment request and note that your client presents a claim for credit hire charges. In order to enable a proper assessment of the claim for hire charges, we hereby request that you provide us with the following documents within 28 days:*

1. *Statements in respect of all bank, credit card and savings accounts statements in your client's name, covering the period of hire and three months before*

2. *Wage slips or other proof of income covering the period of hire and three months before*

3. *Repair invoice*

4. *Images of damaged vehicle taken by the engineer*

The above documents are all 'key documents' relevant to the issues in dispute which should accordingly be provided before proceedings are issued in accordance with paragraph 6(c) of the CPR General Pre- Action Conduct and Protocols Practice Direction.

In relation to the documents relating to impecuniosity, these are plainly of fundamental importance to determining the measure of damages recoverable in respect of both the period and the rate of hire. The difference between recoverable damages in the event that your client proves to be impecunious, and those recoverable in the event that he is not, will be substantial. It is therefore impossible to properly value the claim or formulate any offers in the absence of the financial documents requested.

…"

43. An application for pre-action disclosure such as was in due course brought was threatened if the appellant refused, or failed within 21 days, to provide the requested documents.

44. Mr Williams KC may be right that there was a degree of auto-generation of both Auxillis' claim letter and Allianz's response. Even so, it would have been obvious from that initial exchange to anyone familiar with this type of claim, for example any claims handler at Auxillis or Allianz, that Allianz was asserting that the credit hire rate claimed was substantially greater than any BHR, and was inferring that the appellant's case would probably be to claim impecuniosity to justify the claimed rate.

45. Allianz sent a further email dated 13 October 2020, confirming that since the appellant was seeking to recover credit hire charges, the rate of hire was disputed, and setting out what Allianz said was a summary of the principles established by the case law in credit hire cases. It enclosed as "*evidence of the basic hire rate … in this case*" a BHR report from a service called 'Arbitrate', with supporting evidence and terms and conditions, and a report from the Competition and Markets Authority detailing action taken on hire charges transparency. The email continued:

"*We believe that the collection of the BHR based on an internet search for car hire [for] the relevant location, which is fully evidenced in the report by way of screen prints, replicates what a reasonable person in the position of the claimant would do if hiring a vehicle following an accident. The quotes obtained and evidenced within the report therefore represent the best evidence of the BHR in the relevant area.*

You will note that the lowest reasonable BHR quote is £61.94 per day, inclusive of excess waiver."

46. The email invited agreement of BHR at that rate, stated that it was sent in accordance with the Practice Direction with the intention of resolving the dispute without proceedings, and stated Allianz's expectation that if the appellant did not agree the BHR, then he would provide prior to issuing any proceedings either "*Full and complete financial disclosure evidencing his impecuniosity; including all bank, savings and credit card accounts covering the period of hire and three months before*" or "*Alternative evidence of the BHR with a full explanation and reasoning setting out why that evidence should be preferred over the evidence we have obtained*". It again invoked paragraph 6(c) of the Practice Direction in particular.

47. Auxillis replied to Allianz's first email by letter dated 2 November 2020. It stated that Auxillis did not deal with repairs and so could not send any repair invoice or images, and continued as follows:

> "*We do not send wage slips and bank statements at this stage of the claim.*
>
> *Our Client needed a hire vehicle to conduct their day to day activities.*
>
> *We are not able to comment on our client's financial position as this is outside of our knowledge. If you believe the rate to be excessive, we invite you to provide evidence of alternative rates, following which we can then consider your offer.*
>
> *Our payment pack … was issued to you on the 04/09/2020, to date we are yet to receive payment.*
>
> *We await payment in the sum of £10,387.50 in respect of the credit hire charges within 7 days to conclude matters.*"

48. The 'back end' of that message was unhelpful and the opposite of engaging in constructive dialogue, asking Allianz as it did for BHR evidence that Allianz had already provided, and proposing as it did payment in full within 7 days of a claim that was obviously disputed on serious grounds with which Auxillis was refusing to engage.

49. There was a further exchange of emails on 25 November 2020 (Auxillis to Allianz) and 11 December 2020 (Allianz to Auxillis), before Auxillis sent a further email on 21 December 2020, reiterating the previous email as to vehicle repairs and continuing thus:

> "*Please be advised that we have yet to receive your BHR evidence. Please can this be sent for our review.*"

50. Allianz replied by email on 24 December 2020, attaching the BHR evidence, noting that it had been sent previously on 13 October 2020, and complaining that Auxillis appeared to be "*intent on frustrating our genuine attempts to narrow the issues and resolve the dispute before proceedings are issued and substantial legal costs are incurred*". Auxillis was asked "*finally [to] engage with us and provide a response to our previous correspondence*".

51. By email dated 22 February 2021, Auxillis wrote as follows to Allianz:

> "*Further to your BHR offer, this has been rejected due to your evidence not been compliant [sic.]*
>
> *Your search is based on a 7 day period, however our client did not hire in multiples of 7. Plainly this was carried out in order to receive a favourable outcome of the rates search and as such we consider this to be an irrelevant search and that your BHR rate to be contrived and invalid.*
>
> *We await payment in the sum of £10,387.50 in respect of the credit hire charges within 7 days to conclude matters.*"

52. By letter dated 5 March 2021, Keoghs LLP, identifying their client as Allianz, formally requested the pre-action disclosure later sought and ordered, invoking as Allianz had done previously paragraph 6(c) of the Practice Direction, and threatening a pre-action disclosure application without further notice if the disclosure sought was not provided within 7 days.

53. There having been no response to that letter, the Application Notice giving rise to HHJ Harrison's judgment and order, and now this appeal, was issued by Keoghs, naming Allianz as applicant and the appellant as respondent, on 14 May 2021, in the County Court at Cardiff.

The Decision

54. HHJ Harrison reminded himself of the basic commercial and legal background in the following terms:

> "*7. Put shortly credit hire companies operate by hiring vehicles to drivers whose vehicles have been damaged in road traffic collisions where it is believed the other driver [is] at fault. The credit hire company extends credit to the driver and provides a vehicle. The driver agrees to cooperate in subsequent litigation to recover the hire charges.*
>
> *8. Generally credit hire companies charge for the additional cost of providing credit and case management.*
>
> *9. In Dimond v Lovell (2002) 1 AC 384 the House of Lords held that recovery of hire charges was limited to the actual cost of hire with the additional costs removed (often referred to as the Basic Hire Rate or BHR). However, in Lagden v O'Connor (2004) 1 AC 1067 their Lordships created an exception to the principle established in Dimond if the claimant was impecunious. If a claimant is impecunious then he is not restricted to the BHR and can recover the full cost provided the credit hire cost is not unreasonably high when compared to other credit hire providers.*
>
> *10. In very general terms therefore the impecuniosity of a claimant opens the door to a different approach to valuing a claim.*"

55. That is all sound, and fair, as a high level summary of the general litigation context for the pre-action disclosure before the judge, and it was not criticised on appeal.

56. After summarising the claim correspondence, HHJ Harrison concluded that:

> "*21. It is fair to say that the correspondence from both sides of this case has the feel of a pro forma formulaic approach. Nevertheless it demonstrates the drawing of the battle lines in this case. The insurers want to know whether impecuniosity is being raised and if so to be provided with the documents showing the same. The respondents, effectively the credit hire company, do not consider it necessary to address the question of impecuniosity until proceedings are commenced.*"

57. The judge then neatly encapsulated the contest on the application, as follows:

> "*22. By this application the applicants argue that the prompt identification of impecuniosity as an issue and the consequent disclosure of the sort of documents sought in this case is plainly consistent with the general pre action Practice Direction … .*
>
> *23. Conversely, and in addition to raising jurisdictional objections to the application, the respondents characterise the applicant's approach as an impermissible attempt to obtain a "judicially-devised pre action protocol where the rule makers have not made any such protocol".*"

58. The judge reminded himself of the terms of CPR 25.1(1), 25.2(2)(c), and 31.16, and of the need to adopt a "*two stage approach, namely jurisdictional and discretionary*", and of the analysis of Rix LJ in *Black v Sumitomo* about that. He also reminded himself of the principal provisions of the Practice Direction, including paragraphs 3 and 6.

59. There can be no criticism of the judge's assessment of the dispute he had to determine on the application as it was argued before him.

CPR 31.16(3)(a)-(b)

60. There was no suggestion, nor could there have been, that the appellant was not likely to be the claimant if proceedings were commenced. It was contended, however, that "*the application should fail because the likely defendant is not Allianz but [their insured]*" (judgment at [33]).

61. The judge noted that insurers are routinely pursued directly in road traffic accident cases, under the European Communities (Rights against Insurers) Regulations 2002 (a piece of retained EU law), and that they are frequently joined as a party to proceedings. The reality was, he said, that the insurer meets the claim and makes the decisions in the case. On that basis, the judge determined the 'likely to be party' requirement as follows (judgment at [34]):

> "*The requirement is only one of "likelihood" in the sense that it may well be that the [applicant] will be a party (see Rix LJ in Black at para72). I am satisfied that this threshold is met. To hold otherwise would be to disregard the fact that in vast numbers of cases of this sort up and down the country where proceedings are issued directly on insurers as of right.*"

62. Auxillis had directed their claim to Allianz, not to their insured, and when Keoghs made clear that they were acting for Allianz, and had it in mind to make a pre-action

disclosure application, it was not said in response that they should not incur the cost of doing so as Allianz would not be joined if proceedings on the substantive claim were brought. Nor was it said that Allianz would not be joined, in the appellant's evidence in response to the application when it was brought.

63. However, in a second statement dated 22 September 2021 from Mr Howson of Principia Law Ltd, the appellant's solicitors and an associated company of Auxillis, a detailed explanation was given of the approach adopted by them to whether to join the insurer rather than their insured, the party with the primary liability. The entitlement to proceed against the insurer was acknowledged, but it was explained that:

    (i) the choice of defendant is made on a case by case basis;

    (ii) in a case "*where intervention is not raised … we would have no reason to choose the insurer over the individual and therefore can say with certainty that the [insurer] is not likely to be a party to proceedings*" (my emphasis);

    (iii) the present case was complicated, Mr Howson thought, "*because there is the issue of intervention at large, which involves the insurer*", but even so "*I still expect that future proceedings would be issued against the tortfeasor*" and "*[since] we would be relying upon vicarious liability, we would issue the claim against [the driver's] employer*". Thus, Mr Howson's evidence was that the decision would be to sue Allianz's corporate insured even though (as he thought) an issue of 'intervention' arose that involved Allianz itself.

64. Mr Howson was plainly wrong to think that an issue of 'intervention' might arise in this case. By that, he was referring to the issue that can arise when an insurer in Allianz's position offers to provide a car for use by the prospective claimant while their car is off the road. If such an offer is made that the claimant ought reasonably to accept, the claimant cannot recover hire costs incurred by him that would have been avoided. Allianz did make an offer here, but only on 1 October 2020 (the same day as its initial response to Auxillis' claim letter, but by a separate message). That offer might have been available to trump any claim for hire costs after that date. But no such claim had been intimated, nor was any such claim intimated thereafter.

65. On analysis, therefore, the effect of Mr Howson's evidence was that paragraph 63(ii) above applied in this case.

66. In the introductory paragraphs of his judgment, HHJ Harrison identified Mr Howson's second statement as one of the statements that had been before him on the application. However, he made no reference to any part of its content. On the evidence before the judge, to hold that it had not been shown that Allianz might well be a party to any subsequent merits proceedings would not be to disregard the fact that insurers often are sued directly in credit hire cases (paragraph 61 above), it would simply be to accept Mr Howson's evidence.

67. HHJ Harrison appears, therefore, to have determined the 'likely to be party' requirement in favour of Allianz based only upon the general frequency with which the County Court sees insurers sued directly, and not by reference to the evidence in the particular application that was before him. I consider that to be an error of approach, so that I must assess for myself whether the requirement was satisfied.

68. In that regard, Mr Hough KC did not invite the court to say that Mr Howson's evidence was not an honest account of how Auxillis approaches matters. I therefore note for completeness only, but take the note no further, that there might perhaps have been some reason to wonder if he had understated the extent to which Auxillis suied insurers rather than insureds, given paragraph 62 above and evidence from Mr Herring of Keoghs in a statement dated 16 March 2023 that was before me but not before HHJ Harrison that "*within the last 12 months, Keoghs have been instructed on 894 litigated claims for Auxillis credit hire charges. Of those, 377 were claims brought against the respondent [i.e. Allianz].*" That in turn might depend on whether Mr Herring meant what that appears to say, or whether actually he meant "*… brought against [Allianz or its insured]*".

69. Mr Hough KC's primary submission was that the matters referred to in paragraph 62 above meant the judge was right, or at least entitled, to conclude that Allianz may well be a party to the anticipated claim, and "*[that] conclusion is not undermined by the evidence of Mr Howson*", because "*[the] high point of his evidence is that, at the time of making the statement, he "expected" that proceedings would be issued against Allianz's insured*" and Mr Howson, it was said, had given no plausible reason, applying to this case, why it would be advantageous to issue against Allianz's insured "*since there is no doubt that Allianz is the responsible insurer*".

70. That submission understates the effect of Mr Howson's evidence and invites the court to look at matters the wrong way round. The court had before it the evidence, accepted as honest, of the solicitor with supervisory responsibility for the appellant's prospective litigation claim. The evidence was to the effect, in substance, that Allianz was not going to be sued. It may be said that it fell short of an undertaking that Allianz would not be named as defendant or co-defendant if proceedings were issued, but the question arising was not whether that evidence undermined some conclusion that might have been reached without it. The question was whether there was sufficient reason for doubting that case-specific evidence so as to justify a finding, in the face of it, that Allianz might well be sued.

71. That evidence no doubt should have been given in June 2021, when the appellant's evidence in response to the application was served, not only some months later in a supplemental statement. However, the evidence has the appearance of case-by-case consideration being given for the first time to who would be sued (Mr Howson's second statement dealt with this case and also a number of other cases in which pre-action disclosure applications had been made), and I am not prepared to find that it was contrived or tactical. I have noted already that I was not invited to say that Mr Howson was other than honest in giving it. The possibility that without such direct evidence it might have been appropriate to conclude, by way of inference, that Allianz may well be named as defendant is not in my judgment sufficient reason for doubting that evidence, as given.

72. Mr Hough KC's alternative submission was that since it would be possible for Allianz to become a defendant even if not named as such initially, there should be a conclusion that it might well be a party. The only instance Mr Hough KC identified was that if Allianz's insured failed to co-operate, something he said happens in some cases, then Allianz might seek to be joined under CPR 19.2(2). But there was, and is, no basis in evidence for supposing that might be a real possibility in this case. I do not

consider that a speculative possibility of that sort could justify a finding that Allianz might well be a party.

73. My conclusion is that HHJ Harrison erred in concluding that CPR 31.16(3)(b) was satisfied, and considering that requirement afresh for myself, I find that it was not satisfied.

74. I agree with Mr Hough KC that the pre-action disclosure application therefore should have failed, and this appeal now must be allowed, on what might be considered a 'technical' objection. It could readily have been overcome by Allianz's insured being named as co-applicant, if Allianz was in a position to bring that about. Mr Hough KC said that the application could be amended or re-issued, if necessary, with the insured as applicant. That submission was made in Allianz's skeleton argument for the appeal dated 6 May 2022. No application to amend the application was made, however.

75. Mr Williams KC for his part conceded that for the court to allow the appeal on this ground could limit the usefulness of this judgment, since anything I now say on the main merits of the application will be *obiter*. That is not an entirely satisfactory outcome, as Mr Williams KC also acknowledged, given the basis on which permission to appeal was granted. However, permission to appeal was granted unconditionally on all grounds raised, including this one, and Mr Williams KC did not receive instructions to withdraw this ground with a view to increasing the utility of any judgment. I do not consider that I can in those circumstances ignore the view I have formed on this first ground of appeal or decline to allow the appeal on the basis of it.

76. Since the other grounds were fully argued, I shall set out my conclusions on them, but I shall do so relatively briefly given that they will not now determine the outcome of this appeal.

CPR 31.16(3)(c)

77. The argument before the judge was that the documents sought would only fall within the scope of standard disclosure if and when impecuniosity was asserted by the prospective claimant, and that no such assertion had yet been made (judgment at [36]). The ground of appeal in respect of CPR 31.16(3)(c) is that the judge was wrong to reject that argument. Thus the contention was and is that by refusing to indicate explicitly the appellant's position on a key issue in dispute suggested by the claim correspondence, the appellant could avoid the possible operation of CPR 31.16 no matter how probable it was, considering that same correspondence, that impecuniosity would be an important issue in the case.

78. The skeleton argument for the appeal also took the point I rejected in paragraph 19 above, and the point that Mr Williams KC did not pursue to which I referred in paragraph 20 above.

79. The judge rightly regarded it as helpful to remember that the statutory condition stated in s.52(2) of the 1984 Act was relevant to an issue arising or likely to arise. The basic features of the substantive dispute revealed by the claim correspondence were that Auxillis was claiming, the judge said, £345 per day (in fact, over £400 per day with VAT), Allianz had responded suggesting a BHR of £61.94 inclusive of excess waiver

(with, I would add, evidence appearing to back up the suggestion), and Auxillis had declined a clear invitation to indicate "*whether impecuniosity is an issue or perhaps more importantly is not an issue*" (judgment at [37]). The judge therefore concluded (at [39]) that "*whilst at any trial there will be a requirement for the insurer to adduce evidence of the BHR relied upon, the relevant features set out above are … sufficient to allow the court to conclude that the documents sought are relevant to an issue that is likely to arise and as such would fall within standard disclosure*" (original emphasis).

80. Any possible difference between relevance to an issue, in the language of s.52(2), and the scope of standard disclosure, the language of CPR 31.16(3)(c), does not affect the outcome in this case (see paragraph 20 above). The question for HHJ Harrison was whether impecuniosity was likely to be an issue if proceedings were brought, in the sense that it might well be an issue (see paragraph 19 above).

81. I agree with HHJ Harrison's conclusion – which would also have been my conclusion – that on the material before him, impecuniosity might well be an issue. The limited response to Allianz's pre-action information and disclosure on the BHR suggesting that it was "*contrived and invalid*" because Arbitrate had used 7-day rental rates was not a credible basis for imagining a serious contest over the BHR, or a serious prospect of the appellant avoiding a finding if the claim litigated that the BHR was very much lower than the claimed credit hire rate. What was contrived and invalid here, with respect, was any notion that Auxillis might have in mind that if the claim fought the appellant (in reality, Auxillis) would take a stand on a dispute over the BHR and not contend that the BHR was not a realistic option for him.

82. Where the typical ground for such a contention, *viz.* (asserted) impecuniosity, is not disowned, but also no other case-specific ground for it is suggested, in the face of a fair and reasonable pre-action request to understand the basis of the putative claimant's claim, the only sensible inference was the one drawn by the judge. In truth, impecuniosity is very probably going to be asserted and disputed in this case, if it litigates. On any view, that may well be the case.

CPR 31.16(3)(d)

83. HHJ Harrison considered this condition to be straightforward, and so do I:

> "*45. … Impecuniosity in the context of credit hire is central. It is central because it governs the basis by which damages are calculated. It is in my judgment plainly desirable for a prospective defendant to know the basic principles upon which a claim is put to calculate any offer. I remind myself again of how Lord Nicholls in Lagden expressed his expectation for the future. Having sought to define impecuniosity he said:*
>
> > *"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."*

46. If "litigation and its attendant cost and delay" is to be avoided and if the aims of paragraph 3 of the Practice Direction are to be achieved then in my judgment disclosure as soon as possible of the sort of evidence of impecuniosity that would have to be disclosed if the case were to be issued is in my judgment desirable."

84. The proper test to be applied was whether requiring the disclosure to be given before proceedings had been commenced offered a real prospect in principle of assisting the dispute to be resolved without proceedings or of saving costs (those being the elements of CPR 31.16(3)(d) upon which HHJ Harrison focused): see paragraph 23(iii) above. In my judgment, HHJ Harrison's view that the test was satisfied was plainly a reasonable view he was entitled to form. It is also my view.

85. Mr Williams KC argued that Allianz's ability to make an offer (such an offer, indeed, having in fact been made, on an open basis) to settle the credit hire claim at a figure calculated by reference to what it said was the BHR disproves the claim that the limited disclosure sought was essential for a sensible evaluation of the claim. To the contrary, however, the ability, and (it may be) a willingness, to offer a certain minimum that Allianz may feel it is unlikely to beat, or that it would not be proportionate to incur time and cost trying to beat, is not the same thing at all as having the information needed to understand and begin to assess the very much higher litigation claim being intimated and threatened.

86. The first ground of appeal in relation to CPR 31.16(3)(d) is that as a matter of principle it is not desirable to compel a claimant to produce sensitive financial information before they have chosen to issue proceedings and to make in those proceedings an assertion to which that information would be relevant. The fact that the pre-action disclosure sought would reveal personal financial information is nothing to the point so far as assisting the dispute to be resolved without litigation or saving costs is concerned. It might have gone to whether the court's discretion should be exercised in favour of ordering the disclosure. It did not go to whether CPR 31.16(3)(d)(ii) or (iii) was satisfied.

87. The second ground of appeal is that the pre-action disclosure ordered was not needed for a fair disposal of any proceedings that might be brought, since if they were brought and if impecuniosity were asserted, as appeared to the judge to be likely (in the relevant sense), the documents would then have to be disclosed. I agree, and that may be why the judge did not found his decision on CPR 31.16(3)(d)(i).

88. The third ground of appeal is that it is "*entirely proper and reasonable*" to leave consideration of impecuniosity and its potential effect on the claim until after proceedings have been commenced. I agree with the judge that where claim correspondence indicates that impecuniosity is likely (in the relevant sense) to be an important part of the claim, then it is contrary to the letter and spirit of the Practice Direction not to give serious consideration to it at the pre-action stage.

89. The fourth ground of appeal is that the pre-action disclosure ordered was unlikely to dispose of the claim without litigation, or to save costs, because there was a range of other issues including, in particular an 'intervention rate' issue. As I said when dealing with CPR 31.16(3)(a)-(b), the suggestion that there might be an intervention issue in this case is wrong. More generally, the fact that there might be other issues could be relevant to an assessment of the importance of the impecuniosity question in

a particular case. The judge had that well in mind, and I agree with his assessment that in this case the claim correspondence left no sensible room for the conclusion that impecuniosity was anything other than a central issue, and probably the key real issue.

90. That final ground of appeal also, it seems to me, overlooks the fact that the test of desirability under CPR 31.16(3)(d) is only the offering of a real prospect in principle of achieving one or more of the stated aims.

Discretion

91. HHJ Harrison dealt separately, as required, with the question whether in all the circumstances of the case it was fair and proper to make the order sought. He did not treat the satisfaction of the requirements as sufficient to justify an order, albeit of course by nature it weighs in favour of an order rather than being only neutral.

92. The judge said it would be wrong to require unnecessary pre-action disclosure of personal information, so the court should approach the making of an order requiring such information to be disclosed with caution. But the gist of his reasoning for granting the order sought was that in his view the degree to which it would intrude upon the private financial affairs of the appellant was outweighed by the beneficial impact of pre-action openness as to the issues and an exchange of sufficient basic information and evidence to enable a meaningful assessment to be made of them, in keeping with the overriding objective and the Practice Direction. It would also be wrong, the judge considered, to endorse Auxillis' stated policy of not addressing their client's means, even with their client, before commencing litigation, even where those means will be or are likely to be central to the question of what they might be properly entitled to recover.

93. I agree with HHJ Harrison here too, and would also have exercised my discretion in favour of ordering the limited disclosure sought. The plea to privacy and confidentiality in particular is, with respect, misplaced. The appellant invited and required sufficient intrusion into his financial affairs to warrant the order sought and granted by asserting (through Auxillis) a claim for credit hire charges that on the material put before the court appeared likely to be six times or more higher than the BHR, in context implicitly indicating that the claim thus asserted involved and depended on a claim he would be making that he was impecunious in the sense used in this context.

94. Limited and focused pre-action disclosure would disturb the confidentiality of the disclosed financial information only to the very limited extent that it would have been provided, in confidence, to the party to whom the making of his claim made it important, in the interests of justice, that it be provided, with a view to avoiding litigation in which *inter alia* that information and more would have to be provided in public. The suggestion that a desire on the part of the appellant to protect the privacy of his financial affairs told against ordering pre-action disclosure designed to further the aim of avoiding public litigation is in truth somewhat bizarre.

Conclusion

95. Pre-action disclosure should not have been ordered in this case because it was sought only by Allianz. On the evidence before the court, it should not have been concluded

that Allianz was likely to be party to any proceedings that the appellant might commence in respect of the substantive claim. I consider that HHJ Harrison's approach to that requirement of a pre-action disclosure order, being part of s.52(2) of the County Courts Act 1984 and then also CPR 31.16(3)(b), was flawed.

96. This appeal must therefore be allowed, although but for that first conclusion, possibly a technicality if Allianz could have caused the application to be made in the name of their insured instead, I would have dismissed the appeal and endorsed every aspect of HHJ Harrison's decision to grant the pre-action disclosure sought.

97. Before turning to a separate, costs appeal, brought by the appellant, I should mention one point on the terms of HHJ Harrison's Order. The conclusion of the judge that I would have upheld and endorsed had Allianz been the right applicant, stated compendiously, was that if proceedings were issued on the substantive claim, the appellant would be likely (in the sense required by s.52(2) of the 1984 Act) to make a disputed claim of impecuniosity in respect of which the documents sought by Allianz would be within the scope of standard disclosure, disclosure of those documents before any proceedings were brought was desirable in order to assist the dispute to be resolved without proceedings and to save costs, and it was just and proper in the exercise of the court's discretion to order that they be so disclosed. That conclusion would have justified, and its logic would have led to, an order in unqualified terms requiring disclosure of the documents sought, plus the provision mandated by CPR 31.16(4)(b) and any provision the judge decided should be made under CPR 31.16(5) (as to which, in the event, the Order included a provision as to time (CPR 31.16(5)(b)) but not a requirement to indicate what has happened to any documents no longer in the appellant's control (CPR 31.16(5)(a)).

98. In fact, the Order was drafted in a manner agreed between the parties as part of setting up the consequentials hearing in January 2022 after the judge handed down judgment in December 2021, so that:

    (i) it required the appellant to confirm in writing within 4 weeks "*whether he intends to rely upon the issue of impecuniosity*";

    (ii) it then made only a conditional pre-action disclosure order ("*If impecuniosity is to be relied upon, the [appellant] shall provide disclosure …*").

99. That agreed drafting was turned by the appellant into further grounds of appeal, complaining that "*[the] very form of order proposed by the parties, which requires [the appellant] to state whether he was relying on impecuniosity and, if he is, for disclosure to be given confirms that it was not established that the documents fell within standard disclosure*" and that "*there was no jurisdiction for the judge [to] order that [the appellant] state his case on this issue prior to proceedings. Further even if there was jurisdiction, there was no proper basis for this very unusual order.*"

100. The reality is more prosaic, and those grounds of appeal should not have been raised. On the judgment the judge had given, Allianz was in a position to ask for an unconditional order for the pre-action disclosure it had sought. That was the form of order its Application Notice had said would be sought and it was the form of order logically justified by the judgment it had obtained. It was self-evidently an indulgence favouring the appellant / Auxillis to propose the lesser relief of an order requiring the

pre-action disclosure only if the claim of impecuniosity the judge had held was likely to be made was expressly confirmed.

101. As it happens, with respect, I do not consider the parties' agreed drafting to be apt or helpful. Thus, the requirement was to give notice only of the appellant's present intention, which to my mind should not have been thought sufficient to justify not giving disclosure, and then the condition for pre-action disclosure was not drafted in matching terms. The better course in a case such as this, as it seems to me, is for the terms of any Order to follow the logic of the court's conclusions on the application and not be complicated by unnecessary favours to the respondent putative credit hire claimant.

Costs Appeal

102. HHJ Harrison ordered the appellant to pay Allianz's costs of the application. The claim for those costs was conceded, and the appellant did not seek to appeal against the resulting costs order independently of the main appeal.

103. The costs of complying with the pre-action disclosure order as granted were dealt with separately. HHJ Harrison ordered Allianz to pay such costs "*limited to the costs of obtaining the documents sought and any copying charges incurred*". The judge indicated, when asked by counsel who appeared below, that his intention was for the appellant to be unable to recover any solicitors' fees incurred in complying with the order. But I do not think, with respect, that that is the effect of the order made.

104. If the appellant (in reality, Auxillis) instructed solicitors to correspond with a bank or credit card company to obtain account statements, or with an employer to obtain evidence of income, I cannot see how the resulting fees would not be "*costs of obtaining the documents sought*". Of course, one might not expect it to be necessary for there to be such solicitors' correspondence to enable the appellant to comply with the order, and unless it were necessary it would be unlikely to be reasonable to go about complying with the order in that way. But that is a separate point and would be part of an assessment if the costs to be paid under the order were not agreed in due course.

105. Even on my reading of the order made, however, solicitors' time incurred in checking or reviewing documents obtained by them, or obtained by the appellant and provided to them, against the order, advising as to whether they sufficed or more were needed, and considering and ensuring compliance with the provision in the order, mandated by CPR 31.16(4)(b), requiring the appellant to specify documents within the scope of the disclosure ordered that were no longer in his control or in respect of which he claimed a right or duty to withhold inspection, would not be recoverable from Allianz, even if on assessment (in the absence of agreement) it might be held to have been reasonable and proportionate for the solicitors to have incurred such time on compliance.

106. The appellant challenged that costs order independently of the main appeal, contending (in short) that HHJ Harrison had no proper basis for departing from the general rule of CPR 46.1(2)(b) that the person against whom an order for pre-action disclosure is sought will be awarded their costs of complying with any order made on the application. By a Consent Order in that appeal agreed between the parties on 29

July 2022, although only sealed by the Court on 25 October 2022, the application for permission was listed to be heard, together with the appeal if permission be granted, at the hearing of the main appeal.

107. Since the main appeal has succeeded, this independent costs appeal is now moot as to its substance. However, at least on the appellant's side, it appears that significant cost has been incurred solely in relation to it, and it was argued separately at the appeal hearing, so I should still deal with it on its merits.

108. HHJ Harrison's reason for limiting the scope of the appellant's recoverable costs of compliance appears, in substance, to have been that Allianz should never have been put to the trouble of applying under CPR 31.16 and, if no application had been required, the appellant (and Auxillis) would not have involved solicitors in complying with the order. Auxillis (on the appellant's behalf) only instructed solicitors when the application was made.

109. That is how I read the following, in the approved transcript of HHJ Harrison's explanation at the consequentials hearing on 5 January 2022 of the conclusion he had reached as to costs:

> "*9. The main concern … on behalf of [Allianz] in this case is that they have effectively had to make this application in order to get the matter of principle determined but had there been compliance with the application at an early stage, at very limited cost indeed, documents could have been provided and there would have been no need for the same[*]. The [appellant] submits that [the] general rule is there for a reason. It is there for a reason because in general terms the application on a pre-action basis should not put the potential party who is not yet party to proceedings to unnecessary cost when they may not actually be the party to those proceedings.*
>
> *[* The sense here is: had there been compliance with the request for disclosure, …, there would have been no need for the application to court under CPR 31.16.]*
>
> *10. It seems to me that the court has to approach this case as a matter of practicality. I think that there is obviously need to have regard to the general rule and that as a matter of principle some cost of compliance with the order is properly to be made in favour of the respondent. I do not think it would be appropriate, however, to make an order without some effective limitation upon it by reference to what I envisage as being the relevant costs of compliance that I am prepared to order and it seems to me that the order that I should make in the circumstances of this case is to order that the costs of compliance in favour of the [appellant] should be limited to the cost to the [appellant] of obtaining the relevant documents sought and any copying charges incurred.*
>
> *11. It seems to me that if I limit it in that way, that meets the justice of the situation in this particular case, bearing in mind those matters which were relevant to my determination and bearing in mind how we have reached the position that we have reached in this particular case. …*"

110. In the context of the main appeal, Mr Hough KC suggested that it was to be borne in mind that the subject matter here was a trivial and necessary exercise of collecting a few documents. Mr Williams KC countered that that could not be assumed, for (he

suggested) the appellant's financial affairs might be extensive and complex, or might give rise to a desire for redactions in the disclosure that might reasonably be thought to justify the involvement of solicitors. That was a speculative argument, in the absence of evidence when, if any such were the reality, that would obviously have been relevant to the substantive application, and to the costs argument a month after judgment was handed down if a point on costs was thought to depend on it.

111. To my mind, HHJ Harrison was entitled to form the view he did that Auxillis had adopted, applied, and chosen to stand their ground on, a wrongheaded policy of refusing even to consider, before intimating a claim and threatening litigation, the obviously central issue of their client's means and what, if any, case of impecuniosity they would assert as a result, but for which, in the particular circumstances of this case, the request for pre-action disclosure would have been complied with "*at very limited cost indeed*" ([10]), *viz.* any "*cost … of obtaining the documents sought and any copying charges incurred*".

112. I do not consider it realistically arguable that the decision he made to limit the recoverable costs of compliance to fit with that view was an unreasonable decision beyond the scope of his discretion whether to depart, in whole or to some extent, from the general rule of CPR 46.1(2)(b).

113. Permission for the independent costs appeal is therefore refused. That does not affect my jurisdiction to revisit all parts of HHJ Harrison's costs order, whether independently challenged on appeal or not, by way of relief consequent upon the allowing of the main appeal.