



Claim No: 031DC643

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY
ON APPEAL FROM THE COUNTY COURT

NCN: [2024] EWHC 1060 (KB)

Date: 3 May 2024

Before :

MRS JUSTICE DIAS

Between :

MR JOSHUA PARKER

**Claimant/
2nd Respondent**

- and -

**SKYFIRE INSURANCE COMPANY
LIMITED**

**Defendant/
Appellant**

- and -

SPECTRA DRIVE LIMITED

**Non-party/
1st Respondent**

Mr Mark Roberts (instructed by DWF Law LLP) for the Appellant
Mr Stuart Nicol (instructed on a direct access basis) for the 1st Respondent
Mr Marc Willems KC (instructed by DGM Solicitors) for the 2nd Respondent

Hearing date: 30 April 2024

JUDGMENT

The Honourable Mrs Justice Dias DBE:

1. This is an appeal from an order of Mr Recorder Michael Smith sitting in the County Court at Liverpool on 25 September 2023 refusing an application by the Defendant (“Skyfire”) for non-party disclosure under CPR Part 31.17.

Background

2. The facts giving rise to the application are as follows.
3. The underlying claim arises out of a road traffic accident which occurred on 5 December 2021. It is one of what I understand to be many cases involving what insurers have labelled as “Google-spoofing”. Following the accident, the Claimant, Mr Parker, immediately attempted to notify his insurers, Hastings, of the accident. He Googled their name and rang the first number in the list of search results. Unbeknownst to him, he was in fact speaking to a claims management company which told him that he would be put in touch with a hire company who would arrange for his car to be repaired. His car was then collected from his home later that same day. On the following Monday, he was called by the First Respondent (“Spectra”) who told him that they could provide him with a hire car and also sort out the damage to his own car.
4. In due course he was sent a number of documents by Spectra. These included:
 - i) A short-term rental agreement for a maximum of 89 days on Spectra’s letterhead and displaying its contact details and company registration. There was an express acknowledgement in the signature box that the hirer was agreeing to hire the vehicle on the terms and conditions contained in the agreement. Clause 5 of those conditions (which applied where the hire was necessitated by damage to the hirer’s own car in a road traffic accident) contained an undertaking by the hirer to pay the hire charges either at the conclusion of any action against the third party alleged responsible for the accident or in any event within 11 months of the date of the agreement;
 - ii) A Form of Authority authorising Spectra to recover all uninsured losses arising from the accident and to appoint a solicitor on behalf of the hirer;
 - iii) A Mitigation Questionnaire in which the hirer acknowledged that the hire vehicle was not free, and that it was being provided on a credit hire basis;
 - iv) A sheet of FAQs identifying the hire company as Spectra Drive Limited and expressly clarifying that Spectra was not the hirer’s insurance company or part of or acting on behalf of the hirer’s insurers. It also stated that the hirer was legally liable for the charges incurred in hiring the vehicle but that Spectra would recover these from the third party. It continued, “*We will not ask you to pay the charges provided you have complied with the terms of the agreement and co-operated with us or any solicitor you instruct, throughout your claim.*”
5. Mr Parker signed all these documents by Docusign on 7 December 2021. He also signed a series of further hire agreements at roughly three month intervals but no separate point arises in relation to those subsequent agreements.

6. In this action Mr Parker seeks to recover his losses arising out of the accident, including the credit hire charges and other storage and recovery fees incurred under the agreements with Spectra. Other aspects of his claim have now been settled by Skyfire with the result that these are the only outstanding matters.
7. Skyfire objects to the claim for credit hire charges on a number of grounds, which for present purposes include enforceability of the credit hire contract. Skyfire strongly suspects that in the course of Spectra's discussions with Mr Parker, some misrepresentation was made, whether as to any association between Spectra and Mr Parker's own insurers, or as to the circumstances in which Mr Parker might or might not himself be called upon to pay the charges under the agreement. Its argument is that if any misrepresentation were made, the agreement would be voidable for misrepresentation and that if Mr Parker were to avoid it, he would not be under any subsisting liability to pay the credit hire charges and would not have suffered any corresponding loss. Skyfire would accordingly be relieved *pro tanto* of any obligation to indemnify him.
8. However, it is unable to advance any positive case to this effect without sight of the recordings of the conversations between Mr Parker and Spectra. It has accordingly brought this application against Spectra for non-party disclosure of "*the recordings of all calls between Mr Joshua Parker and Spectra in relation to the accident, vehicle damage and replacement vehicle...*" Meanwhile, its Defence and Counter Schedule of Loss simply puts Mr Parker to proof that he signed an enforceable agreement with Spectra and as to the representations made to him regarding the terms of payment.

Part 31.17

9. CPR Part 31.17 provides in material part as follows:

“(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings;
and

(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

...”
10. It is common ground that Part 31.17(3) sets out the threshold conditions which must be satisfied before any order can be made but that even if those conditions are met, the court has an overarching discretion whether to grant the order or not. In other words, satisfying Part 31.17(3) is a necessary but not sufficient condition of obtaining relief.

11. It was also not seriously in dispute that an order for non-party disclosure is to be regarded as the exception rather than the rule: see *Rowe v Fryers*, [2003] EWCA Civ. 655 at [10].

The judgment under appeal

12. The application for non-party disclosure came before the Recorder on 25 September 2023 and was opposed by both Spectra and Mr Parker on the grounds that:
- i) Disclosure was not necessary in the circumstances of the case;
 - ii) There had been delay in bringing the application;
 - iii) It would be disproportionate to require Spectra to search for all recordings over the entire lifetime of its relationship with Mr Parker;
 - iv) On a proper analysis of the law, no useful purpose would be served by ordering the disclosure because it would take Skyfire nowhere.
13. In his judgment, the Recorder correctly recognised that he was required to consider first whether the threshold conditions in Part 31.17 had been satisfied before proceeding to exercise his discretion based on a consideration of all the circumstances in the case.
14. His conclusions were as follows:
- i) He accepted that the question of enforceability and misrepresentation was a pleaded issue to which the disclosure was relevant.
 - ii) With some hesitation, he also accepted that the documents were necessary in order for Skyfire properly and fairly to advance the case it wished to make since, without the disclosure, its counsel would only be able to cross-examine Mr Parker on a purely speculative basis.
 - iii) It would not be unduly difficult to search for the recordings and it would not therefore be disproportionate to require disclosure to be made.
 - iv) Skyfire could justifiably be criticised for having delayed in bringing the application, with the result that granting the order would inevitably lead to vacation of the trial date. However, the credit hire charges were the key issue remaining in the case and the sum at stake was substantial. If disclosure was otherwise justified on the grounds of necessity, delay would not itself be a reason to refuse an order. There was no real prejudice to Mr Parker in vacating the trial since he had not been called upon to pay the charges himself and was not being kept out of any other damages to which he was entitled.
 - v) However, even if the disclosure demonstrated unequivocally that there had been a misrepresentation, Skyfire's defence could still not succeed because the contract between Mr Parker and Spectra remained valid and enforceable until such time as Mr Parker chose to avoid it. There was no indication that he intended to do so and on the authority of *Irving v Morgan Sindall plc*, [2018] EWHC 1147 (QB) he would be entitled to recover even if his liability under the

contract was contingent upon his recovering damages from Skyfire. Accordingly no useful purpose would be served by making an order.

Grounds of appeal

15. In its Appeal Notice, Skyfire asserts that the Recorder's reasoning discloses an error of law and/or that his conclusion was perverse. More specifically, it asserts that:
- i) The Recorder wrongly interpreted *Irving v Morgan Sindall plc (supra)* as precluding Skyfire from raising an argument as to misrepresentation;
 - ii) It was inconsistent for the Recorder to suggest that, despite satisfying the threshold provisions of Part 31.17, disclosure would nonetheless serve no useful purpose;
 - iii) The conclusion that no useful purpose would be served was in any event perverse since it was based on an assumption that the contract with Spectra would be confirmed by Mr Parker when there was no direct evidence from him to this effect, only indirect hearsay evidence from his solicitors (in respect of whom there was a clear conflict of interest given that they also acted for Spectra). It was pure speculation what his evidence would be at trial.
16. Permission to appeal was granted by Constable J on the papers on 18 January 2024. Recognising that the Recorder's decision was a case management decision and that Skyfire therefore had a high threshold to overcome in showing that it should be overturned, he gave the following key reasons for his decision:
- “(2) the sole reason for dismissing the application was Recorder Smith’s conclusion that, on the basis of Irving v Morgan Sindall [2018] EWHC 1147, the content of the call recordings between the Claimant and Spectra Drive Limited (the subject matter of the disclosure application) were incapable (taking their possible content at its highest in favour of the Defendant), as a matter of law, of assisting the Defendant on the question of liability;*
- (3) there is a reasonable prospect of establishing that this was an error of law and/or that the implicit decision preventing the Defendant from advancing the point at trial having explored the evidence following disclosure of the material (effectively by summary determination as part of the disclosure application) was perverse;*
- (4) moreover, the case raises an important of principle which may impact other cases of a similar nature in which Claimants have been ‘Google-spoofed’ into communicating with accident management companies in the belief that they were speaking to there insurers, and as a result entering into credit hire arrangements with entities other than those arranged/sanctioned by their insurers, and in respect of which the Defendants (and/or insurers through subrogation), from whom the hire and storage costs are then sought, seek disclosure of the content of the calls between the Claimant and the (non party) accident management companies;...”*
17. A further subsidiary ground of appeal is put forward in relation to the Recorder's order that Skyfire should pay Mr Parker's costs of the unsuccessful application. Constable J.

refused permission under this ground save to the extent that the substantive appeal succeeds.

The Respondents' case

18. The appeal was opposed by both Mr Stuart Nicol on behalf of Spectra and Mr Marc Willems KC on behalf of Mr Parker. Their case, in essence, was that the Recorder's decision was right for the reasons he gave. No error of law was disclosed. On the contrary, the Recorder correctly appreciated that even if Mr Parker's contract with Spectra was voidable for misrepresentation, on the particular facts there was no practical possibility that it could now be avoided.
19. In the alternative, they submitted that the decision should be upheld on the basis that, contrary to the Recorder's decision, the application should in any event have been dismissed on grounds of delay and/or failure to meet the threshold conditions. Of the arguments raised under this head, delay is the only point which requires any separate consideration; the others all resolve, on analysis, into different manifestations of their primary submission that there is insufficient basis to suppose that the credit hire contract might yet be avoided.

Discussion and analysis

20. It is not in dispute that an appeal to this court from the County Court does not proceed by way of rehearing. It is limited to a review of the decision below and in accordance with CPR Part 52.21(3) requires the appellant to show that the decision appealed from was either wrong or unjust because of a serious procedural or other irregularity in the proceedings below. The latter is not suggested and the present appeal is argued by Mr Mark Roberts on behalf of Skyfire on the basis that the Recorder's decision was wrong in law and/or perverse.
21. I start by observing that in my judgment the relevance of the disclosure is in relation to the question of whether Mr Parker has suffered any loss in respect of the credit hire charges. If the agreement with Spectra were invalid (for example, because it was irredeemably unenforceable due to some breach of the Consumer Credit Act), then Mr Parker would be under no liability to pay the charges and would have suffered no loss in that respect. In those circumstances, any claim would be limited to general damages to reflect the notional cost of hiring a car: see *Bee v Jenson*, [2007] EWCA Civ. 923.
22. I do not therefore accept the suggestion in Mr Willems' skeleton argument that any issue of remoteness arises or that the recent Supreme Court decision in *Armstead v Royal & Sun Alliance Co. Ltd*, [2024] UKSC 6 has any relevance. In that case, the argument raised by the defendant as to enforceability of the credit hire agreement had been withdrawn before the case reached the Court of Appeal and there was no dispute that the claimant was under a liability to pay the hire company. The only question was whether a particular clause might be unenforceable because it was penal, in which case the Supreme Court was of the view that the sum claimed would be too remote for the purposes of recovery in tort because an unenforceable liability is not reasonably foreseeable.

Threshold requirements

23. Turning to the threshold requirements of Part 31.17(3), there was no dispute before me that when assessing whether the disclosure sought is “likely” to support or adversely affect one side’s case, the appropriate test to apply is whether it “may well” do so. This requires a higher degree of probability than that of “real prospect” (such as applies to applications for summary judgment) but something less than a balance of probabilities: see *Three Rivers District Council v HM Treasury*, [2002] EWCA Civ. 118 at [33]:

“We think that the word “likely”, when used in the Civil Procedure Rules, connotes a rather higher threshold of probability than mere “more than fanciful” but a prospect may be more than fanciful without reaching a threshold of “more probable than not”.

24. It is clear from the material placed before me, including various court decisions involving Spectra itself, that it is not uncommon in credit hire cases for the claimant to be told – incorrectly – that he or she will have no personal liability for the hire charges. Other criticisms have also been made of credit hire companies, for example in failing to make clear that they were not the claimant’s insurers or acting on behalf of the claimant’s insurers. Equally there have been cases where it has been held that no misrepresentation was made.
25. However, it is important to note that these are all findings which were made after the judge had heard evidence at trial. This, by contrast, is a pre-trial application where it cannot be known for certain whether any misrepresentation was actually made or, if so, exactly what was misrepresented. Mr Roberts submits that this is precisely why pre-action disclosure is needed because the point is crying out for investigation at trial.
26. I have considerable sympathy with this submission. Non-party disclosure applications frequently involve a degree of speculation as to what will emerge. The question for me is whether Skyfire has done enough to show that the call recordings “may well” support its case or adversely affect that of Mr Parker.
27. To the extent that it was still persisted in, I am not impressed by the Respondents’ argument that Skyfire had failed to advance a positive plea of misrepresentation. It is difficult to see how it could possibly do so in advance of disclosure. In my judgment, the question of enforceability was sufficiently raised in the Defence and Counter Schedule of Loss to render it an issue in the case and, judging from some of the decisions drawn to my attention, this could hardly have come as a surprise to Spectra.
28. For the same reason, I am not persuaded by Mr Willems’ submission (adopted by Mr Nicol) that an application for non-party disclosure must be supported by evidence and that there was insufficient in Ms Talbot’s witness statement on behalf of Skyfire to show that the call recordings would be likely to assist its case. Ms Talbot gave evidence as to the circumstances in which the credit hire contract was concluded. When combined with the other material before the court, including in particular previous decisions involving Spectra and other credit hire companies, there is sufficient to show that some form of misrepresentation is by no means implausible and that this is not merely speculation without any foundation at all.
29. At the very least, it seems to me that this is a point which would in principle be worthy of exploration at trial. I am therefore satisfied that the disclosure sought “may well”

support Skyfire's case on misrepresentation and is accordingly likely to do so. It is not a mere fishing expedition. I stress, however, that this is a decision which rests on the particular facts of this case. It may well be that in cases involving other claims management and credit hire companies, there is not sufficient evidence to satisfy the threshold condition of likelihood with regard to the existence of a misrepresentation. This must always be a fact-specific assessment which may vary from case to case and it is not possible to lay down any general rules.

30. However, that is not the end of the matter because Skyfire must also satisfy me that the disclosure is necessary in order to dispose fairly of the claim or to save costs. But if there is no real prospect that the disclosure can make any difference to the outcome of the claim, it is difficult to see how it could ever be "necessary" to the fair disposal of the claim.
31. There was rightly no suggestion in this case that the contract was unenforceable or invalid because Mr Parker did not understand what he was signing. It is well-established that it unnecessary for a contracting party to have understood the true nature of the contract in order to be bound by it: *Burdis v Livsey*, [2002] EWCA Civ. 510.
32. The only basis on which Mr Roberts suggested that Mr Parker might not actually be liable to Spectra was on the grounds of misrepresentation. However, he conceded that even if he could establish that Mr Parker's contract with Spectra was tainted by misrepresentation that would not of itself mean that he was under no liability. On the contrary, he did not dispute the following propositions:
 - i) The effect of a misrepresentation is only to render a contract voidable at the option of the innocent party. It is not thereby rendered automatically unenforceable.
 - ii) A voidable contract is valid unless and until it is avoided.
 - iii) Avoidance requires the innocent party to take some step to rescind the contract.
 - iv) Rescission is not available unless it is possible to make *restitutio in integrum*.
 - v) A contract cannot be rescinded if it has been affirmed by the innocent party with full knowledge of the facts and of his or her right to avoid.
 - vi) Affirmation is not confined to an express declaration or statement but may be found in conduct.¹
33. In paragraph 25 of his judgment, having considered *Irving v Morgan Sindall plc (supra)*, the Recorder expressed his conclusion in the following terms:

"Applying that analysis to the facts of this case, ... it seems to me that there is nothing to displace the evidence that is before the court already to the effect that the claimant entered into a contract with Spectra. There may have been a misunderstanding as to

¹ Mr Willems also submitted that rescission requires the sanction of the court. This is not an entirely uncontroversial proposition (see *Chitty on Contracts*, (35th ed.)(Sweet & Maxwell) para. 10-131. However, it is certainly true that if the rescission is challenged by the other party to the contract, the court will have to determine whether it is effective or not.

who he was dealing with initially but was clear once he signed the documentation to any reasonable person that he was contracting with Spectra and even if there had been representations made to him to the effect that Spectra would never seek recover from him despite the terms of the written contract, in circumstances where he has not sought to exercise any rights arising from that misrepresentation and, indeed, has gained the benefit of the contract and has arguably affirmed it, it seems to me that the defendant's search for documentation in relation to the call recordings would take matters no further. It would not entitle the defendant to argue that they would not be liable to the claimant even in those circumstances and on that basis, in my judgment, no useful purpose would be served by making an order for disclosure against Spectra in this case and by vacating the trial and on that basis the application, the defendant's application is dismissed."

34. Mr Roberts submits that this passage discloses an error of law in that the Recorder wrongly interpreted *Irving v Morgan Sindall plc* to mean that Skyfire was precluded as a matter of law from raising a point as to misrepresentation.
35. I disagree. In *Irving v Morgan Sindall plc*, Mr Justice Turner made an assumption that the claimant's liability under the credit hire contract before him was, whether as a matter of construction or by operation of a collateral agreement or otherwise, contingent upon her recovering damages from the defendant. In other words, if the claimant recovered the hire charges from the defendant, she would be liable to pay them to the hire company but if her claim failed, then she would not have any personal liability to pay. It is important to note, however, that there was no question of unenforceability in this assumption. On the contrary, it was accepted that the claimant was under a liability, albeit only a *contingent* liability. On the authority of cases such as *Giles v Thompson*, [1994] 1AC 142 and *Harlow & Jones Ltd v Panex (International) Ltd*, [1967] 2 Lloyd's Rep. 509, Mr Justice Turner held that such a contingent liability nonetheless constituted a loss in respect of which the claimant could recover.
36. For myself, I do not read paragraph 25 of the Recorder's judgment as relying on *Irving v Morgan Sindall plc* for anything more than this proposition. His conclusion that ordering disclosure would be futile was rather the result of his assessment, based on the facts and evidence before him, that there was no sufficiently realistic prospect of avoidance *even if* a misrepresentation could be established.
37. Accordingly, I reject the submission that his decision flowed from any error of law.
38. The question then is whether the Recorder's conclusion was nonetheless wrong because it was perverse. This requires consideration of two separate questions: first, whether avoidance is even an option open to Mr Parker unless he can make restitution; secondly, if it is, whether he has in any event put it out of his power to avoid by affirming the contract.
39. Taking the question of affirmation first, Mr Roberts argues, correctly, that affirmation is a question of fact. He submitted that there was no direct evidence of affirmation before the court and the question was at large because Mr Parker had not yet given evidence. Skyfire should therefore be permitted to explore the question at trial.
40. However, to frame the question in those terms risks looking at the matter through the wrong end of the telescope. A voidable contract does not depend for its validity on

whether it has been affirmed or not. Rather it is valid unless and until it is avoided. The correct question is therefore not whether the Respondents have produced sufficient evidence of affirmation, but whether Skyfire can point to a real prospect that the contract is both capable of being avoided in principle, and, if so, might in fact be avoided by Mr Parker.

41. It is the latter consideration to which the question of affirmation is primarily relevant. As to this, Mr Roberts lays much emphasis on the fact that there is no positive or direct evidence of affirmation from Mr Parker. However, a contract can be affirmed by conduct as much as by express words and statements. It may even be deemed to have been affirmed by lapse of time: *Chitty (op.cit.)* para. 10-148.
42. In this case, Mr Parker has brought his claim to recover the credit hire charges in express reliance upon the contract with Spectra: see paragraph 10 of his Updated Schedule of Loss where it is pleaded that the agreements with Spectra are *prima facie* enforceable. He also opposed the application for non-party disclosure before the Recorder. Mr Parker was in attendance at the hearing below and even if he was unaware at that stage that he might potentially have a right to avoid the contract, he cannot have failed to grasp the point following that hearing. Yet he continues to maintain his opposition to the application on basis argued by his counsel that avoidance is not a realistic possibility. It is difficult to see how such a case could properly have been advanced by Mr Willems unless this represented Mr Parker's instructions.
43. Mr Roberts argued that it would be counterintuitive to suppose that Mr Parker would choose to maintain a contract when he could readily extricate himself from any potential liability. However, in the present circumstances I regard it as no more than fanciful speculation to suppose that he might change his position in the witness box – even when subjected to the forensic rigour of Mr Roberts' cross-examination. Quite apart from anything else, it could not be assumed that Spectra would accept any purported avoidance and it is difficult to see why Mr Parker would reasonably subject himself to the risk of uncertain litigation. Failure to do so would certainly not be categorised as an unreasonable failure to mitigate: see *Armstead (supra)* at [54]. In short, I cannot see any basis for suggesting that Mr Parker might seek to avoid the contract with Spectra in the future, having chosen not to do so hitherto.
44. But even if I were wrong about that, a submission based on potential avoidance begs the question as to whether it is a course of action even theoretically open to Mr Parker if restitution can no longer be made.
45. As to this, the hire agreement is a contract for services which has now been fully performed. Mr Parker had the benefit and use of the car for nearly one year and it is difficult to see how he can make restitution in respect of those services received. In this respect, a contract for services is very different from, for example, a contract for the sale of goods where the goods themselves can be returned, even if it might be necessary to make some allowance for depreciation. Although there are indications that the courts might be prepared to adopt a slightly more flexible approach to restitution than in the past, it is still the case that a fully performed contract for services cannot be rescinded: *Chitty (op.cit)* paragraphs 10-139 to 10-140.

46. This, it seems to me, is an insuperable obstacle to avoidance of the contract which exists independently of any misrepresentation or affirmation. It follows that even if the application were granted and even if the disclosure fully supported a case of misrepresentation, Skyfire would be unable to establish any circumstances in which Mr Parker would be relieved of his liability under the contract with Spectra.²
47. For these reasons, the Recorder was in my judgment entirely correct to conclude that disclosure would serve no useful purpose. If so, it cannot be regarded as necessary for the fair disposal of the claim. Mr Roberts did not argue that disclosure was necessary in order to save costs, rightly in my view, since it is far from clear what, if any, costs saving would have resulted. It accordingly follows that Skyfire cannot satisfy the threshold conditions for non-party disclosure set out in Part 31.17(3)(b). To this limited extent I disagree with the Recorder who found in paragraph 13 of his judgment that the conditions of Part 31.17(3) were satisfied because the documents were “*necessary in order for the defendant properly and fairly to advance the case it wishes to advance on a fair basis.*” With the greatest respect to the Recorder, this is not the correct test. There is a distinction between the documents being likely to support the applicant’s case on misrepresentation (as to which I agree that they may well) and the question of whether they are *necessary* to dispose fairly of the claim. For the reasons I have given, they are not.
48. Again, I stress that this is a fact-specific finding which depends on the circumstances of the particular case. Other cases may present factual situations where rescission is not barred on the facts and where there are no compelling grounds for saying that the contract had been affirmed but that is not the case here.
49. Given my finding that the threshold conditions have not been satisfied, I can deal with the remaining points briefly.
50. As regards proportionality, the Recorder held that it would not be disproportionate or unreasonable for Skyfire to be ordered to give disclosure if it was otherwise appropriate. I agree and I would not have refused the application on this ground alone.
51. That leaves the question of delay. The issue of enforceability was first raised in the Defence and Counter Schedule of Loss served on 23 August 2022. Directions for trial were given on 22 February 2023 by District Judge Lampkin. Skyfire had first requested the call recordings a few days previously and there was apparently an issue before the Recorder as to whether the District Judge had positively refused to make an order for non-party disclosure. At all events, it was made clear in correspondence that the recordings were not in Mr Parker’s control. Disclosure was given on 22 March 2023 and, following further requests for the recordings, Mr Parker’s solicitors again confirmed on 5 April 2023 that they were not in his control and that an application for non-party disclosure would be necessary if this was to be pursued. Witness evidence was exchanged on 6 May 2023 but it was not until 15 August 2023 that the present application was issued.
52. The question of whether the application should be refused on grounds of delay is a paradigm example of a case management decision falling within the ambit of the

² It does not appear that this particular consideration was raised on the papers before Mr Justice Constable when he gave permission to appeal. If it had been, one would have expected him to mention it in his reasons.

Recorder's discretion. It is clear from his judgment that he considered all the relevant factors and weighed them carefully. Like the Recorder, I think that there is legitimate criticism to be levelled at Skyfire in (i) not having approached Spectra for the recordings immediately after being told by Mr Parker's solicitors in February 2023 that he did not have them and (ii) if those requests led nowhere, not issuing an application promptly. PD23 para. 2.5 emphasises that any application should be made as soon as it appears necessary or desirable to make it. In no way was Skyfire justified in delaying the issue of an application until 15 August 2023, a few weeks before trial, which in the event could not be determined until the first day of the trial itself.

53. I also bear in mind the extreme pressure under which the County Courts operate day, day out. Had the application succeeded, it is inevitable that the trial would have had to be vacated. This is highly unsatisfactory. Last-minute adjournments seriously impact the efficient use of the court's precious time and resources and cause serious prejudice to other court users in clear contravention of the overriding objective.
54. Nonetheless, it is difficult to challenge the Recorder's assessment that even if an application had been made in May 2023 immediately after disclosure, it is unlikely to have been listed in sufficient time to allow the trial date to stand. On that basis, he concluded that there was no prejudice to the Respondents because the trial would have had to be adjourned anyway.
55. This was a decision which was well within the generous ambit of the discretion allowed under Part 31.17 and I do not consider that the Recorder erred in concluding that delay would not have been a free-standing ground for refusing the application if it had been otherwise well-founded.
56. The appeal is accordingly dismissed. As the appeal has not succeeded, I do not have to deal with the limited issue relating to costs upon which contingent permission to appeal was given.

Postscript

57. This and other similar cases turn a spotlight on what some clearly view as questionable practices by certain credit hire and claims management companies. This is a point which appears to have troubled Mr Justice Constable who considered that the prevalence of these practices raised a point of principle. Indeed, I was informed by counsel that the questions raised by this appeal are ones on which an authoritative decision is eagerly awaited.
58. I did not hear evidence directly on this point. However, so far counsel were able to enlighten me, Google offers companies the opportunity to pay for an advertisement or Google ad. Such ads typically appear at the top of any search results. There can be no doubt that in the present context this enables such companies, wittingly or otherwise to take advantage of claimants who, in the heat of the moment and having just sustained an accident, are understandably in a position where they might not concentrate as carefully on a list of Google search results as they might do in other circumstances. It is clearly not uncommon for claimants in Mr Parker's situation to assume that they are speaking to their own insurers when they are in fact not.

59. One can therefore readily understand the desire of insurance companies to challenge such practices so that they can keep control themselves of the nature and amount of any credit hire charges that might be incurred. On the other hand, even if the enforceability of a credit hire agreement cannot be successfully attacked, the defendant can still challenge the amounts payable under it on grounds of failure to mitigate.
60. Moreover, misrepresentation aside, it is not clear to me that paying Google to ensure that a company appears at the top of a particular list of search results necessarily involves anything illegal. I was informed by Mr Nicol that only FCA regulated companies may appear in such ads. It is, in any event, a practice which it is difficult for insurers to challenge in the context of Road Traffic Act proceedings. The only question as between the parties to such proceedings is whether the claimant has suffered the losses alleged. In the context of credit hire charges that depends on the enforceability of the contract. But if the contract is tainted by misrepresentation, the question of avoidance is one which arises solely between the claimant and the credit hire company. It is no concern of the defendant (or his or her insurer) unless there is some suggestion of fraud. If, for example, there were evidence of collusion between the claimant and the credit hire company there would be a clear defence. That is not suggested here, but it could conceivably arise in another case.
61. In the absence of any evidence, it is not appropriate for me to say anything more about the legitimacy or otherwise of this so-called "Google-spoofing". However, if there is anything objectionable in it, it may well be that this can only be addressed by Parliament, the FCA or one of the other industry regulators.