Case No: D75YX571

IN THE COUNTY COURT AT MANCHESTER

Justice Centre
1 Bridge Street West
Manchester M60 9DJ

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Before:

HIS HONOUR JUDGE PLATTS

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Between:

ALISON HESTER	**Claimant**
- and -	
SIMON MAY	**Defendant**

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MR VIRK for the **Claimant**
MISS TITUS-COBB for the **Defendant**

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Approved Judgment

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JUDGE PLATTS:

1. This is an appeal against the decision of District Judge Osborne at Stockport County Court on 13 February of this year, permission having been granted by His Honour Judge Pearce.

2. The claim was a claim for credit hire arising out of a road traffic accident on 1 April 2017. Liability for the accident was never in issue. As a result of it the claimant's car was damaged beyond economical repair. It is of note that the pre-accident value was £650.

3. The claimant through her insurers obtained a replacement vehicle which she had from 3 April to 18 April 2017, incurring total charges of £2037.12. It is those charges which are sought to be recovered from the defendant's insurers.

4. The claim was allocated to the small claims track and came to trial before District Judge Osborne. He dismissed the claim. His principal ground for doing so was that he found that the hire agreement upon which the claim was based and upon which the claimant relied was a sham and therefore unenforceable. It is that finding which is challenged on appeal.

5. The brief facts are these and are not really in dispute. After the accident the claimant telephoned her own insurers in order to report its happening. Following that call she was contacted by a company Auxillis, which is a subsidiary of Auxillis Services Limited, who were the ultimate hirers of the vehicle which the claimant had. The clear inference is, and I accept, as did the judge, that Auxillis had been contacted by the claimant's insurers and given details of the accident and the claimant.

6. The claimant's evidence was that she had paid her insurers for a courtesy vehicle and she thought that this phone call from Auxillis was to do with her getting that courtesy vehicle. By "courtesy vehicle" I understand, and it seems that she and the judge understood, that it was a vehicle provided to her by her insurers for which she had paid a premium in advance.

7. She said in her evidence that she thought she had been told in that telephone call, that she might personally be liable for the charges for the hire car. She also confirmed in her evidence at trial that the rates of hire were explained to her before she signed any hire agreements.

8. Documents were sent to her by Auxillis electronically, these being the hire agreement, a mitigation questionnaire and an insurance policy relating to payment for hire charges which could not be recovered from the defendant. She electronically signed for those documents on 2 April 2016. All those documents were in evidence before the learned district judge.

9. She says that she signed those documents only to get the car, and after she had signed them the car was in fact delivered to her on the following day and she took it for a pre-arranged family holiday.

10. That was the factual background.

11. The learned district judge, when dismissing the claim, gave his reasons at the end of his judgment, in paragraphs 11 and 12, having gone through the facts which he describes as "somewhat unusual and fairly stark". I have to say I am not so sure they are so unusual. He says this:

> "That raises the question are her insurers then entitled to put forward an expensive credit hire claim as a means of providing the car when they were already obliged to do? Can they artificially increase the liability merely by passing it on to the claimant? My view from the whole of the claimant's evidence is that she did not expect to be liable on this."

12. Carrying on at paragraph 13, he said:

> "The claimant said she was entitled to a courtesy car. She clearly believed that this hire car was that courtesy car. It seems to me, and I use these words advisedly, that this hire claim brought in her name is in fact a sham. I am supported in that by the document at page 36, which is an email to which she was told not to reply, telling her 'You will also find a letter giving important information and guidance on how your claim will be produced and the insurance policy that protects you if the vehicle hire costs are not recovered from the party at fault.'It continues, in other words, telling her, "You will not in any circumstances have to pay"".

13. It then goes on:

> "… I believe this is a sham for the benefit of the hirer, Albany …" -- I pause and note that it is not clear who Albany is in this transaction -- "… and Auxillis. The agreement is quite unenforceable against the claimant in my view and there is no reason to pass any liability to the defendant on the facts of this case and I therefore dismiss the claim."

14. I make some observations about that judgment. First of all, as is pointed out on behalf of the appellant, it was never pleaded by the defendant/respondent that the agreement was a sham. Although it was pleaded generally that it was unenforceable, no particulars were given and in particular no advance warning was given to the claimant that this argument was going to be raised. Nor indeed was it argued or advanced as an argument by counsel for the defendant at the hearing. The whole issue of this being a sham appears to have been introduced by the learned district judge when he questioned the claimant about the courtesy car and then dealing with it in his final judgment.

15. The second observation is that there is no real explanation by the learned district judge as to why he found this agreement to be a sham. It seems to me it was based upon the

following findings or inferences. First, that the claimant was entitled to a courtesy car from her insurers. Second, that the insurers had contacted the hirers in order to arrange the provision of a car. Third that the hirers hired the car on a credit hire basis. Fourth, the claimant believed that she was getting a courtesy car as she was entitled to from her policy.

16. It seems to me that those are the only factual bases upon which the learned district judge concludes that this was a sham.

17. It is clear that he believed that there was some collusion between the claimant's insurance company and the hiring company, which was calculated to "artificially increase the liability". It seems to me on the evidence that I have read, and the judgment which I have read, that in reality there is no evidence of such collusion and therefore his finding to that extent must be based upon an inference. However, there is no evidence of any corporate link between the hirers and the claimant's insurers, nor is there any evidence of any commercial arrangement that there may have been between them.

18. Having made those observations about the judgment, I deal first of all with the respondents' response to the appeal and of the efforts to support the learned district judge's conclusions.

19. Miss Titus-Cobb, on behalf of the respondent has advanced an argument based upon the words of Lord Diplock in *Snook v London and West Riding Investments Ltd, [1967]* 1 All England Law Reports 518, when at page 528 paragraph 8 he said this in relation to what constitutes a sham:

> "… it is necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

20. It is submitted in an attractively put argument that what in fact happened here was that the obligation which the parties intended to create was an obligation to provide a courtesy car based upon the contract between the claimant and her insurers, and that the different obligation that was created was a credit hire agreement between the claimant and the hire company. It is said that that was done in order to give the appearance of creating obligations different from the actual ones and that was done on the intention of the insurers and the hirer.

21. In answer to that, and in support of the appeal, reliance is placed upon the more recent Court of Appeal authority of *Clark v Ardington* [2002] EWCA Civ 510. That was a case where the circumstances were very similar and the argument of pretence was advanced. It was dealt with by the Court of Appeal at paragraph 31 in this way:

> "It is not contended that the Helphire scheme was a sham in the sense described by Lord Justice Diplock in *Snook* … because it obviously did not involve any deceit or improper motive by the claimants. The judge put it this way:
>
> '31. There was no suggestion in last year's cases and there is none in the instant ones, that any of the claimants who entered into their credit or insurance agreements had any improper motive whatsoever. They merely and perfectly legitimately wanted their cars mending and a substitute providing without significant expense to themselves. There is no evidence that they had any intention to avoid, legitimately or illegitimately, the application of the consumer credit legislation.'"

22. I note the beginning of the next paragraph:

> "Complicity by all those involved is not however a prerequisite to rejection of agreements which are a sham in the wider sense."

23. References are then made to other cases in which contracts have been held to have been entered into in order to avoid statutory obligations under either the Rent Acts or the Agricultural Holdings Act or the like.

24. It seems to me that, although the facts here are slightly different, those observations in *Clark v Ardington* are appropriate to this particular case and it seems to me that in the circumstances of this case, for a number of reasons, the learned district judge was wrong to find this agreement was a sham.

25. First of all, I accept the argument that he should have given the claimant/appellant an opportunity to deal with it if he was going to make that finding. As I have said, it was not pleaded, it was not raised in argument by the defendant and it was a finding that he came to of his own volition without giving the claimant any opportunity to comment or answer, and it seems to me for that reason alone the finding was one that is open to challenge.

26. Secondly, it seems to me that there was insufficient evidence for him to make the finding that he did. As I said, there was no evidence of the relationship between the claimant's insurer and the hire company. He drew the inference that it was a relationship that was intended to increase the liability but there was no evidence on which to base that inference. It could well have been an arm's length commercial transaction between the two and it was wrong for him to make or infer any improper motive.

27. Thirdly, as I said, there is no evidence at all that the claimant was a party to the improper motive at all, as was suggested was necessary in *Snook*, although I do accept that in *Clark v Ardington* it was said that that was not a prerequisite. Certainly, it is relevant

because the claimant who has full age and capacity was acting on her own account without any improper motive.

28. Fourthly, there is no evidence at all that she was deceived or misled as to what she was signing electronically. What she signed was clearly an agreement which was a hire agreement on the face of it. It was clear on the face of the agreement, it was clear on the face of the mitigation questionnaire, and the insurance policy again was clearly spelt out in the letter to which the learned district judge referred.

29. In those circumstances, in my judgment, the comments of the Court of Appeal in *Clark v Ardington* paragraph 111 are quite relevant to this case when they said in relation to that case:

> "She made the claim on the policy by signing the letter from the solicitors 'so as to have nothing further to worry about'. We think these facts demonstrate that Mrs Clark did sign up to the scheme. The fact that she did not understand that this is what she had done because she did not read the documents she signed is not to the point. Looking at the matter objectively we think there can be no doubt that there was a mutual intention to create legal relations in Mrs Clark's case. It follows that we allow the appeal in her case as well."

30. It seems to me the same must apply to Mrs Heston. I cannot see that there can be any doubt that Mrs Heston intended to enter into the agreements which she signed electronically, notwithstanding her understanding of the nature of those agreements was perhaps not accurate.

31. I therefore consider for those various reasons that the learned district judge was wrong to reach the conclusion that he did and therefore the appeal will be allowed. I do not propose to remit this case back for assessment of damages on the small claims track. I propose to deal with that shortly now and will invite submissions as to what the appropriate claim should be.

This Judgment has been approved by the Judge.