WRITTEN SUBMISSIONS OF DIRECT ACCIDENT MANAGEMENT LIMITED

IN RESPONSE TO THE CMA'S PRIVATE MOTOR INSURANCE MARKET INVESTIGATION: PROVISIONAL DECISION ON REMEDIES.

8 JULY 2014

INTRODUCTION AND SUMMARY

1. Direct Accident Management Limited is one of the leading companies within the UK credit hire market. The following submissions are confined to the AEC, Provisional Findings and proposed Remedies in connection with Theory of Harm 1 ('**ToH1**') in the credit hire sector. DAML notes that the CMA remains open to submissions in connection with the AEC.[1]
2. Attached to these submissions are three reports:

    a. An 'economic report', considering the impact of the proposed remedies on the credit hire market, provided by Mr Mat Hughes of AlixPartners, ('**the economic report**').
    b. A 'market report' setting out the nature and operation of the credit hire market in some detail, provided by Mr Peter Gradwell of Exchange Insurance Services Limited ('**the market report**').
    c. A report on the law of credit hire, where relevant to this market investigation provided by Armstrongs solicitors ('**the litigation report**').
3. These submissions focus on the key features of, and materials included in, these reports. However, the reports should be read in their entirety.
4. In summary, these submissions (developed in more detail below) argue as follows:

    a. The CMA has misunderstood or, to say the least, has failed properly to take into account, certain crucial features of the credit hire market. The CMA proposes a price cap in order to remedy the purported AEC arising from 'separation' within the credit hire sector. However, all insurers are entitled to 'capture' customers at any stage during the credit hire process.[2] The CMA has completely failed to consider or to evaluate why it is that insurers fail to exercise their right to 'capture' customers (or have agreed not to do so via the GTA, which DAML is not party to, and which in any event could be readily addressed by amending the GTA if this were to be a real impediment to such claims being captured by the at-fault insurer). If there is an AEC at all, within the credit hire sector, it should be reformulated as:

        i. The insurance sector has pursued a policy of not capturing those customers or taking steps to limit the costs of credit, either under the terms of the GTA

[1] Provisional Decision on Remedies ('**PDR**') § 3.
[2] We recognise that those insurers that participate in the GTA/ABI scheme have agreed, on a voluntary basis, not to capture customers that have already been contacted by another party.

or by adopting a 'no offer no capture' policy in respect of customers outside of the GTA. It seems most likely that this policy is adopted so as to under provide replacement vehicles, which is contrary to the interests of non at-fault consumers;

ii. Separation - the insurer liable for paying the non-fault driver's claim (the insurer to the at-fault driver) often materially increases the costs of credit hire as a result of the manner in which they handle and process claims from inception to final payment of court judgments.

b. The CMA has failed to conduct a proper analysis of the market in credit hire vehicles. As a consequence, the CMA has not conducted a proper assessment of the impact of its proposed remedies. Had the CMA conducted such an assessment, it would have identified the very serious adverse consequences of its proposed remedies including:

i. Forced market exit for many or all participants.

ii. The substantial narrowing, perhaps elimination of competition in the market.

iii. The removal from that market of, at the very least, providers who offer services to the least pecunious and most disadvantaged customers.

iv. Substantial detriment to customers.

[redacted]

PART 1: THE CENTRAL FLAW IN THE CMA ANALYSIS

5. The notion of separation is at the heart of the CMA's reasoning. The CMA regards separation as a natural consequence of the credit hire sector.
6. However, separation in the credit hire sector does not mean that insurers facing liabilities cannot readily control such costs. The CMA has misunderstood how separation works; as a result it has imposed remedies that are unnecessary and disproportionate.
7. Paragraph 3.19 of the Provisional Findings Report (**'PFR'**) observes that the 'strategy' of capturing customers is 'unusual' and notes that, under the GTA the insurers and affiliated CHCs agree not to intervene once a non-fault driver has made contact with another provider (the 'first to a customer principle').
8. The CMA's consideration of this extremely significant feature of the market has been cursory at best. The CMA's working (and unchanged) AEC is predicated on the notion that its two limbs are connected: separation drives 'renting'. That reasoning is flawed.
9. The CMA estimates that 23% of the credit hire market is outside of the GTA structure.[3] Liability in motor accidents is established on 75% of cases at an early stage.[4]
10. Given the concern within the insurance sector about 'rent seeking', it is reasonable to expect that customer capture would be a prominent feature of the 17% of cases that are outside of the GTA, where liability has been determined early. Those customers provide a 'test pool' against which to evaluate the AEC and to evaluate which factors and patterns of conduct are driving the purportedly high costs in the sector.
11. DAML customers predominately fall into that category. As set out in the economic report, insurers are in a position to 'bridge' the gap arising from separation via three different mechanisms:[5]
    a. 'First Notification of Loss' FNOL. Insurers are ordinarily contacted by their own customers to inform them that they have been involved in an at-fault accident. The customers provide the insurers with the details of the victim. Insurers can contact non-fault victims, admit liability and offer to pay for a replacement vehicle ('direct hire). If the insurer's letter contains all the relevant details, there is no need for the non-fault party to enter a credit hire agreement.
    b. By making an offer via a *Copley* letter. As the Court of Appeal has explained, insurers can write, admit liability and offer to provide a replacement vehicle or to pay the cost of direct hire. If they do so, they are able to control the rate and length of that

[3] PDR, § 2.57.
[4] PFR, § 3.56.
[5] § 1.9(a).

hire period. Insurers are entitled to send a *Copley* letter at any point prior to or during the hire. If a proper offer is made, and the victim thereafter fails to accept any reasonable offer of replacement vehicle, the victim will be restricted to the sums set out in that offer. In practice, as explained in the market report, the almost universal practice of the insurance sector is to not exercise their rights to send a *Copley* letter.[6]

c. Making a without prejudice payment. If an insurer sends a without prejudice payment to the victim, the victim will be given an opportunity to mitigate their loss. They can either repair their vehicle, or purchase a new one (as appropriate). As a result, any need for a credit hire is obviated. The insurer is entitled to take this step at any point. Furthermore, the insurer is entitled to apply to retract their admission of liability and seek to recover the funds paid. Once again, the almost universal practice of the insurer is to not exercise that right.

12. As explained in the market report, the reality is that the insurance sector has adopted a policy of not exercising those rights. They do not capture customers in order to take control of costs and ensure they are kept low. Indeed, quite the opposite approach is taken. Armstrongs solicitors are not able to identify a single case in which an acceptable *Copley* letter has been sent to a non-fault victim.[7] The almost universal practice of the insurance sector is to avoid 'capture' and to allow the credit hire to carry on.
13. The CMA has failed to ask itself the vital question: why is it that insurer's have adopted a consistent practice of not 'capturing' customers? Indeed the largest insurance companies have signed up to the GTA which expressly provides that customer capture should not occur.
14. DAML is highly concerned that the CMA has not considered this question. That failure is consistent with the CMA's wider failure to properly evaluate the credit hire market on its own terms.
15. In brief, there is competition within the credit hire sector (or at least a part of it). However, the insurance companies have adopted a strategy of 'non-competition' with credit hire.
16. For the reasons set out more fully above, we do not believe that the credit hire sector is characterised by inflated costs due to any conduct on DAML's part as it does not pay referral fees to any material extent (but DAML would have no objection to such fees being banned).

[66] Litigation report § 6.1ff.
[7] Market report § 6.21

Nonetheless, even if that is the case, we consider that the AEC, as formulated, is wrong and that the CMA should reframe it as:

a. The insurance sector has pursued a policy of not capturing those customers or taking steps to limit the costs of credit, either under the terms of the GTA or by adopting a 'no offer no capture' policy in respect of customers outside of the GTA. It seems most likely that this policy is adopted so as to under provide replacement vehicles, which is contrary to the interests of non at-fault consumers;
b. Separation – the insurer liable for paying the non-fault driver's claim (the insurer to the at-fault driver) often materially increases the costs of credit hire as a result of the manner in which they handle and process claims from inception to final payment of court judgments.

17. At the very lowest, the CMA should have tested its first AEC by reference to this alternative formulation. The formulation above provides a much clearer explanation for the purportedly 'high' cost of credit hire. The market (or at least a portion of it) already contains a mechanism for resolving the alleged 'problem' of separation.
18. To the extent that the CMA remains of the view that separation creates unwarranted increased costs (DAML does not agree that its costs are artificially high, except due to the conduct of insurance companies, for the reasons set out above and considered further in section two), it has failed to even consider the possibility that there already exists a mechanism in the market to drive down those costs by 'capturing' customers. To the extent that the CMA has considered other 'capture' based remedies, it has failed to enquire why it is that the existing remedies are not routinely exercised by the insurance sector.

PART 2: THE AEC IDENTIFIES THE WRONG COST DRIVERS

19. As explained in the economic report, the PDR and PFR misidentify the causes of the higher costs in the credit hire sector. The CMA appears to have accepted as axiomatic that companies in the credit hire sector are collecting 'rents': it has not tested that proposition satisfactorily.

20. The CMA considers that higher costs in the credit hire sector are attributable to (i) referral fees, (ii) purported 'earning of rents' from the management of claims and (iii) 'frictional costs'. As to referral fees, DAML pays comparatively small referral fees to garages and other parties that refer victims on to them. The level of those fees is certainly well below that suggested by the CMA (£328 per claim). DAML is more than content to see referral fees abolished in the credit hire sector. That would bring the credit hire sector in line with the position in the personal injury sector. The CMA's proposed remedy would perpetuate the anomaly that referral fees may be charged where there is no personal injury claim but may not be where there is.[8] DAML does not consider that referral fees are an integral part of either its business model, or the sector more widely.

21. DAML denies that the credit hire sector in general, or DAML in particular, adopts a business model that is characterised by 'earning of rents.' That principle may be very easily tested by enquiring whether or not credit hire companies make excessive, or even substantial, profits. Indeed, the CMA has stated that it has not found that CHCs make high profits. As is clear from the market report, credit hire companies operate on fine margins. Indeed, one of the leading providers in the sector has published accounts revealing that they have made a loss in recent years.[9]

22. The CMA does not appear to have considered whether there are any 'insurer-side' patterns of behaviour, that contribute to higher charges. That is a substantial flaw in the CMA's approach. DAML considers that there are a number of 'insurer-side' behaviours that drive costs in the credit hire sector such as:[10]

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[8] In effect the CMA's conclusions about how to reform the post-accident sector would differ from those drawn by the Ministry of Justice.
[9] Market Report § 5.12-24.
[10] Ibid. § 5.25.5-40..

a. The failure of insurance companies to respond to letters leading to excessive correspondence.
b. The failure of insurers to resolve claims.
c. The failure of insurance companies to provide payments (whether without prejudice or otherwise) leading to increased duration of hire.
d. The failure of insurers to pay judgment debts once they have been awarded.

23. Each of those factors, independently and cumulatively, lead to longer hires and increased costs.
24. Those insurance-side practices are particularly likely to affect the 'independent' credit hire sector: they focus their service on customers who would not otherwise be served. The CMA's report has not assessed the distinction between those independent and GTA sectors by reference to business model, costs or impact of the proposed remedy.
25. As to the 'frictional' costs arising from recovery of charges, DAML accepts that they may be a consequence of 'separation' but considers that a more efficient response mechanism (on behalf of the insurers) would greatly reduce such costs. That could include the introduction of an insurance code of conduct or protocol, setting out appropriate response times and behavioural patterns. Furthermore, DAML considers that those frictional costs are not 'dead weight' costs to the consumer. The credit hire companies provide an important service to accident victims; they ensure that the victim receives their full tortious rights.[11]
26. We are concerned that the CMA has focused on the 'cost' of credit hire in the form of raised insurance premiums but has not considered in sufficient detail the benefits that derive from the existence and operation of the credit hire sector. The CMA has not considered the difference in service provision between the credit hire and direct hire sectors or asked whether the 'captured' and non-captured markets provide the same quality of service. Given the CMA's concern that the credit hire sector is too 'expensive', it is surprising that the CMA has failed rigorously to interrogate the distinctions between the different kinds of service provider in the market.
27. Furthermore, the CMA has failed to properly take into account the additional costs that are unique to the credit hire sector. The credit hire sector deals with almost exclusively impecunious and frequently vulnerable customers. The additional costs include advice, provision of second language speakers and higher insurance premiums. As explained in the market report, DAML provide vehicles to many of the most 'expensive' individuals to insure including those aged 17-20 and those with previous driving bans. By contrast Enterprise, the

[11] Economic report § 6.9.

largest provider in the sector, does not provide credit hire vehicles to individuals under 25.[12] Direct hire and credit hire are not directly comparable markets but the CMA appears to have treated them as interchangeable.

28. Finally, we are concerned to note that the CMA has not paid regard (at least on the face of its reports) to the extensive case law concerning what is and is not properly recoverable under a credit hire agreement. The matter has been to the House of Lords/Supreme Court on three occasions in the last decade.[13] There are also numerous judgments on this question from the Court of Appeal. The CMA has swept aside the weight of judicial comment, which has repeatedly rejected the submission that credit hire costs are *prima facie* inflated or improper.
29. In conclusion, the CMA's analysis of costs in the credit hire sector is flawed. It has uncritically accepted the premise that costs derive from CHC conduct. In reality, the cost drivers in the sector are attributable to insurer-side conduct and the increased costs arising from the CHC's role in securing consumers' full tortious rights.

[12] See Enterprise website ("Enterprise Rent-A-Car Age Policy for UK Car Rentals* For vehicle classes A to F, mini MPV and all vans, the driver must be 25 years of age or over. For all other vehicle classes, the driver must be 30 years of age or older. * Other restrictions may apply. For information relating to restrictions, please call our contact centre on 0800 800-227").
http://www.enterprise.co.uk/car_rental/agePolicies.do;jsessionid=DLS1T7cc3gQQkm418LBf0dHqZPkvQhpLQdx2msvxY1cR7Cl12cQc!1245288132?transactionId=WebTransaction1

[13] See the litigation report.

PART 4: THE PROPOSED REMEDY IS FLAWED

30. If, which we do not accept, the AEC is correct, we further consider that the proposed remedy is not rationally connected to the AEC. In short, the simplest remedy (in order to resolve the 'problem' of separation) is to extend the *Copley* position to all providers and introduce a insurance protocol which is properly regulated to ensure efficient and timely management of claims by insurance companies. The GTA could be amended to remove the 'first to the customer' policy and to allow for genuine competition within the sector. This remedy would afford the insurers with precisely what they allegedly want, the opportunity to make reasonable, proper and concrete offers to victims that drive down costs.
31. The CMA's proposed Remedy 1C does nothing to remedy the AEC identified: it does not address itself to separation. Rather the CMA proposes to distort the market and to fix prices. It appears that, in substance, the CMA has determined that the AEC arises from the 'practices and conduct' of the credit hirers. Accordingly it is that aspect of the AEC that they have addressed.
32. We consider that this approach is flawed for two reasons:

    a. The remedy is not rationally connected to the AEC: it does nothing to address the 'problem' of separation that was identified.

    b. The remedy is disproportionate. The CMA could easily have addressed the AEC by adopting a number of much less disruptive remedies, that were focused on the first half of the AEC (separation).[14] By way of example, customer capture might be secured throughout the sector (via an amendment to the GTA if necessary), or through an insurance protocol aimed at lowering costs. Rather than stimulate the market, to keep down purportedly high costs, the CMA proposes to eliminate the market and fix costs.

       We recognise that the CMA has considered and rejected alternative ways to capture claims, but it has not considered why such claims are not already captured as detailed above.

[14] As set out above, we are also supportive of remedies to address the purported high fees in the second half of the AEC, by abolishing referral fees.

PART 5: THE CMA HAS FAILED TO CONDUCT A PROPER IMPACT ASSESSMENT

33. At paragraph 4.37 of the PFR, the CMA sets out that it does not consider it needs to investigate the market in credit hire *per se*. That was a mistake. The remedy proposed is an intervention in the credit hire market. The CMA cannot impose a price cap within that market without properly evaluating the market itself.

34. As set out above, the CMA has failed to appreciate certain legal and substantive issues about the nature and operation of the credit hire market. We also consider that the CMA should have conducted a thorough, quantified assessment of the impact of the proposed remedy on the credit hire sector. The CMA's failure to consider credit hire as a market, and therefore its failure to assess the impact of the remedy on the market, is a serious flaw. As explained in the market and economic reports, Remedy 1C will result in:

    a. [redacted]
    b. [redacted]
    c. The substantial narrowing, perhaps elimination of competition in the market.
    d. Substantial detriment to customers.[17]

[redacted]

35. [redacted]

36. The economic report also explains that Remedy 1C will impact in a discriminatory manner on different providers in the market. The 'independent' credit hire companies, that are not directly linked (via the GTA or otherwise) to insurers are likely to face the most substantial impact. They lack the 'tie-ups' to the insurers to provide them with a guaranteed volume of bulk turnover. Nor does the CMA ask who will then service these customers? In any event, Remedy 1C will lead to a substantial lessening of competition in the credit hire market.

[15] Market report § 5.1-10.
[16] Market report § 5.11-15.
[17] The economic report, § 7.11 - § 7.12.

37. [redacted]. Without credit hire (or at the very least independent credit hire), under provision will rise and there will be a decline in the incentives for insurers to provide direct hire to customers. CHCs 'keep insurers honest': they are aware of, and able to secure, victims' full tortious rights. As a result, CHCs drive up standards across the entire sector.

38. The customers of independent providers, such as DAML, will be particularly badly affected. The 23% of customers who currently 'fall through the gaps' and receive no offers of support will be left without a remedy. As we explained above, they are disproportionately likely to lack economic and social capital (see Part 6 below). It is implausible to assume that those individuals will secure their rights by commencing litigation against large, well resourced and experienced insurance companies. As explained more fully below, Remedy A will also be ineffectual as a result. An impecunious client or a client who falls into one or more of the categories serviced by DAML, who has not received an offer from an insurance company, cannot and should not be expected to start proceedings on their own, in order to enforce their rights. Accordingly Remedy 1C may discriminate (for the purposes of Article 14 of the European Convention on Human Rights) between persons who are economically disadvantaged, within the ambit of Article 6 (access to the courts and to a remedy). The CMA has also failed to conduct any kind of Equality Impact Assessment (or at least none is available of its website). That is a further freestanding error of law.

39. The CMA's only evaluation of the interests of consumers is set out in their market research concerning whether customers were content with the provision they have received.[18] 24% of respondents did not know they were even entitled to a replacement vehicle. This merely accentuates the problems identified above: consumers do not know their rights and the CMA proposes to remove one of the vital levers that secures those rights for the most vulnerable innocent parties to accidents.

40. [redacted]

[18] PFR, § 7.9.

PART 6: THE EFFECTIVENESS OF REMEDY A

41. DAML supports the CMA's proposed remedy A: increasing consumers' access to information about their rights.
42. Non-fault accident victims, that require access to the credit hire vehicles, are largely financially disadvantaged. As explained in the diagram on page [11] of the economic report, they are the customers that have 'fallen through the gaps', in the sense that neither their own insurer, nor an at-fault insurer have offered to provide them with their tortious remedy and put them back on the road.
43. Paras 4.24-38 of the market report explains in detail the financial profile of DAML's customers. In short, their average income is £13,732, which is half of the national average gross income.[19]
44. As is also clear from the market report, DAML's customers are disproportionately likely to have English as a second language.[20] DAML employs 6 staff with second language abilities for precisely this reason, it also works with a network of garages with multilingual staff in order to ensure (wherever possible) that customers are able to discuss their accident with someone able to speak their nature tongue. DAML's customers are frequently vulnerable, often lack social capital and would not (without DAML's assistance) obtain a replacement vehicle.
45. For all those reasons, DAML is strongly supportive of Remedy A. However, DAML is also concerned that Remedy A will not be effective on its own. In order to secure their full legal rights, victims must enjoy access to effective mechanisms for securing their entitlements. It is, for obvious reasons, unrealistic to expect consumers to engage in litigation to secure their rights from well-resourced and experienced insurance companies. Provision of information is ineffective without viable mechanisms for enforcement. Therefore, we consider that [redacted] Remedy 1C will [redacted]

[19] Economic report § 4.14 (a).
[20] Market report § 3.4.

[redacted]

ECONOMIC EXPERT REPORT: THE COMPETITION AND MARKET AUTHORITY'S ANALYSIS OF THE ADVERSE EFFECT ON COMPETITION RELATING TO CREDIT HIRE AND APPROPRIATE REMEDIES

REPORT PREPARED FOR DIRECT ACCIDENT MANAGEMENT LIMITED ON BEHALF OF ARMSTRONG SOLICITORS LTD

CONFIDENTIAL: CONTAINS BUSINESS SECRETS

AlixPartners UK LLP

8 July 2014

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1 EXECUTIVE SUMMARY

1.1 AlixPartners LLP ("AlixPartners") has been instructed by Armstrong Solicitors Ltd ("Armstrongs") to act on behalf of Direct Accident Management Limited ("DAML"), a credit hire company ("CHC"), in relation to the UK Competition and Markets Authority's ("CMA") proposed findings and proposed remedies in relation to its market investigation into private motor insurance. In particular, AlixPartners has been instructed to consider the areas of economic analysis in relation to credit car hire.[1]

1.2 Under its ToH 1, the CMA identifies two features that it provisionally concludes give rise to an adverse effect on competition ("AEC"):

> "*(a) separation—that is, that the insurer liable for the non-fault driver's claim, ie the insurer to the at-fault driver, is often not the party controlling the costs; and*
>
> *(b) various practices and conduct of the other parties managing such non-fault drivers' claims which (i) were focused on earning a rent from control of claims rather than competing on the merits; and (ii) gave rise to an inefficient supply chain involving excessive frictional and transactional costs.*"[2]

1.3 The CMA's quantification of potential consumer detriment resulting from ToH 1 focuses on the extent to which credit hire costs are higher than that for direct hires. The CMA estimates that this results in £618 per claim in higher costs to at-fault insurers, with a net detriment of £290 per claim after deducting referral fees to non-fault insurers and brokers.[3]

1.4 In response to this AEC, the CMA proposes a number of remedies, the most significant of which is a dual rate price cap relating to temporary replacement vehicles provided to non-fault claimants.[4]

1.5 In my view, it appears that the CMA has not fully investigated three particularly substantive issues in relation to this AEC and remedy:

(a) what are the types of customers that credit hire seeks to serve, and what their needs and interests are. This is particularly important given that the purpose of credit hire arises from the need to restore non-fault parties to the position they would have been in had the accident not occurred, according to tort law;

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[1] Credit car hire arises through third party insurance, which protects non-fault drivers in the event of an accident, allowing these drivers to seek compensation if they have temporarily lost the use of their vehicle. This includes recovering the reasonable costs of car hire where a reasonable need for doing so is established. Currently, replacement vehicles may be provided to non-fault customers either on a credit hire or direct hire basis. Credit hire is where the replacement car (typically like-for-like) is supplied on credit to a non-fault driver by a CHC, whereas direct hire is supplied directly either by the at-fault or non-fault insurer.

[2] CMA, "Private motor insurance market investigation: Provisional findings report", notified 17 December 2013 ("PFs"), §50.

[3] This is based on the difference between rates for credit and direct hires, plus various frictional costs incurred by insurance companies, less the costs they would incur through managing the claims themselves. CMA, revised Working Paper "*Estimation of the detriment from the separation of cost liability and cost control (theory of harm 1)*" ("Revised WP"), 12 June 2014, Table 12 (of §123).

[4] This involves "*a low rate cap based on average direct hire daily rates plus fixed replacement vehicle arrangement costs and a high rate cap calculated as a multiple of the low rate cap*". CMA, "Private motor insurance market investigation: Provisional decision on remedies", notified 12 June 2013 ("PRs"), §7(a).

(b) why insurance companies do not seek to minimise these costs, given their ability to do so in a variety of ways (see further below) and the CMA's assertion that the separation between liability and cost control costs the at-fault insurer some £618 per credit hire claim; and

(c) why CHCs' costs and prices are higher than direct hire, and therefore whether a price cap would achieve the CMA's aims.

These points raise a variety of issues as to the CMA's finding of an AEC and the appropriate remedies.

The characteristics of competition in and customers of credit hire

1.6 Independent CHCs who are not covered by the Association of British Insurers' General Terms of Agreement, focus on serving those customers who have not been captured by at-fault insurers, nor been served by non-fault insurers and lack the funds for retail car hire.

1.7 These impecunious and vulnerable customers share a number of common characteristics that distinguish them from both direct hire customers and other credit hire customers, and typically include: (i) earning an annual income well below national average;[5] (ii) little or no other access to funds to obtain a replacement car;[6] and (iii) a substantial minority who do not speak English or do not speak it as their first language.[7]

1.8 In serving such customers, independent CHCs such as DAML need to incur additional costs in providing tailored services to ensure these customers receive their legal entitlement, including additional advice, language interpretation and assistance.[8] These customers may also otherwise have higher costs to serve, for example attracting higher insurance premiums on the replacement car. The CMA has made no substantive analysis of CHCs' costs.

Economic effects of "separation"

1.9 There are a number of means by which at-fault insurers can already exercise to control costs, some of which are acknowledged by the CMA including:

[5] For example, for a random selection of 140 DAML clients, the average gross annual salary is £13,732, which is nearly half the national median gross annual earnings for full-time employees of £27,000 (according to the Office of National Statistics, "*Annual Survey of Hours and Earnings, 2013 Provisional Results*". Median gross annual full-time earnings cited are for the year ending 5 April 2013).

[6] For example, the financial documents of the randomly selected 140 DAML clients show common features including being overdrawn throughout the hire period, any income (salary or benefits) taken up with outgoings such as rent and bills, no savings or spare funds in any current account, no overdraft facility and/or credit cards, or credit cards that are "maxed out" or close to the authorised credit limit.

[7] For example, out of 3530 hire claims for DAML in 2013, around a third of these involved customers who do not speak English as a first language, or do not speak English at all.

[8] Peter G. Gradwell (Exchange Insurance Services Limited), "*Credit Hire – Market Structure Report: Response to the Competition and Market Authority's investigation into Private Motor Insurance; Report prepared for Direct Accident Management Limited*", 8 July 2014 ("Credit Hire market report"), §4.21.

(a) claims capture and use of direct hire at the first notification of loss ("FNOL"), [9] with claims were captured in about 32% of all non-fault cases;[10]

(b) a "Copley offer", where at-fault insurers can make an offer of a replacement vehicle to the non-fault claimant at any point in the credit hire that could limit the charges that the claimant can recover from the at-fault insurer.[11] The CMA notes this, but observes the use of Copley offers is "unusual";[12] and

(c) in the case where a vehicle is irrecoverably damaged, the at-fault insurer can prevent any reimbursement for car hire by sending a "without prejudice" cheque for the written-off vehicle.[13]

1.10 I consider that the most likely reason why at-fault insurers rarely utilise these means of cost constraint is because of their inherent incentives to under provide, such as by not offering a replacement vehicle at all. This is because the non-fault claimant is not their customer, and reputational damage is potentially weak. These incentives may actually be exacerbated by intense price competition among insurers,[14] since such competition would strengthen incentives to save costs through under provision. Moreover, a key potential economic benefit of having non-fault claims handled by non-fault insurers and CHCs is their role in mitigating this under provision, a benefit that the CMA has omitted to take into account.

1.11 The CMA acknowledges these incentives and has rejected alternative remedies which would limit the separation between liability and costs,[15] but do not adequately account for these incentives.

1.12 Under provision is likely to harm all credit hire customers, particularly given customers are often distressed after an accident, have low awareness of their tortuous rights, typically do not have accidents frequently, and find financial products difficult to navigate. Impecunious and vulnerable customers are especially likely to be less aware of and able to enforce their rights without representation, particularly given language difficulties and their lack of the funds.

The CMA's consumer detriment estimate and consequences of the CMA's price cap remedy

1.13 The CMA advances no evidence that CHCs have substantial market power. As the CMA acknowledges, it had "*not seen evidence that CHCs earn more than normal profits*", and "*consider it unlikely that CHCs earn more than normal profits*".[16]

[9] As the CMA sets out, "[a]*t-fault insurers have an incentive to 'capture' a claim so that they can control costs effectively. A captured claim is one where the at-fault insurer agrees with the non-fault driver that it will manage the claim*". PFs, §42.
[10] PFs, §42.
[11] Subject to compliance with certain requirements about what content and level of information is to be provided to the non-fault claimant, as set out in the Court of Appeal decision in *Copley v Lawn*.
[12] PFs, §3.20.
[13] Credit Hire market report, §5.26.
[14] PFs, §5.13.
[15] In considering remedy options to enable at-fault insurers to capture every claim, the CMA observes that "*at-fault insurers would have less incentive to meet claimants' legal entitlements*", where other providers currently provide a constraint on at-fault insurers acting on this threat. PRs, §2.192.

1.14 The main alternative explanation for higher prices is that CHCs have higher costs than direct hire companies. However, the CMA has not considered at all the actual costs of CHCs such as DAML, nor carried out any assessment of why these costs generate higher prices.

1.15 While the CMA infers that CHCs compete excessively on referral fees,[17] the CMA does not acknowledge that some independent CHCs, such as DAML, pay referral fees only on a limited basis. Moreover, referral fees could simply be banned, and I understand that DAML would support such a ban.[18]

1.16 The CMA has also attempted to account for potential differences in costs due to differences in the quality of vehicles provided under credit hire as compared with direct hire,[19] and uses the revenues of the main direct hire providers to ensure that charges for additional services such as young or high-risk drivers and child seats are captured.[20]

1.17 However, there is a range of other potentially significant reasons for why these costs vary. For independent CHCs, these include the additional costs of serving impecunious and vulnerable customers. Accordingly, there is a serious question of whether direct hire is the appropriate benchmark particularly for independent CHC services, given different offerings and business models for each service. There is also no consideration of the fact that insurers' claim handling processes increases CHCs' costs and thus prices, and there would be merit in measures being imposed to address this.

1.18 Without consideration of these issues, the CMA is proposing a price cap at significantly lower levels for cases where liability is undisputed as compared to current charges.[21]

1.19 Given the lack of excess profit for CHC firms, such a price cap is likely to result in:

[redacted]

(b) potential adverse attempts at mitigating such losses, particularly if independent CHCs reduce or cease services to their impecunious and vulnerable customers who incur higher costs to serve, resulting in such customers not being served at all

[16] PFs, §6.17.
[17] PRs, §2.104.
[18] Moreover, if this were the sole issue, a more direct method of removing referral fees would be to ban them, which the CMA considers but dismisses as an ancillary remedy to price caps. PRs, §2.237.
[19] Revised WP, §114.
[20] Revised WP, Table 3 (of §60).
[21] The CMA proposes a low rate cap of £583, which is half of the high rate cap that the CMA notes is "*approximately similar to the current GTA level*" and therefore more than half of independent CHC charges, which are higher than GTA rates. PRs, §2.88 and footnote 36.
[22] Credit Hire market report, §5.1ff.

2 ALIXPARTNERS' INSTRUCTIONS, THE AUTHOR OF THIS REPORT, AND THE STRUCTURE OF THE REPORT

AlixPartners' instructions

2.1 AlixPartners LLP ("AlixPartners") has been instructed by Armstrong Solicitors Ltd ("Armstrongs") to act on behalf of Direct Accident Management Limited ("DAML"), a credit hire company ("CHC") whose business income is solely derived from providing credit hire services to members of the public following non-fault accidents. AlixPartners has been instructed in relation to the UK Competition and Markets Authority's ("CMA") proposed findings and proposed remedies in connection with its market investigation into private motor insurance.

2.2 In particular, AlixPartners has been instructed to consider the areas of economic analysis in relation to credit car hire which the CMA should have considered regarding the alleged adverse effect on competition ("AEC") arising from the separation of cost liability and cost control (Theory of Harm 1, "ToH 1"),[23] and the proposed remedies for this AEC (focusing on the dual rate price cap relating to temporary replacement vehicles provided to non-fault customers).[24]

2.3 Accordingly, this expert report focuses on the economic issues of the case. The facts and background to the credit hire industry are covered by a separate report commissioned by Armstrongs, "the Credit Hire market report",[25] which this report refers to where appropriate. This report also refers to another report commissioned by Armstrongs which considers the legal issues raised by credit hire, "the Litigation report".[26]

2.4 At the request of Armstrongs, DAML's external legal advisers, this report has been prepared by AlixPartners in accordance with the standards required of an independent expert witness providing evidence for UK court proceedings under Part 35 of the Civil Procedure Rules, albeit that this report is addressed to the CMA rather than to a court. Further information on Armstrongs' instructions and the standards to which this report has been prepared can be found in Annex 1 of this report.

The author of this report

2.5 I am a Managing Director in AlixPartners' European Economics Consulting practice. I am an economics expert on competition matters with some 25 years' experience advising on market/sector investigations, antitrust cases, and mergers. In preparing this report, I have been assisted by relevant colleagues, most notably Cherryl Ng, another economist who is a Vice President at AlixPartners, who has worked under my direction and supervision.

[23] CMA, "Private motor insurance market investigation: Provisional findings report", notified 17 December 2013 ("PFs"), see e.g. §41ff.
[24] CMA, "Private motor insurance market investigation: Provisional decision on remedies", notified 12 June 2013 ("PRs"), see e.g. §7ff.
[25] Peter G. Gradwell (Exchange Insurance Services Limited), *"Credit Hire – Market Structure Report: Response to the Competition and Market Authority's investigation into Private Motor Insurance; Report prepared for Direct Accident Management Limited"*, 8 July 2014.
[26] Armstrongs, *"Written submissions detailing case law relating to credit hire litigation: 'The Litigation Report' – Report to supplement the written submissions and reports on behalf of Direct Accident Management Limited"*, 8 July 2014.

2.6 I have advised on a considerable number of UK Office of Fair Trading ("OFT") and Competition Commission ("CC") market and antitrust investigations, including the OFT's investigation of information sharing in the motor insurance market, the CC Groceries investigation (and subsequent remittal), and successful appeal of the OFT's decision in relation to alleged tobacco price fixing. In total, I have acted on over 30 market and merger investigations before the CC and the Monopolies and Mergers Commission.

2.7 I have written widely on competition issues, including articles on "*An Economic Perspective on EU and UK Competition Policy in the Insurance Sector*" in ICLG's "*Guide to Insurance and Reinsurance 2014*", pay-for-delay in pharmaceuticals cases, a series of articles on the economics of EU and UK merger control in ICLG's Comparative Legal Guide to International Merger Control, co-authoring the leading book on UK merger control (Parr, Finbow and Hughes), and co-authoring the section on the economic assessment of competition law damages in the 2004 Ashurst report for the European Commission.

2.8 I have a Master's degree in Economics from Queen Mary College, University of London, and a Bachelor's degree in Accounting with Economics from the University of Kent at Canterbury.

Structure of the report

2.9 This report is divided into a number of sections:

(a) section 3 provides a summary of the CMA's ToH 1, and outlines the key relevant economic issues in relation to credit car hire that in my view the CMA should have investigated in relation to this ToH both as regards its assessment of the AEC and appropriate remedies;

(b) sections 4-6 consider the underpinnings of the CMA's analysis of the AEC which it has found:

(i) section 4 sets out: (a) a summary of the CMA's analysis of competition in credit car hire services and the characteristics of the consumers whom use these services; (b) the nature of competition within credit hire services; and (c) the types of customers that typically use these services, in particular impecunious customers;

(ii) section 5 assesses the economic reasons for the separation of cost liability and control in the credit hire sector. In particular, it considers the role of the credit hire sector in preventing a greater market failure caused by the under provision of credit hire services (referred to generally as "under provision");

(iii) section 6 considers of the CMA's estimate of potential consumer detriment in the context of the risk of under provision; and

(c) section 0 assesses the CMA's proposed price cap remedy, taking into account the conclusions reached in the preceding sections.

3 SUMMARY OF THE CMA'S TOH 1 AND RELEVANT ECONOMIC ISSUES

The CMA's ToH 1: Credit hire is too expensive due to rent seeking and excessive costs, and price controls on credit hire rates will address this?

3.1 On 12 June 2014, Alasdair Smith, Chair of the private motor insurance investigation group and CMA Deputy Panel Chair, said:

"*There are over 25 million privately registered cars in the UK and we think these changes will benefit motorists who are currently paying higher premiums as a result of the problems we've found.*

A cap on replacement vehicle costs will reduce the amounts charged to insurers of at-fault drivers, which will cut out some of the inefficiencies in the system and feed through to reduced premiums for all drivers. Through the measures we propose to introduce, we will address the problems that stem from those managing the non-fault accident claim having little or no incentive to keep costs down."[27]

3.2 As set out above, the focus of this report is the CMA's ToH 1 in relation to credit car hire. Credit car hire arises through third party insurance, which protects non-fault drivers in the event of an accident, allowing these drivers to seek compensation if they have temporarily lost the use of their vehicle. As the CMA sets out, "[t]*he non-fault driver is entitled to recover the reasonable costs of car hire, provided the reasonable need for an alternative vehicle can be established.*"[28]

3.3 The CMA further notes that "[a] *replacement car may be provided either on a credit hire or direct hire basis*".[29] Credit hire is where the replacement car (typically like-for-like) is supplied on credit to a non-fault driver by a CHC, whereas direct hire is supplied directly either by the at-fault or non-fault insurer. In both cases, the costs are recovered from the at-fault insurer.[30]

3.4 No issues have been identified as regards direct hire or retail hire (i.e. where consumers arrange for car hire themselves, pay upfront and are reimbursed by the at-fault insurer). Under its ToH 1, the CMA identifies two features that it provisionally concludes give rise to an AEC:

"*(a) separation—that is, that the insurer liable for the non-fault driver's claim, ie the insurer to the at-fault driver, is often not the party controlling the costs; and*

(b) various practices and conduct of the other parties managing such non-fault drivers' claims which (i) were focused on earning a rent from control of claims rather than

[27] CMA press release, "*CMA sets out changes for private motor insurance*", 12 June 2014.
[28] PFs, §3.16.
[29] PFs, §3.18.
[30] PFs, §3.88.

competing on the merits; and (ii) gave rise to an inefficient supply chain involving excessive frictional and transactional costs."[31]

3.5 In relation to point (a), the CMA observes that "*non-fault insurers and brokers usually refer non-fault drivers to a CHC for a replacement vehicle, which is then provided under a credit hire contract. On the other hand, when a claim is captured by the at-fault insurer, replacement cars are arranged directly between the at-fault insurer and a car hire company (direct hire)*".[32]

3.6 Based on this, the CMA's quantification of potential consumer detriment resulting from ToH 1 focuses on the extent to which credit hire costs are higher than that for direct hires, and then adds in various frictional costs incurred by insurance companies less the costs they would incur through managing the claims themselves. The CMA estimates that this results in £618 per claim in higher costs to at-fault insurers, with a net detriment of £290 per claim after deducting referral fees from which non-fault insurers and brokers profit[33] (the principles behind these estimates are discussed further in section 0). The CMA's estimates also suggest that it considers credit hire to cause by far the largest amount of net detriment in relation to ToH 1.[34]

3.7 The "*various practices and conduct*" outlined in point (b) above are expanded on later in the CMA's provisional findings, which set out that "*the party handling the claim has the opportunity to earn a rent on the non-fault claim (by charging the at-fault insurer more than the cost incurred)*",[35] resulting in the following effects:

"*(a) Claims handling and car hire intermediaries charge at-fault insurers more than the cost incurred, leading to disputes with at-fault insurers and a high level of frictional and transactional costs. Claims handling and car hire intermediaries in turn compete to obtain work via referral fees and this provides non-fault insurers, brokers (and others) with an opportunity to earn a rent.*

(b) Some, but not all, non-fault insurers directly charge at-fault insurers more than the cost of repairs incurred (though the practice of one insurer is currently subject to litigation in the appeal courts).

(c) When cars are written off, at-fault insurers may not receive the full salvage value of the car."[36]

The latter two points ((b) and (c)) are clearly irrelevant to credit car hire. As regards (a), it should be noted that DAML pays only limited referral fees.[37]

[31] PFs, §50.
[32] PFs, §6.13.
[33] CMA, revised Working Paper "*Estimation of the detriment from the separation of cost liability and cost control (theory of harm 1)*" ("Revised WP"), 12 June 2014, Table 12 (of §123).
[34] See, e.g., Revised WP Table 17 (of §136).
[35] PFs, §6.86.
[36] PFs, §6.87.
[37] See further Credit Hire market report, §5.41-§5.45.

3.8 The CMA also considers that separation gives rise to "*frictional and transactional costs...Insurers and brokers are competing to find ways of earning a rent from their control of non-fault claims, rather than simply 'competing on the merits'*".[38]

3.9 In response to this AEC, the CMA proposes a number of remedies. The most significant from DAML's perspective, and the focus of this report, is a dual rate price cap relating to temporary replacement vehicles provided to non-fault claimants, "*with a low rate cap based on average direct hire daily rates plus fixed replacement vehicle arrangement costs and a high rate cap calculated as a multiple of the low rate cap*".[39] This price cap would be "*mandatory for all those involved in the provision of replacement vehicles to claimants (insurers, brokers, CHCs/ CMCs* [claims management companies], *repairers and vehicle recovery providers)*".[40]

3.10 Given the CMA's AEC finding relates, in substance, to CHCs, and the price cap remedy is likely to significantly impact CHCs and their customers, it is surprising that the CMA does not appear to have investigated a number of issues relating to CHCs that seem relevant to its AEC finding and price cap remedy.

Relevant economic issues

3.11 There are three particularly substantive issues to be addressed in this report.

What are the interests of non-fault drivers seeking credit hire?

3.12 Firstly, there is an important question regarding the types of customers that credit hire seeks to serve, and what their needs and interests are. The fundamental purpose of credit hire is to ensure that a party who is not at fault is able to obtain a suitable replacement vehicle. I understand that there is a substantial body of case law which emphasises the importance of ensuring that non-fault claimants obtain access to their full tortious rights.[41]

3.13 However, the CMA has not carried out any analysis of the characteristics of credit hire consumers or whether their legal requirements are in fact currently being met. In particular, the CMA has not considered whether many non-fault consumers are not offered a replacement vehicle at all. Nor has it considered a non-fault claimant's overall bargaining position should she accept direct hire from the at-fault insurer. (For example, what if there were a dispute between the at-fault insurer and a non-fault claimant as to the value of a car written off and where that insurer is directly providing replacement car hire? Since the insurer can terminate the car hire, this is likely to confer (directly or indirectly) negotiating leverage to the at-fault insurer over the claimant. In my view, this is highly relevant to the identification of the AEC for reasons considered further below.

[38] PFs, §6.88.
[39] PRs, §7(a).
[40] PRs, §2.57.
[41] See, e.g., Litigation report, §4.1ff.

3.14 Moreover, these matters are also highly relevant to the appropriate remedy. It is difficult to see how a proper cost-benefit analysis of the CMA's proposed price cap can be carried out without such analysis.

Why is there separation between cost control and liability?

3.15 In the present case, the CMA asserts that the separation between liability and cost control costs the at-fault insurer some £618 per credit hire claim.[42] This begs an obvious question as to what steps may insurance companies take to minimise those costs? If they do not take those steps, that begs the subsequent question, why not?

3.16 The first opportunity which the insurance companies have to minimise credit hire costs is to "capture" the claim by contacting the non-fault consumer after their own (at-fault) customer reports the accident to them and provides them with the contact details of the non-fault party (first notification of loss or "FNOL").[43]

3.17 The second opportunity arises once a claim for credit hire is contemplated. The solicitor acting for the non-fault party will contact the at-fault insurance company shortly thereafter or indeed before the credit hire has commenced (for example, if the car is still driveable and the car is being booked in for repair sometime in the future). Indeed, the CMA has explicitly acknowledged in its provisional findings that insurance companies can minimise the costs of credit hire via this route:

"*If the non-fault driver enters a hire agreement of either type, the courts will consider whether they were offered an equivalent vehicle free of charge, when assessing the reasonableness of the claim for hire costs. The courts will not normally take account of the availability of a replacement vehicle under a non-fault driver's insurance policy. A non-fault driver does not have to accept an offer of a replacement vehicle from the at-fault insurer. However, under tort law principles,* ***it might be unreasonable to claim credit hire rates if the at-fault insurer offered the non-fault driver an equivalent replacement vehicle at a lower cost.*** *The at-fault insurer will have to demonstrate that sufficient information had been provided to the non-fault driver in order to allow the non-fault driver to make an informed decision whether to hire from a credit provider or to accept the offer from the at-fault insurer. They will be able to claim compensation for the actual rate incurred even if it is above local averages, provided it falls broadly into the range of local hire rates.* [FN 13 ***"In which case the non-fault driver would only cover the costs that the at-fault insurer would have incurred."***]"[44] (Emphasis added.)

3.18 The offer is commonly referred to as a "Copley offer" after the Court of Appeal decision in *Copley v Lawn.*[45] The key point to appreciate is that at-fault insurers can make an offer of a replacement vehicle to the non-fault claimant at any point in the credit hire or indeed before

[42] The at-fault insurer will not earn any offsetting referral fees from claims against them, so on the CMA's analysis these claims do cost the at-fault insurer £618.
[43] See further Credit Hire market report, §6.3ff.
[44] PFs, §3.19.
[45] See further Litigation report,§6.1ff.

the credit hire commences. Subject to compliance with certain requirements set out in the court decision about what content and level of information is to be provided to the non-fault claimant, a Copley offer would then limit the charges that the claimant can recover from the at-fault insurer, if the claimant unreasonably refuses or ignores the offer.

3.19 Indeed, I understand that the solicitor instructed by DAML at Armstrongs writes almost immediately to the at-fault insurer, on being instructed, which may be before any credit hire has commenced (if the car is driveable and the repair is occurring later) or shortly after credit hire has commenced.[46] This is essential given the claimant's legal requirement to mitigate their losses, and the claimant would thus otherwise be prejudiced if the at-fault insurer was not provided a further opportunity to intervene. Moreover, the case studies provided in the Credit Hire market report indicate that Armstrongs writes on more than one occasion to request payment and inform the insurance company that credit hire is continuing.[47]

3.20 However, the CMA simply disregards this possibility by stating that:

> ***"In practice, this type of strategy to capture customers is unusual.*** *We note that under the ABI General Terms of Agreement between subscribing insurers and credit organizations (the GTA—see paragraph 3.89), insurers and CHCs agree not to intervene once a non-fault driver has been captured by another entity (referred to as the 'first to a customer' principle).*[48] (Emphasis added)

3.21 It is puzzling that the CMA has not assessed at all why *"this type of strategy to capture customers is unusual"*, since this would remove the separation between liability and cost. If 'capture' were a commonplace feature of credit hire cases, *"the non-fault driver would only cover the costs that the at-fault insurer would have incurred"*. As set out in the Credit Hire market report[49] and in the sections below, DAML is not party to the GTA and can confirm that this is also the case as regards its claims. (As an aside, if the separation issue were some aspect of the GTA, this issue could be readily addressed by amending the GTA). Given the above, it would seem pertinent to consider what steps the insurance companies do take and also to assess the incentives that motivate their conduct. However, the CMA does not do so.

3.22 In the event that the not at-fault driver's car has been written off, the third opportunity for insurer to reduce the cost of credit is to reduce its duration by paying out the value of the car quickly. This payment can be made on "a without prejudice" basis, which is sufficient for the claimant to lose her tortious right to credit hire.[50] Again, the CMA has not considered this possibility.

[46] Credit Hire market report, §5.26.
[47] Credit Hire market report, §5.24ff.
[48] PFs, §3.19.
[49] See, e.g., Credit Hire market report, §1.8.
[50] See further Credit Hire market report, §5.26.

3.23 The most likely answer as to why at-fault insurers do not seek to gain such control is that they have a strong cost incentive to under provide. It is my opinion that, by choosing not to offer all claimants a replacement vehicle, insurers would save costs by "losing" claims along the way. In particular, claimants ignorant or uncertain as to their legal right to a replacement vehicle, or who have simply been dissuaded from pursuing their rights due to a combination of uncertainty, hassle, inconvenience and inertia, will simply adopt the default position of not having a replacement car.

3.24 I assume that the issues of under provision are uncontroversial. Indeed, the CMA acknowledges that "*in the absence of separation insurers (ie if at-fault insurers handled all claims from non-fault parties) insurers would have an incentive to under-provide on service as well as to control costs*".[51]

3.25 Moreover, the CMA is instead explicit that its assessment of harm does not consider insurers' incentives to reduce costs by providing fewer replacement cars, nor what this would mean to non at-fault claimants. For example, in its paper on the "*Estimation of the detriment from the separation of cost liability and cost control (theory of harm 1)*" the CMA states that:

"*We do not include in any of our calculations of the detriment any cost savings to insurers (and consequent benefits to consumers from lower premiums) from providing fewer replacement cars if there were no separation*".

"*We do not reflect in any of our calculations any benefits of separation to claimants who would otherwise not be provided with a replacement car, or would get only a courtesy car from a repairer.*"

Why are CHCs' costs high, and therefore would a price cap achieve the CMA's aims?

3.26 The third substantive issue relates to why credit hire prices are higher than direct hire prices? It is striking that the CMA has not considered at all the actual costs of CHCs, such as DAML, nor carried out any assessment of why these costs generate higher prices. This omission is surprising since these costs are the source of the AEC which the CMA has found, and the CMA asserts that its proposed price cap "*will cut out some of the inefficiencies in the system*".[52]

3.27 A price cap could in principle remove excessive profits, but the CMA acknowledges that it had "*not seen evidence that CHCs earn more than normal profits*", and "*consider it unlikely that CHCs earn more than normal profits*".[53]

3.28 Even if CHCs are not earning excessive profits, their costs could be too high if CHCs' had incentives to compete excessively in paying referral fees, since they would not be able to

[51] CMA, revised Working Paper "*Estimation of the detriment from the separation of cost liability and cost control (theory of harm 1)*" ("Revised WP"), 12 June 2014, §25.
[52] To quote the CMA's press release.
[53] PFs, §6.17.

recover such fees if they were not covered by the price cap. However, this misses the point that DAML expenditure on such fees is limited (but some payments are unavoidable due to the scale of the payments made by its larger competitors) and that DAML is opposed to them.[54] More generally, a more direct way of removing referral fees would be to ban them; this point is considered further in section 7.

3.29 Businesses earning limited profits have incentives to control their costs. Moreover, CHCs' costs are, in fact, largely outside their control since they are largely determined by the conduct of insurers in their handing claims or other third parties (such as the costs of procuring car hire or the costs of insuring cars).[55] In such circumstances, the imposition of large price reductions could compromise the very existence of CHCs, including DAML.

3.30 These issues are explored in turn below.

[54] See further Credit Hire market report, §5.41-§5.45.
[55] See further Credit Hire market report, §4.14.

4 CHARACTERISTICS OF COMPETITION IN AND CUSTOMERS OF CREDIT CAR HIRE SERVICES

4.1 This section sets out: (i) a summary of the CMA's analysis of competition in credit car hire services and the types of customers that use those services; (ii) the nature of competition within credit hire services; and (iii) the characteristics of the consumers whom use those services, in particular a class of impecunious customers.

Summary of the CMA's analysis

4.2 It is surprising that the CMA has not investigated in any depth the nature of competition within the credit hire market, particularly since the CMA's own guidelines observe that remedies to control outcomes – most commonly price caps – "*directly overrides market signals with the result that it may generate distortion risks over time that increase the effective cost of the remedy or reduce its effectiveness*".[56] This suggests that in order to impose a price cap, the CMA would need to conduct a detailed assessment of existing competition in credit hire, and whether this would be distorted by the remedy.

4.3 The CMA attempts to address this in its provisional remedies decision by stating that:

"*due to the separation of control and liability, there is no competition over the amount that can be charged to the at-fault insurer. Rather, the amount that can be charged to the at-fault insurer is currently determined by GTA rates or, for claims outside the GTA, by the basic hire rate. Competition between CHCs/CMCs is instead over the referral fee paid to referring parties. Our proposed remedy would not reduce competition between CHCs to obtain business from referring parties, though it would affect the level of any referral fee paid*".[57]

4.4 The CMA does not advance any further facts or discussion of competition in credit hire. In particular, the CMA does not appear to have considered at all how competition may differ between CHCs that are party to a voluntary protocol (the General Terms of Agreement ("GTA")) with the Association of British Insurers ("ABI"), and those that are not. Similarly, the CMA appears unaware that DAML only pays limited referral fees and thus the CMA's observations do not apply to it to any material degree. As noted above, if the CMA is concerned about the level of such referral fees it could simply ban them, which we understand would have DAML's support and this point is considered further in section 0.

4.5 In relation to the types of customers that use credit hire, the CMA notes that if credit hire is used, any credit costs over and above the "spot rate" (car hire rates to retail customers) can only be recovered if the non-fault party had no choice but to use a CHC, e.g. they are "*impecunious*".[58]

[56] Competition Commission guidelines adopted by the CMA, "*Guidelines for market investigations: Their role, procedures, assessment and remedies*", April 2013 §89.
[57] PRs, §2.104.
[58] PFs, §3.18.

4.6 It is surprising that, having noted this point, the CMA has not undertaken any substantive investigation into impecunious not at-fault claimants who – unlike other customers – have no choice but to use a CHC. Consequently, the CMA has also not considered the characteristics of impecunious customers, nor the type of services that such impecunious customers value and require. Nor has the CMA sought their specific views (for example, through a consumer survey focusing on such customers). Moreover, the CMA has had no consideration of the specific impact of its proposed remedies on such consumers.

4.7 The characteristics of competition and customers in credit car hire – and what the CMA may have found had it adequately investigated them – are discussed further below.

Competition within the credit hire market

4.8 Credit car hire is provided by two main types of providers:

(a) those who are party to the agreement to the GTA with the ABI (referred to henceforth as "ABI CHCs"). As the CMA notes, the GTA "*sets out the terms, conditions and rates of credit hire for replacement vehicles to non-fault claimants*".[59] The Credit Hire Organisation submitted to the CMA that an estimated 77% of credit hire and credit repair claims are settled under the GTA.[60] The largest of these ABI CHCs are Helphire and Enterprise Hire-a-Car; and

(b) those who are not party to the GTA, commonly referred to as "independent" CHCs, of which DAML is one of the largest.

4.9 The mode of competition to win customers for these two types of providers tends to differ significantly, as set out further in the Credit Hire market report, where:

(a) ABI CHCs receive most of their customer volumes through referrals from non-fault insurers and brokers (although they do not have to exclusively serve these customers). ABI CHCs tend to have contracts with an insurer for a certain volume of customers.[61] The GTA daily hire rates charged by ABI CHCs tend to be lower than those charged by independent CHCs, because the GTA offers incentives that ABI CHCs will be reimbursed within a certain time period (the GTA rates are linked to the amount of time it takes to reimburse the CHC);[62] and

(b) independent CHCs generally advertise for their customers (who are typically those not served by either non-fault or at-fault insurers, set out further below). This includes advertising in local garages that are typically their customers' first point of call, as well as with recovery and storage agents, via brokers and on the internet. Accordingly, independent CHCs do not compete on referral fees (DAML pays only

[59] PFs, §3.89.
[60] PFs, Appendix 6.1, §7.
[61] Credit Hire market report, §4.15.
[62] Credit Hire market report, §4.19 - §4.21.

limited referral fees to garages), but mainly compete on the service quality provided and reputation.[63]

4.10 In short, the CMA does not seem to appreciate how CHCs compete, namely they compete to best serve non at-fault claimants' interests. Given that compulsory third-party insurance is intended to protect such interests, it is essential to recognise the importance of this competition, and thus the costs which CHCs incur in order to compete.

4.11 As an illustration of this point, the CMA observes that collision damage waiver ("CDW") cannot be recovered from the at fault insurer under terms of the GTA.[64] This, however, does not reflect claimants' legal entitlements; it is simply an industry agreement.[65] All of DAML's clients, on the other hand, are entitled to protect the vulnerable position in which they have been placed, by taking of CDW and TEW (theft excess waiver) in respect of the rental of the hire vehicle. A CHC's insurance is typically one of its largest operating costs as it reflects the significant risk of insurance to the insurer of the hire company in provision of hire vehicles to individuals who are treated as high risk (e.g. 17 year olds, those with driving penalties which can include previous bans etc.) as such the excess of such an insurance policy are high.

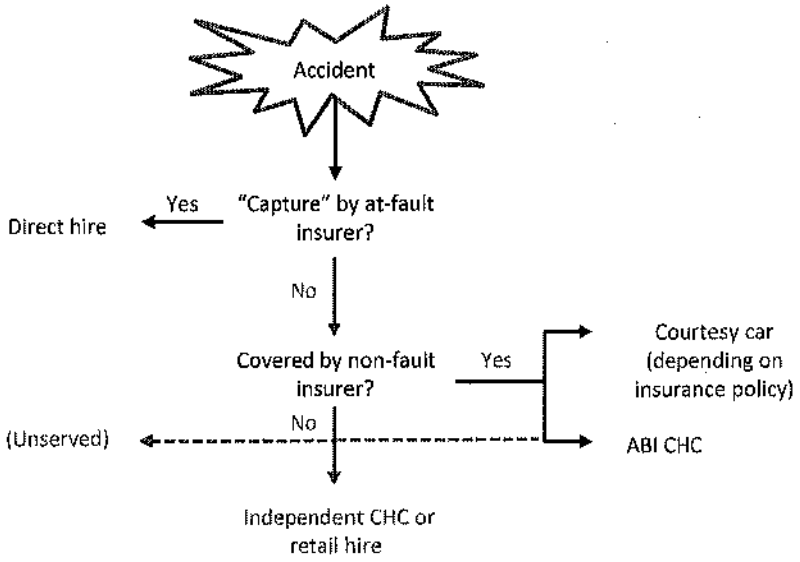
4.12 One theoretical possibility is that CHCs' focus on referral fees and high service quality might enable them to earn excessive profits, due to a lack of emphasis on price. However, the CMA acknowledges that it had "*not seen evidence that CHCs earn more than normal profits*", and "*consider it unlikely that CHCs earn more than normal profits*".[66] Moreover, insurers already have the means through their legal rights to constrain CHCs' costs, for example by using a Copley offer as already discussed.

Types of customers in credit car hire

4.13 The CMA has also failed to consider the different types of customers being served by credit car hire. In particular, a class of customers are currently being served mainly by independent CHCs through a selection process in the market, where these customers have not been captured by at-fault insurers, nor been served by non-fault insurers (often because they are only covered by third party insurance) and they lack the funds to purchase car hire directly. (There may be a remaining number of non-fault drivers who have "fallen through the gaps" and not been served at all.) This particular category of customers is highly vulnerable for the reasons considered further below. This selection process is set out in more detail in the Credit Hire market report,[67] and summarised in the figure below.

[63] Credit Hire market report, §4.14(iii).
[64] CMA, revised Working Paper "*Estimation of the detriment from the separation of cost liability and cost control (theory of harm 1)*" ("Revised WP"), 12 June 2014, footnote 17.
[65] See further Litigation report, section 5.
[66] PFs, §6.17.
[67] Credit Hire market report, §4.1.

Figure 1: Selection process for impecunious customers



4.14 In short, it is important to appreciate that the type of customers DAML serves may differ markedly from the average non-fault claimant with a legal entitlement to a replacement car. Instead, as an independent, DAML focuses on serving all impecunious claimants without exception whose legal entitlements would not otherwise be served – regardless of age, language barrier, need for any type of vehicle, endorsement on policy and/or previous driving bans etc. This obviously affects insurance and vehicle costs.[68] These impecunious and vulnerable customers share a number of common characteristics that distinguish them from both direct hire customers and other credit hire customers, as set out further in the Credit Hire market report and which typically include:

(a) earning annual income well below the national average. For example, for a random selection of 140 DAML clients, the average gross annual salary is £13,732,[69] which is about half the national median gross annual earnings for full-time employees of £27,000;[70]

(b) little or no other access to funds to obtain a replacement car. For example, the financial documents of the randomly selected 140 DAML clients show common features including being overdrawn throughout the hire period, any income (salary or benefits) taken up with outgoings such as rent and bills, no savings or spare funds in any current account, no overdraft facility and/or credit cards, or credit cards that are "maxed out" or close to the authorised credit limit. More generally,

[68] Such customers could also choose an ABI CHC to provide them with a replacement car, but this is less common.
[69] Credit Hire market report, §4.34.
[70] Office of National Statistics, Annual Survey of Hours and Earnings, 2013 Provisional Results. Median gross annual full-time earnings cited are for the year ending 5 April 2013.

customers may also have a poor credit history or even a bank account (or only one offering a cash card);[71]

(c) some 98% of DAML's customers are referred from garages/recovery or storage agents or call from their premises, and they are otherwise without any assistance;[72] and

(d) the vulnerability of these customers is often further increased by their personal circumstances, in terms of language, education and understanding. For example, a substantial minority do not speak English (or do not speak it as their first language). For DAML, out of 3505 hire claims in 2013, around a quarter involved customers for whom English was not their first language, and another 13% of customers did not speak English at all.[73] To put these figures in context, the 2011 Census indicates that only 138,000 people living in England and Wales did not speak English and only 8 per cent did not have English or Welsh as their first language.[74]

4.15 The Credit Hire market report also observes that these customers are likely to have only the minimum legal requirement in insurance cover, and to have a poor understanding of insurance protocols.[75]

4.16 The CMA states in a footnote in Appendix 6.5 that "*the test for impecuniosity does not appear to be clear and, with the exception of WNS Assistance, the CMCs/CHCs on our sample do not appear to assess whether a driver requires a replacement car on credit terms*".[76] This does not reflect DAML's experience. [redacted]

4.17 Moreover, impecuniosity is strictly assessed and challenged by insurers and third parties, as set out in the Credit Hire expert report.[78] For example, in a random selection of 140 DAML clients, 80 of these are likely to be assessed as clear-cut cases of an impecunious client, but the remaining 60 clients are likely to face a dispute (e.g. because the client's bank statements demonstrate lack of funds but the at-fault insurer may suggest the claimant should have taken out a loan or credit card to spot hire or replace their vehicle).

4.18 Such characteristics are likely to affect the degree to which these customers are aware of their tortuous rights, and their ability and willingness to bear the risks of seeking redress without intermediation, as compared with direct hire customers. These characteristics also

[71] Credit Hire market report, §4.37, §3.3.
[72] Credit Hire market report, §4.1.
[73] Credit Hire market report, §3.4.
[74] See further http://www.bbc.co.uk/news/uk-21259401.
[75] Credit Hire market report, §3.3-§3.4.
[76] PRs, Appendix 6.5, footnote 6 (to §49).
[77] Credit Hire market report, §4.24.
[78] Credit Hire market report, §4.26, §4.29ff.

mean that certain market failures, such as the under provision of replacement cars, are likely to affect these customers to a greater extent than other types of customers.

4.19 As emphasised in the Credit Hire market report,[79] and set out in more detail in section 0 below, all of these characteristics must be judged in light of the fact that those whose accident is so severe that they have lost the use of their car may well be shaken, upset or hurt, and people may have such accidents only infrequently. Other studies of consumer behavioural traits suggest that consumers make poor decisions in financial markets even in less stressful scenarios, particularly in circumstances where there are information asymmetries (for example, consumers have low awareness and understanding of their tortious rights). In the present case, the "default option" – i.e. what happens if the non-fault claimant does nothing – is that they would receive no replacement vehicle at all or something inadequate, regardless of their legal entitlements.

Section conclusion

4.20 To summarise the discussion above:

(a) it is surprising that the CMA has not considered in more detail the nature of competition in credit hire services and the types of consumers that use such services, given its ToH 1 and associated remedy would significantly impact them;

(b) had the CMA investigated competition in credit hire in more detail, it would have found that ABI CHCs (which are party to the GTA) compete differently for customers as compared with independent CHCs, but that both face constraints on their charges through legal rights that insurers possess but do not fully utilise; and

(c) had the CMA investigated credit hire customers in more detail, it would have found that there is a class of impecunious customers that are not captured by at-fault insurers nor covered by non-fault insurers, but are mainly served by independent CHCs. These customers have distinctive characteristics such as low income, limited or no access to funds and English as a second language (or speaking no English at all).

[79] Credit Hire market report, §4.6.

5 ECONOMIC EFFECTS OF 'SEPARATION'

5.1 This section discusses: (i) the inherent incentives for at-fault insurers to under provide redress to non-fault parties, which the CMA mentions but does not adequately capture in its analysis; and (ii) the effect of under provision on impecunious customers in particular.

Incentives to under provide redress

5.2 The CMA emphasises that "*one of the basic incentive mechanisms of competition in many markets is not present in the treatment of non-fault parties: the party paying for the service is not the party receiving its benefits*".[80]

5.3 The CMA's analysis focuses primarily on only one of the two dimensions of the economics of separation, namely CHC's costs being too high – but without considering why at-fault insurers do not seek to control these costs through capturing claims at the outset, the use of so-called Copley letters, or making without prejudice payments quickly on written off vehicles so that credit hire is terminated quickly. The second dimension is that the at-fault insurer has no incentive to incur costs to the benefit of not at-fault claimant, particularly where it is not their insurer (in a small minority of cases an insurer may cover both the at-fault and not at-fault parties). This is dealt with in a cursory manner, in the sense that the CMA merely acknowledges the possibility that under provision may occur. However, as noted above, it has concluded that it is irrelevant to its assessment of the AEC.

5.4 In my view, this emphasis on one element of the economics of insurance from the perspective of at-fault insurers is mistaken. As the CMA sets out, the intention of compulsory third party motor insurance is "*to ensure that all non-fault parties are protected, regardless of the financial status of the at-fault driver*".[81]

5.5 The compulsory nature of this insurance recognises that, absent legislation, the market is likely to significantly under provide redress for non-fault parties. Indeed, in the absence of compulsory third party insurance:

(a) non-fault parties would most likely need to rely on litigation for redress. This would involve incurring upfront costs that many claimants would consider significant, while bearing the risk of litigation being unsuccessful, potentially deterring many from seeking redress; and

(b) redress would be dependent on the financial solvency of the at-fault driver.

5.6 Even with compulsory third party insurance, at-fault insurers are likely to face inherent adverse incentives to under provide redress where possible, since the non-fault claimant is not their customer and reputational damage is potentially weak. These incentives may actually be exacerbated by intense price competition, since such competition would strengthen incentives to save costs through under provision. The CMA provisionally found

[80] PFs, §5.2.
[81] PFs, §3.6.

that insurers faced intense price competition on price comparison websites, and high levels of switching for phone and own-website sales.[82]

5.7 The CMA focuses its analysis on whether insurers have under provided on the quality (e.g. class) of vehicle through direct hire as compared with credit hire. The CMA provisionally concludes that while quality differences between direct hire and credit hire are small, its evidence suggests that quality of service is better under credit hire.[83] Moreover, the CMA acknowledges that the existence of CHCs "*was likely to give insurers the incentive to provide a high quality of service to non-fault claimants*".[84]

5.8 However, the CMA does not consider whether insurers attempt to avoid providing replacement vehicles at all, or the reimbursement for these. A market which does not deliver legal minimum requirements is one where there is serious market failure. It is one matter for prices to exceed costs, but another for consumers' legal entitlements not to be met at all. It is puzzling that this has not been investigated in some detail.

5.9 This is particularly the case that there is UK court evidence and actual claim case studies which indicate that at-fault insurers attempt this through a variety of means, as set out in more detail in DAML's responses to the CMA's provisional findings and remedies and in the Credit Hire expert report, and include:

(a) delays in payments to clients (including payments in respect of damage to a client's vehicle), including cases in Liverpool County Court where Direct Line has admitted to postal delays of up to 9 months whereby post is ignored.[85] The CMA itself acknowledges that there is a longer payment period for credit hire as compared with direct hire that results in additional costs for CHCs. The CMA treats this as an offsetting benefit to insurers which **reduces** its detriment estimate associated with the high prices charged by CHCs.[86] This should instead be interpreted as evidence indicating that insurers deliberately act in an obstructive way, increasing costs substantially for CHCs and thus the price of credit hire. For example, Armstrongs and DAML report that between them they employ in excess of fifty people to chase outstanding invoices, which is an astonishing number given that they are relatively small undertakings.[87] This policy of delay and avoidance raises an obvious question of whether this enables the insurers to not meet claimants' legal entitlements; and

(b) making inadequate offers to provide replacement vehicles. For example, a matter heard before a circuit judge (His Honour Judge Platts) found that the advances of the at-fault insurer in question were aimed at forcing the non-fault party to settle without any legal advice, and that the insurer's "offer" was unclear and inadequate

[82] PFs, §5.13.
[83] PFs, §6.66.
[84] PFs, §6.38.
[85] DAML and Exchange Insurance Services, "*Joint response submission: Private Motor Insurance response to notice of provisional findings*" ("DAML joint response to PFs"), 17 February 2014, p.3.
[86] Revised WP, §85.
[87] DAML joint response to PFs, p.3.

in the information provided. The Judge held that the non-fault party had acted reasonably in staying with their CHC (DAML), and allowed their credit period and rate of hire in full to be reimbursed.[88] The CMA has merely surveyed consumers' views on the adequacy of the vehicles offered, but this is bound to be unreliable given many consumers' ignorance of their legal entitlements.

5.10 Therefore, a key potential economic benefit of having non-fault insurers and CHCs represent non-fault parties – and which the CMA appears to have omitted – is the mitigation of the at-fault insurer's incentives to under provide, with non-fault insurers and CHCs raising awareness of and enforcing the non-fault party's tortious rights. However, CHCs must incur costs to do so, and the extent to which they incur such costs depends on the nature of their customer base, including whether the CHC primarily relies on insurer referrals or is an independent CHC (such as DAML) which focuses on impecunious claimants who would not otherwise be served. The CMA's treatment of such costs are discussed in section 0.

5.11 Moreover, as discussed above, it is striking that insurers do not exercise their legal rights to control costs more frequently, for example in capturing claims and issuing Copley compliant offers, particularly given the intense price competition that the CMA suggests insurers face. The most likely explanation lies in this inherent incentive to under provide, where the cost savings of doing so may be greater than alerting customers of their tortious rights by attempting to capture the claim. The CMA does not appear to have considered or investigated this point (e.g., by reviewing insurers' internal documents on their strategies/policies as to the treatment of claims and how they "manage" increases in claims).

Effect on impecunious and vulnerable customers

5.12 The impact on CHC customers of any under provision in redress, and the role of non-fault insurers and CHCs in mitigating this, is likely to be exacerbated by a number of consumer behavioural factors including:

(a) any distress resulting from having been in an accident (which the CMA also remarks on in relation to informational remedies[89]), when the customer most requires assistance with the insurance process and with mobility;

(b) low awareness of tortious rights – for example, in the CMA's survey of non-fault claimants, 24% of respondents were not aware of their right to any replacement vehicle.[90] At-fault insurers would have an incentive to exploit such low awareness by not offering a replacement vehicle at all or an inadequate one;

(c) lack of familiarity with the redress process, particularly since most customers are in accidents rarely and do not have the opportunity of learning through repeat

[88] Credit Hire market report, §6.23ff.
[89] PRs, §2.24.
[90] PFs, §7.9(b).

experience. Again, without assistance and representation, at-fault insurers may have an incentive to exploit this lack of familiarity to under provide; and

(d) general behavioural biases when encountering financial services. The Financial Conduct Authority ("FCA") occasional paper and other studies in behavioural economics have found that behavioural biases affect decisions in retail financial markets in particular because most consumers find financial products complex and difficult to learn about, as well as requiring an assessment of risk and uncertainty.[91]

5.13 The under provision of redress is likely to affect impecunious customers to a greater extent than other customers, given that:

(a) a substantial minority of these customers speak English as a second language (or speak no English at all). As a consequence, it is likely that an even larger proportion of these customers are unaware of their right to a replacement vehicle and lack familiarity with the redress process (the CMA does not split out any results for impecunious customers in their survey); and

(b) a lack of access to funds means that these customers are less able and willing to bear the risk and costs of negotiating for a replacement vehicle without representation, even if they were aware of their rights.

5.14 Consequently, any attempts to under provide replacement vehicles by at-fault insurers are likely to harm customers, particularly in light of consumer behavioural factors. Therefore the services of non-fault insurers and CHCs bring substantial customer benefits; they mitigate such under provision. Moreover, these effects are likely to be larger for impecunious customers and otherwise vulnerable customers (e.g., due to language and understanding) than for others, given they are more likely to be unaware of their rights and less able to bear the risk and costs of enforcing their rights without representation.

Section conclusion

5.15 In summary for this section:

(a) at-fault insurers have an inherent incentive, and have made various well documented attempts, to under provide redress to non-fault parties by avoiding the obligation to provide a replacement car (or the reimbursement of the CHC for it). For each documented attempt, it seems reasonable to assume that there is a large number of other consumers who simply reverted to their default option of doing without a replacement car, notwithstanding their legal entitlements. Accordingly, a key potential economic benefit of having non-fault claims handled by non-fault insurers and CHCs is their role in mitigating this under provision by enforcing non-fault customers' tortious rights. The CMA does not appear to have considered this; and

[91] FCA, "*Occasional Paper No. 1: Applying behavioural economics at the Financial Conduct Authority*", April 2013, p.16.

(b) under provision is likely to harm credit hire customers, particularly in the light of findings in behavioural economics, but impecunious customers are especially likely to be less aware of and able to enforce their rights without representation.

6 THE CMA'S CONSUMER DETRIMENT ESTIMATE

6.1 This section analyses: (i) the components of the CMA's estimate of potential consumer detriment arising from ToH 1; and (ii) how this relates to the issue of under provision discussed in the previous section.

The components of the CMA's estimated consumer detriment

6.2 As already outlined, the CMA considers that a potential detriment arises as a result of the fact that credit hire costs are higher than direct hire costs. It estimates that this results in £618 per claim in higher costs to at-fault insurers. Deducting the CMA's referral fees (of £328 per claim), from which non-fault insurers and brokers profit, leave a net detriment of £290 per claim.[92]

6.3 The remaining net detriment of £290 per claim can be further disaggregated into:[93]

(a) costs of £78 per claim, which the CMA describes as resulting from "*frictional and transactional costs incurred by an at-fault insurer when dealing with a CHC*".[94] The CMA observes that "*certain costs may be an unavoidable consequence of separation, and therefore cannot be remedied without removing separation*";[95] and

(b) the remaining difference between credit and direct hire costs (£238 i.e. £566 of difference minus £328 of referral fees), less the management costs that at-fault insurers would have incurred in directly managing the vehicle provision (£27 per claim). This nets to £212 per claim. The CMA does not give a specific explanation of this remainder, but notes that apart from excessive frictional and transaction costs, the other effect of separation is "*the earning of rents from the control of non-fault claims*".[96]

6.4 My general comments on the difference between credit and direct hire costs, and more specifically on the two components of remaining net detriment set out above (particularly in relation to at-fault insurers' incentives to under provide redress), are set out below. These focus on points of principle, rather than the exact quantum of the CMA's estimates.

How the CMA's estimated consumer detriment relates to under provision

6.5 As already mentioned, it is striking that the CMA has not considered in detail the actual costs of CHCs, such as DAML, nor carried out any assessment of why these costs generate higher prices as compared with direct hire prices.

6.6 It is important in making price comparisons that one compares apples with apples. For example, if one wished to assess whether Sainsbury's is cheaper than Asda then one must

[92] Revised WP, Table 12 (of §123).
[93] Revised WP, Table 12 (of §123).
[94] Revised WP, §2.
[95] Revised WP, §27.
[96] Revised WP, §2.

compare a shopping basket that contains the same mix of products, which here will include the car provided, the risk profile of the driver (which determines insurance costs), the insurance cover offered, and additional products/services.

6.7 The CMA does make two adjustments to its net detriment analysis to try to account for the mix of vehicles provided (the CMA applies the distribution of vehicles provided under credit hire to its analysis of direct hire charges as well).[97] The CMA also states that it uses the revenues of the main direct hire providers to ensure that charges for additional services such as young or high-risk drivers, automatic cars, estate cars, tow bars or roof racks and child seats are captured.[98]

6.8 However, car hire insurance costs are driven by the risk characteristics of the driver and the services/products they require. The CMA has not similarly imposed the distribution of drivers under credit hire to its analysis of direct hire charges as well, and it expressly admits that it has not done this in footnote 16 of its revised WP. This is not a detail. For example, we understand that Enterprise, the largest direct hire company, does not hire cars to drivers under 25 years old,[99] whereas DAML offers insurance (including collision damage waiver and theft waiver) to all of its customers whatever their risk profile (age, driving experience, points on licence etc).

6.9 However, there is a range of other potentially significant reasons for why these costs vary. In particular, the CMA does not consider how the conduct of the insurance companies increases CHCs' costs (as discussed above). Moreover, these reasons are likely to differ depending on the business model and cost structure of the CHCs being examined, in particular, whether ABI CHCs or independent CHCs are considered, given the differences in operations and modes of competition discussed in section 0. For independent CHCs, other significant reasons for cost differences with direct hire could include:

(a) additional and tailored services for impecunious customers that direct hire would not provide. These include advice, language interpretation and assistance.[100] Moreover, there may be other increased costs to serve these customers, for example in terms of higher insurance premiums due to customer mix and profile. These are necessary costs incurred to serve a group of customers who are not served by the insurers and therefore may otherwise not be served; and

(b) advertising/marketing costs to raise awareness of the business and compete for customers. Again, because independent CHCs compete for individual consumers, they must incur advertising/marketing costs that direct hire companies do not.

[97] Revised WP, §114.

[98] Revised WP, Table 3 (of §60).

[99] See Enterprise website ("Enterprise Rent-A-Car Age Policy for UK Car Rentals* For vehicle classes A to F, mini MPV and all vans, the driver must be 25 years of age or over. For all other vehicle classes, the driver must be 30 years of age or older. * Other restrictions may apply. For information relating to restrictions, please call our contact centre on 0800 800-227"). http://www.enterprise.co.uk/car_rental/agePolicies.do;jsessionid=DLS1T7cc3gQQkm418LBf0dHqZPkvQhpLQdx2msvxY1cR7Cl12cQe!1245288132?transactionId=WebTransaction1

[100] Credit Hire market report, §4.21.

6.10 The CMA does not appear to have considered these potential reasons in any detail or conducted any detailed analysis of CHCs' costs. These factors raise a significant question of whether direct hire charges are the right benchmark for independent CHCs in particular, given the significant differences in services provided and business models operated.

6.11 Regarding more specific comments, the CMA appears to regard the "*frictional and transactional*" cost of £78 per claim as a deadweight loss for customers. However, as set out above, there are key economic benefits resulting from separation. This is because there are inherent incentives for at-fault insurers to under provide, i.e. not provide a replacement vehicle at all (or not reimburse a CHC for this), creating a role for non-fault insurers and CHCs to enforce non-fault claimants' tortious rights. The CMA asserts that it has "*compared actual outcomes against a benchmark where not-fault claimants receive their legal entitlements*".[101] However, the CMA has emphatically not done this – instead the CMA has not considered at all whether claimants' legal requirements are being met.

6.12 Similarly, the CMA's rejoinder to Kindertons' point that "captured" customers are not protected to the same extent, as they are technically regulated clients of the at-fault insurer, can only be described as extraordinary.[102] The CMA simply observes that the insurer would remain liable for any damage. This seems to imply implausibly that the threat of litigation – which is likely to be low – is a serious constraint on any insurers' behaviour towards vulnerable individual consumers with relatively low awareness of their rights.

6.13 The CMA acknowledges that in the absence of separation:

> "*..insurers would have an incentive to under-provide on service as well as to control costs. However, it is not appropriate to take this into account in our assessment because the existence of a second potential problem (under-provision of service) does not preclude the existence of the problem we provisionally found (an inefficient supply chain involving excessive frictional and transactional costs).*"[103]

6.14 However, the two issues are clearly linked. This "*frictional*" cost is not a deadweight loss that is separate to the issue of under provision, but is actually incurred primarily to mitigate at-fault insurers' incentives to under provide. Accordingly, it is inappropriate to count this cost toward the CMA's detriment estimate.

6.15 Regarding the remaining £212 per claim of the CMA's net detriment estimate, it is appropriate to consider the following factors:

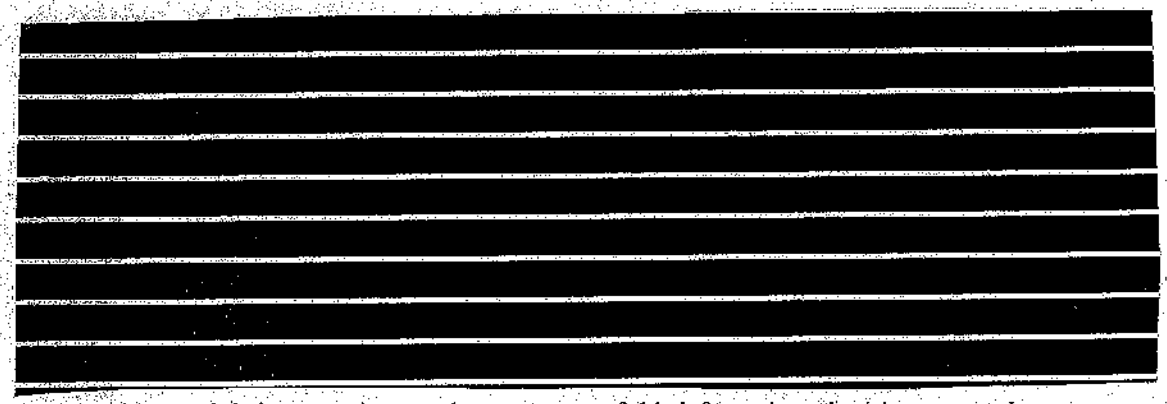
(a) as already outlined, the CMA has not seen evidence that CHCs earn excess profits, and indeed the CMA expects CHCs to earn normal returns. Accordingly, it is unlikely that this amount (which excludes referral fees) would consist primarily of the "earning of rents"; and

[101] Revised WP, §43.
[102] Revised WP, §42-3.
[103] Revised WP, §25.

(b) whether direct hire services are the right benchmark for CHC costs as set out above, particularly for independent CHC costs, given the different offerings and business models for each service. This applies across the entire service offering. For example, as regards the delivery and collection, the CMA asserts that "*credit and direct hire provide a similar level of service*".[104] The CMA observes that many customers of Enterprise chose to pick up their vehicles from its site, but they do not consider whether they are making this choice due to the delays that would otherwise occur due to Enterprise's service levels.

6.16 Moreover, there appear to be serious issues with the approach that the CMA has taken to estimating the £78 per claim of frictional cost and £27 of saving from at-fault insurers managing the claim themselves. In particular:

(a) the CMA appears to have obtained these estimates by simply asking insurers for estimates.[105] This is not a bias-free source of information, and the CMA does not mention having cross-checked the estimates with any actual factual information as to costs;



(c) it is inappropriate to take an average of this information, given its range and poor quality. However, the CMA has done so[109] to reach its estimates of £78 and £27.

6.17 Therefore, based on the observations made, the CMA does not appear to have adequately investigated the potential reasons for any difference between direct hire and credit hire costs, including the extent to which these costs are attributable to the conduct of at-fault insurers. Instead, it appears to me that the CMA has identified costs that are necessary for the enforcement of non-fault claimants' rights in the market, which do not actually result in any detriment.

[104] Revised WP, §56-57.
[105] The CMA "*asked insurers to estimate their claim handling costs for different categories of claims.* [It] *requested the average incremental cost that would be determined by a significant number (1,000) of extra claims...*" Revised WP, Appendix E, §3.
[106] See the Excel document "New detriment estimation (anonymized).xlsx", tables in the "Insurers' costs" tab.
[107] "Insurer 2" in the Excel document.
[108] "Insurer 10" in the Excel document.
[109] Estimates from each insurer are weighted by the gross written premium for that insurer.

Section conclusion

6.18 To summarise the comments set out above:

(a) the CMA does not appear to have investigated in any detail the potential reasons why costs for CHCs may be higher than those for direct hire, including as regards the costs of independent CHCs versus ABI CHCs;

(b) the CMA's net detriment estimate can be divided into £78 per claim of "*frictional and transactional*" cost and £212 per claim of the remaining difference between credit and direct hire costs (less the management costs that at-fault insurers would have incurred);

(c) however, the £78 per claim is not a deadweight "frictional and transactional" cost, but incurred to enforce non-fault claimants' tortious rights, mitigating at-fault insurers' incentives to under provide; and

(d) the remaining £121 per claim is unlikely to be excessive profits or rents being earned given the CMA's expectations of normal profits of CHCs in the credit hire sector. Instead, this is likely to be the cost of additional services offered by CHCs over and above those offered by direct hire companies. For independent CHCs, this is likely to consist of services tailored to its impecunious customers, including advice, language interpretation and assistance.

7 THE CONSEQUENCES OF THE CMA'S PRICE CAP REMEDY

7.1 Before specifically commenting on the CMA's price cap remedy, it is worth noting again that I disagree, at a basic level, with the nature of the AEC which the CMA has found. If the AEC has been misdiagnosed, any remedy will be equally misdiagnosed.

7.2 This section outlines: (i) whether the CMA's proposed price cap is likely to address any consumer detriment, given the discussion in previous sections of this report; and (ii) the likely effect of the CMA's proposed price cap were it to be imposed. In this context, it also considers what alternative remedies would directly reduce CHCs' costs.

Whether the CMA's proposed price cap is likely to address any consumer detriment

7.3 The CMA's proposed price cap is intended to "*reduce the cost of replacement vehicle provision to non-fault claimants without compromising claimants' tortious entitlements*".[110]

7.4 However, as discussed above, at-fault insurers appear to have adequate means of imposing a constraint on CHCs' costs, particularly through claims capture, sending Copley compliant offers, and making without prejudice payments quickly where vehicles have been written off so as to bring credit hire to a rapid end. These insurers have chosen not to fully utilise those means, for reasons that the CMA has not explored.

7.5 The CMA has rejected alternative remedies which would limit the separation between liability and costs,[111] but this does not justify why insurers cannot, for example, routinely send out Copley compliant letters at the earliest opportunity and secure control of credit hire costs. At-fault insurers may well object to this, because this could potentially substantially increase their provision of replacement vehicles. That, however, would only serve to highlight the under provision of replacement vehicles.

7.6 As already set out, the CMA expects CHCs to make normal returns, so that (excluding the referral fees which DAML does not pay to any material degree) there are no "rents" or excess profits as regards their profits that need to be controlled using the price cap.

7.7 The CMA's provisional findings on remedies also observes that there is no need for it to prohibit referral fees given its price cap remedy, treating it as a supporting remedy that is redundant with the price cap.[112] However, this misses the point. The CMA has specifically found that frictional costs are increased by the level of CHC charges[113], and according to its estimates, referral fees paid (£328) account for over half of the £618 in higher costs which at-fault insurers face. Accordingly, banning referral fees would itself make a substantial contribution to reducing these frictional costs. As noted already, I understand that DAML would unreservedly support such a ban.

[110] PRs, §2.50.
[111] See, e.g., PRs, §2.185 ff.
[112] PRs, §2.237.
[113] PRs, §2.81.

7.8 Furthermore, the identified net consumer detriment, that the CMA is trying to limit through the price cap, consists mainly of substantive costs incurred in enforcing non-fault customers' tortious rights. It is difficult to see how a price cap can incentivise CHCs to reduce costs which they cannot control, but are driven in large part by exogenous factors not in CHCs' control, such as the costs of vehicles, insurance and dealing with insurance companies.

7.9 However, the Credit Hire market report makes a much more direct suggestion for reducing CHCs' costs, namely regulating insurance companies' handling of credit hire claims so as to speed up claims resolution and reduce costs.[114] It is difficult to read the case studies set out in this report without alarm as to the insurance companies' conduct. This is not somehow a source of efficiency, as the CMA assumes, by reducing insurance companies' costs; this is inherently socially wasteful behaviour where the true cost saving to insurers is in a failure to provide redress to claimants in line with their legal entitlements. This is a serious form of market failure.

7.10 Given this, it does not appear that the CMA has adequate justification for imposing a price cap, particularly since there are more proximate and proportionate ways of reducing CHCs' costs and in a way that serves claimants' interests.

The likely effect of the CMA's proposed price cap

7.11 As discussed above, the CMA has not found any evidence that CHCs do not earn a normal profit, and indeed expects them to do so. Conversely, the CMA's proposed price cap sets prices at significantly lower levels for cases where liability is undisputed as compared to current charges (the CMA proposes a low rate cap of £583, which is half of the high rate cap that the CMA notes is "*approximately similar to the current GTA level*"[115]. Independent hire rates are currently higher than GTA rates, for reasons discussed in section 0).

7.12 This is likely to result in:

[redacted]

(b) potential adverse attempts at mitigating such losses, particularly if independent CHCs reduce or cease services to impecunious and vulnerable customers who incur higher costs to serve, resulting in such customers not being served at all. Logically, CHCs would choose not to serve customers which are difficult to communicate with, whose claim involves any substantive effort/cost and so on; and

[114] See further Credit Hire market report, §5.23.
[115] PRs, §2.88 and footnote 36.
[116] Credit Hire market report, §5.1ff.

[redacted]

Section conclusion

7.13 In summary, the discussion above sets out that:

(a) the CMA does not appear to have adequate justification for imposing a price cap; at-fault insurers appear to have adequate means of imposing a constraint on CHCs' costs, which they have chosen not to fully utilise for reasons the CMA has not explored. Furthermore, the CMA's identified net consumer detriment consists mainly of substantive costs, including costs which are increased by the conduct of insurance companies; and

[redacted]

ANNEX 1: ARMSTRONGS' INSTRUCTIONS AND REPORT STANDARDS

A1. INSTRUCTIONS

A1.1.1. I, Matthew J. Hughes of AlixPartners, have been instructed by Armstrong Solicitors Limited ("Armstrongs"), external legal advisers acting on behalf of Direct Accident Management Limited's ("DAML"), to provide an Expert Report in relation to DAML's response to the Competition and Markets Authority's ("CMA") provisional findings of 19 December 2013 and provisional remedies of 12 June 2014 in relation to its private motor insurance market investigation.

A1.1.2. As set out in the letter of instruction, I have been asked by Armstrongs to carry out the following:

(a) Read and review:

(i) The Provisional Findings Report (dated 17 December 2013);

(ii) The Notice of Possible Remedies under Rule 11 of The Competition Commission Rules of Procedure (dated December 2013);

(iii) The Provisional Decision on Remedies (12 June 2014);

(iv) revised Working Paper "*Estimation of the detriment from the separation of cost liability and cost control (theory of harm 1)*", 12 June 2014;

(v) The report of Mr. Peter Gradwell ("the Credit Hire market report") concerning the operation and nature of the Credit Hire market; and

(vi) A report detailing the legal issues raised by credit hire ("the Litigation report)

(b) Obtain whatever information considered to be necessary in order to analyse the Credit Hire sector.

(c) By reference to the documents above to address the following questions:

(i) What economic and other evidence would the CMA need to obtain in order to evaluate Theory of Harm 1?

(ii) What are the economic effects of 'separation'?

(iii) What are the economic effects of the 'various practices and conduct of the other parties managing such non-fault drivers' claims?

(iv) Do 'separation' or the 'various practices' create an Adverse Effect on Competition?

(v) If an Adverse Effect on Competition arises in this section, what remedies would most appropriately address that effect?

(vi) What will be the consequences of the proposed cap on credit hire rates?

A2. STANDARDS OF THIS REPORT

A2.1.1. At the request of Armstrongs, this report has been prepared by AlixPartners in accordance with the standards required of an independent expert witness providing evidence for UK court proceedings under Part 35 of the Civil Procedure Rules, albeit that this report is addressed to the Competition and Markets Authority rather than to a court.

A2.1.2. All the opinions expressed in this report are my independent opinion. All facts and instructions which are material to the opinions expressed in the report, or upon which those opinions are based, are set out in the papers. I have also made clear which of the facts stated in the report are within my own knowledge.

A2.1.3. The footnotes to the papers contain extensive references to details of any literature or other material which I have relied on in producing the report.

A2.1.4. In writing this report I have been assisted by Cherryl Ng, a Vice President in AlixPartners' European Economics Consulting practice.

A3. EXPERT STATEMENT

A3.1.1. I understand the duties that independent experts owe to the UK courts under Part 35 of the Civil Procedure Rules, and we have prepared this report in a manner consistent with those duties.

A3.1.2. I am aware of the requirements of Part 35 of the Civil Procedure Rules and the Protocol for Instruction of Experts to give Evidence in Civil Claims.

A3.1.3. I confirm that I have made clear which facts and matters referred to in this report are within our own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions we have expressed represent my true and complete professional opinion on the matters to which they refer.

Credit Hire - Market Structure Report

Response to the Competition and Market Authority's investigation into Private Motor Insurance

Report prepared for Direct Accident Management Limited

Peter G. Gradwell

Exchange Insurance Services Limited

Contents

1. Introduction

1.1 I have been an Insurance Broker for 40+ years specialising in Motor Insurance in particular. I am Managing Director and major shareholder of Exchange Insurance Services Ltd, a brokerage that provides commercial insurance services to companies and individuals throughout the UK.

1.2 The purpose of this document is to provide an explanation, from my experience and understanding, of the nature of the credit hire market and to comment on the CMA's Provisional Findings Report ("PFR") and Provisional Decision on Remedies ("PDR"). This report will explore the following 3 key points:

(i) The CMA's failure to identify the market

(ii) The 'separation' issue or capture point

(iii) The resultant effect of these failures of analysis points on remedy.

1.3 Exchange Insurance Services Ltd act as Insurance Brokers to Direct Accident Management Ltd. Armstrong Solicitors Ltd ("Armstrongs") is a firm of Solicitors based in the Northwest of England that have for many years dealt with the claims of clients who have utilised the services of Direct Accident Management Ltd ("DAML"). Armstrongs' commitment is to protect and help the victims of non-fault road traffic accidents by getting them back on the road and helping them receive the compensation they are legally entitled to. Armstrongs operates so as to serve the needs/demands of the categories of clients DAML provides its services to. Neither I nor Exchange Insurance Services Ltd have any financial interest in DAML or Armstrongs Solicitors.

1.4 Exchange Insurance Services Ltd does not and never has derived earnings or income of any substance (not more than £1,000 in any one year) from referral fees or other income arising from clients' claims. In principle we do not believe that brokers who earn their income from commission or fees for placing the business for their clients (both of which are disclosable under FCA rules) should earn additional income (which is not disclosable) from claims where they do little or no work.

1.5 Having worked within the insurance industry for over 40 years, this report details the market analysis which has not, in my opinion, been considered by the CMA to date. This report constitutes a summary of my sincerely held opinions from experience. Within this report I have summarised and provided commentary as to factual information that I have been provided with by:

(i) DAML

(ii) Armstrongs

1.6 DAML is a credit hire company whose business income is derived solely from the provision of hire vehicles on a credit hire basis. DAML's clients are those who have been involved in a non-fault road traffic accident and require a replacement vehicle. The customer contacts DAML (be that directly or through their local garage) to organise a vehicle as a replacement while their own vehicle is "off the road". DAML is able to provide an all-round, tailor made service to provide assistance to members of the public who have been involved in non-fault claims.

1.7 A critical part of the service that DAML provides is that the provision of the replacement vehicle is provided on a credit basis.

1.8 DAML is not nor has ever been registered or had any affiliation to the ABI/GTA scheme, the ABI/GTA rates are therefore irrelevant to the independent credit hire market, and specifically the rates that DAML charges its clients.

1.9 In 2013, DAML provided 3,530 clients who had been involved in a non-fault claim with a replacement vehicle. Since 2010 to date, DAML has provided 15,087 non-fault victims with replacement vehicles.

1.10 In layman's terms, the credit hire charges are not payable upfront by the customer and instead allow the lay member of the public access to a suitable vehicle that meets their needs and requirements, immediately following an accident at minimal disruption to their day to day lives without requiring any payment up front. Thereafter, the charges can be reclaimed back from the fault party. In particular, which I will return to later in this report, DAML provide a service to lay members of the public who are impecunious and vulnerable. These clients have no surplus funds in relation to their income. They may have no credit cards or debit cards, or may even not have a bank account. They may be unemployed or be in receipt of benefits. They are unable to pay for a

vehicle by way of "spot hire"[1] and further may not be able to afford to pay out any sort of deposit or money upfront in respect of a replacement vehicle.

1.11 These lay members of the public will hire from DAML and the hire charges they incur will be legally recoverable from the insurers of the party who is at fault.

1.12 DAML also provides an invaluable data collection system[2] whereby all the accident details and insurance details can be taken at the outset of the claim and suitable conflict, fraud and claims vetting steps are undertaken. Clients may and indeed often also make claims for damage to their vehicles, the repairs or the recovery and storage of the vehicle.

1.13 DAML helps the client with arrangements following the accident. For clients who have credit hire claims they are recommended to one of DAML panel Solicitors, who hold expertise in credit hire claims. Credit hire is historically and continues to be a complex area of law[3] and indeed this report details this in due course.

1.14 DAML does not, and has not, litigated any matters on behalf of their customers. It does not subrogate claims or act in any subrogated manner. Each customer who has utilised the services of DAML retains the duty to recover those charges from the at fault insurer, mainly through instruction of Solicitors.

1.15 As set out further below, independent credit hire companies have a particularly important role in servicing impecunious and vulnerable customers.

2. The CMA's approach to identifying the 'market'

2.1 I am aware that the OFT referred the matter to the CMA as an investigation into the insurance market.

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[1] Spot hire being the rates available on the high street to the high street consumer. For example, following an accident an individual calling Hertz, Avis and paying for a replacement vehicle, such "spot hire" arrangement will include payment of charges, also a provision of credit card for security in the event of accident for payment of excess etc.

[2] Data collection is an important part of DAML infrastructure, as they provide vehicles to non-fault victims of Road Traffic Accidents (RTA); therefore DAML will collect data to enable an assessment of the claim to take place, prior to their services being offered. Further, DAML is committed to eradicate fraud from the RTA market, and indeed in any such instances, DAML becomes a victim to such fraud, therefore strengthening the value in the vast data collection system implemented. This is valuable to insurance companies as well.

[3] See credit hire litigation submissions

2.2 Upon my review of the PFR, I consider the CMA's analysis of the post-accident management and credit hire market to be wholly inadequate. Paragraphs 4.29 to 4.32 of PFR – post-accident service, and in particular claims management, is discussed as a market in only very brief terms. Indeed, the CMA confirms that it did not consider it necessary for their investigation to define the specific markets associated with each of the identified activities.

2.3 Furthermore, the CMA has neglected to investigate and identify the very market it wishes to remedy. In particular, I consider that the CMA have failed to have regard to the market which the credit hire industry services i.e. the industry that services impecunious and vulnerable clients who have not, or cannot, utilise the services of their own or the at fault insurer, or afford to spot/direct hire and are placed in the position where the only option available to them is to hire a credit hire vehicle.)

2.4 The CMA was keen to stress that it would not consider a prohibition on credit hire as "this would leave the impecunious non-fault claimant in a position where they might not be able to access a replacement car"[4]. However, without full consideration of the credit hire market, it is highly likely, if not inevitable that this exact situation will arise if the remedy proposed by the CMA is implemented due to the impact the proposals will have upon credit hire companies. If credit hire companies are forced to operate at a capped rate which is wholly divorced from their costs, then they will be extinguished from the market due to financial constraints and the public will no longer have access to the unique, unmatched service that credit hire companies are able to provide.

2.5 Failure to consider the market, means that the CMA's objective in "ensuring that replacement vehicles are provided to non-fault claimant so that their tortious rights are met" cannot be achieved. Indeed that failure to consider the market, means that it is almost certain that that objective will not be achieved. In particular, it is important to appreciate the role which independent credit hire companies play in ensuring the tortious rights of impecunious and vulnerable customers are protected who have otherwise not been offered any replacement vehicle and are in an emergency situation.

2.6 Paragraph 4.37 PFR states that the CMA is not going to treat the credit hire market and the direct hire market as separate. I do not understand why that is. The ToH identified, and the remedy proposed are dependent on the distinction between the two. The only remedy proposed by the

[4] Paragraph 69 of "Notice of Possible Remedies under Rule 11 of the *Competition Commission Rules of Procedure*"

CMA appears to be in respect of the credit hire market, with the direct hire market being excluded from any such 'capture', indeed, it is confirmed that if a victim is in the fortunate financial position to be able to afford to directly hire (i.e. pay for hire upfront from a high street provider such as Hertz) then he is entitled to reclaim the full amount from the at fault insurer under legal rights in tort. However, if you are an impecunious victim, and indeed do not have the financial ability to pay for an alternative vehicle up front, then you are covered by the proposed remedy.

2.7 It is critical that the market is correctly analysed as it is pivotal to the outcome. The CMA has not informed itself properly in order to draw conclusions or propose remedies.

3. CMA's failure to identify the customers served by the credit hire market

3.1 The PFR mentions "non ABI/GTA" in paragraph 2.57 but fails to address the market properly if at all. The report suggests that the new proposals are to essentially replace the relevant parts of the GTA without regard to the reality of the credit hire market.

3.2 There are certain significant elements of these two aspects of the post-accident market that the CMA has not had regard to:

- The CMA has not examined the credit hire market as a separate market in its own terms.
- The credit hire market does not compete (in the main) with 'spot' hire: it services the needs of impecunious clients.

3.3 As above, the majority of DAML client base consists of members of the public who are impecunious. These are the class of people who do not have spare funds to be able to go out and hire a vehicle by paying up front for it. They live within tight financial constraints and do not have any spare disposable income. Examples of those clients may fall into the following descriptions:

- They are low value earners or unemployed. They may be in receipt of benefits.
- They may have poor credit history or previous refusals of credit.
- They may be moderate value earners but all of their income is taken up with outgoings. They may have families to support and all the money that comes into the household is accounted for.

- They may not have a bank account.
- They may have a bank account but may only have a cash card, not a debit card or credit card.
- They may have a debit card, but no credit card.
- They may have a debit and credit card but that credit card is already significantly in use or, the individual may not be able to afford to spend any more money on that credit card for fear of not being able to meet repayments.
- In terms of insurance, these people may have the minimum legal requirement in terms of insurance cover. Insurance to them is viewed as a legal requirement and not as being the source of any additional benefit. I should add at this juncture that it is important to appreciate that one of the reasons that insurance is compulsory is to ensure that every person, be it third party cover to full comprehensive, gets justly and equally compensated for the negligent actions of another party. Regardless of the level of your insurance cover, you are entitled to be equally compensated in law.

3.4 In addition to those impecunious clients, DAML is able to serve the needs of members of the public who fall into the following categories;

- Do not speak English as a first language. Clients who do not speak English are given access to replacement vehicles as they can access the services of DAML via their local, perhaps native tongue speaking garage. These are the types of people who are not familiar with insurance protocols who need that extra assistance following an accident. These people very often also fall into the impecunious category. Out of the 3530 hire claims in 2013, 13.13% of clients did not speak English. 86.87% of clients could converse in English, but of the 86.87%, 24.8% were people for whom English was not their first language.

- Unsophisticated members of the public who have poor understanding of insurance protocols or limited reading skills. They require that helping hand through a process and would simply not be able to co-ordinate a replacement vehicle without significant hands on assistance following an accident. It is in my opinion totally unrealistic to expect these people to understand their legal rights and how to claim by way of their legal right by way of provision of a script at FNOL as suggested by the report.

- Members of the public who are of varying ages. DAML prides itself at being able to service the needs of all ages of the population from 17 to 90 plus. I am aware of other non ABI credit hire providers who satisfy this criteria.

3.5 The categories of people referred to above are severely at risk of having their rights deprived if the provision of companies such as DAML is taken away from them. By way of practical illustration, consider categories 1 and 2 above: These individuals are highly unlikely to be able to understand the automated messages that insurers will use when customers are for example placed on hold, if they are able to stay on the phone long enough to understand what is happening, they are likely to be met by an English speaking call handler. Thereafter, they are unlikely to be able to understand the script, either by way of language or by way of content. It is entirely understandable that these individuals will feel frustrated and isolated and as such will not get the help they need or are legally entitled to.

3.6 It is imperative that in considering any future proposals for change that the needs of these people are considered. Not to do so would be depriving these people their rights in law.

3.7 These extremely vulnerable groups have simply not been considered in the CMA analysis.

4. The markets addressed

The 'post-accident' market

4.1 The post - accident market is divided into two:

(i) Spot hire/direct hire: this market encompasses those individuals/non-fault victims who have available to them sufficient spare funds to be able to go out and hire a vehicle following an accident by paying upfront for it (spot hire), or those who are offered a replacement vehicle from the at fault insurer (direct hire).

(ii) Credit hire: This section is divided into 2 subsections.

(a) ABI – the CMA's report acknowledges that the ABI/GTA scheme is a voluntary protocol between members of insurers and CMC's.

(b) Non ABI – As previously set out, there are credit hire companies, such as DAML who do not operate within the ABI scheme. DAML is the largest (non ABI) credit hire

provider in the UK however there are a large number of other non ABI credit hire providers in the sector.

The post-accident non-fault victim can be classified by reference to four categories

(i) Non fault victims who are captured by at fault insurers, and are offered assistance and replacement vehicle by way of Direct Hire.

(ii) Non fault victims who are referred by their own insurer to credit hire companies who operate and affiliate themselves with ABI GTA rates

(iii) Non fault victims who of their own accord, or by way of recommendation from local garage/recovery agent, approach a credit hire company to utilise their services, having been left in the cold by at fault/own insurer (98% of DAML customer base)

(iv) Non fault victims who simply fall through the gaps, and are offered no assistance whatsoever.

4.2 The CMA report proposes in real terms that if an individual hires on a credit hire basis following an accident, recovery of those rates should be capped at the rates set out within the report.

4.3 There is no suggestion that a lay member of the public is not allowed to spot hire at their election and then proceed to claim those charges back from the fault party (although I submit that this is unfeasible in reality having regard to mitigation defences raised by at fault insurers as to the recovery of these higher spot rates[5]).

4.4 The PDR quite bizarrely seems to also suggest (paragraph 2.59) that a lay member of the public is entitled to credit hire and claim those credit hire charges back as long as they do not have any involvement of a garage, CHC, CMC, or Solicitor etc. Essentially the CMA appears to state that one may credit hire and claim those full charges back as long as you manage the claim yourself, a notion which I submit is unfair and unworkable. This is depriving the claimant of access to an infrastructure such as DAML or more importantly professional help in the form of a Solicitors, that is precisely the help and assistance he/she should fairly and legally be allowed access to following a non-fault claim. Essentially, if a victim is offered no assistance whatsoever by an at fault insurer,

[5] It is standard in any claims which include a claim for hire (be it spot hire, or credit hire) for at fault insurers/those solicitors instructed by them to raise defences as to mitigation. In a case where a Claimant 'spot hires' a replacement vehicle they will still be subject to any mitigation defence by the at fault insurer, e.g. need for hire (any additional vehicles in household), option of alternatives (public transport), like for like vehicle, betterment, period of hire, rate etc.

and the only option to that victim is to credit hire at a rate above the cap, then the Claimant is deprived of his legal right to recover those fees from the at fault insurer.

4.5 In order to understand the market of credit hire (ABI and non ABI), it is important to understand the path or the options available to an individual that has been involved in a road traffic accident. The CMA appears to have not had regard to this in its report which is highlighted by the generalisation and lack of distinction within the credit hire market.

The paths available to a non-fault victim following an accident

4.6 An individual is involved in a road traffic accident. They are shaken up and upset. Their car has been damaged and they/their family may have been in the car at the time of the accident and may be injured. Immediately, the individual finds themselves in that "state of emergency". They may have a vehicle damaged at the road side and essentially are in that "panic state". They need immediate help in respect of that damaged vehicle and immediately they know they need that vehicle to continue with day to day life including work/family commitments, and that the use of that vehicle has been taken away from them.

4.7 The person may be of healthy financial means. In this instance, they know they will be able to simply; i) sort recovery of their vehicle and pay for the same together with a taxi home from the accident scene and ii) organise the immediate provision of a spot hire vehicle, by paying up front for it while they make arrangements to sort themselves out in respect of re-imbursement, be it through their own insurers or the third party insurers. They have the financial means to be able to satisfy their immediate needs and requirements, knowing that if they bear the costs, these costs can be reclaimed back from the fault insurer.

4.8 Unfortunately for many individuals, they do not enjoy this financial luxury. They are the impecunious people who do not have the financial means to be able to afford to part with their cash following an accident. They may not even have any spare money at all in their bank account at the time they are involved in an accident.

4.9 As a direct result of at fault insurers' fallings and delays in offering any remedy to the victim of the RTA, they are left 'out in the cold'. They are offered no assistance from the party who at law is to compensate them.

4.10 This individual placed in this "state of emergency" has a number of options:

(a) Call their insurer – the client makes a call to their insurer. Firstly, they may not insured on a fully comprehensive basis, and their insurer is thus unlikely to be able to assist. In the year to date (2014) 32.59% of DAML customers (i.e. those who have sought hire vehicles from DAML) do not hold the benefit of fully comprehensive insurance. Any claim for damage will have to be made against the fault party. If the client is fully comprehensively insured, the insurer may or may not be able to assist; such emergency help would depend upon the competence and service of the insurer to meet the demands and needs of the client. There is a high probability this call will end, without any satisfactory resolution or help and this is almost a certainty if the client is not insured fully comprehensively. Indeed, it is to be noted that even in instances where a non-fault victim may have fully comprehensive insurance, it is a myth to suggest that such policy comes with an offer of a courtesy vehicle. Courtesy vehicles are policy and indeed insurer specific. In my experience, it is dependent on third party factors, i.e. does the garage who the non-fault insurer deals with have any vehicles available for that client, it will be very much a 'take what is on offer' approach, not what the Claimant is legally entitled to.

(b) Call the third party insurer – the client may have been able to obtain a telephone number and/or policy number for the third party insurer at the scene. In reality, this is rare. Indeed it is unknown to many clients that other than taking a party to blame's name and address and their details that anything further is required. The likelihood of any third party being able to provide the client with the telephone number of their insurers at the scene occurred 0 times in the sample of 140 clients[6]. It is to be expected that third parties do not normally carry telephone numbers around with them; they simply recall they are insured with X. If the client is able to get in touch with the third party insurer, the successful outcome of the call is entirely within the control of and dependent on the actions of the third party insurer. Unless at that stage, the third party is able to take details and offer a service to the client that meets their needs, the call is likely to end with a client being left without assistance. Armstrongs is not aware of any instances where its clients have called third party insurers following an accident at the road side and been offered a DAML type service, i.e. suitable replacement vehicle and personal recovery and a replacement vehicle that suits their needs. Armstrongs' clients report instances of being "charged for lengthy calls, being left on hold, not being able to get through", when citing experiences of contact with insurers.

[6] See paragraph 4.31 onwards regarding data sample from Armstrong Solicitors

In respect of this option, the client may elect to try this option at a later stage, e.g., the day after the accident and again, the success of this option satisfying the client's needs is entirely dependent upon the stance taken by the third party insurers.

(c) Call their local garage or get a family member to call a local garage– this is a very common avenue for clients to take. In 2013, DAML derived 98% of their claims via garages and recovery and storage garages/agents. A client may have exhausted avenues (a) and (b), but in most situations, the first call will be to a garage to say "I need help, come and get me and my vehicle". The garage comes to collect the client's vehicle and recovers the client and the vehicle. The client expresses to the garage that they need help; they do not know what to do. The garage recommends the services of an accident management company/hire company, such as DAML. The client is able to make 1 phone call to DAML and their emergency situation is addressed immediately. DAML offers a 24 hour telephone helpline service and call backs where required. DAML is able to discuss the client's needs and provide the client with advice and re-assurance. The tailored made service is initiated. This is the client who is worried that they cannot afford to pay for repairs or a replacement vehicle and they need a vehicle to go to work and carry on with their day to day life. If they do not go to work, they will not get paid and will not be able to support their home. It really is this basic. They need a vehicle to take the children to school and cannot afford public transport. Their need is specific and immediate.

4.11 All of the above must be addressed in context that a client may/may not be able to speak English or have difficulty understanding English. This is why the option of the local, friendly, native speaking garage is so often utilised. The above must also be viewed in the context of control issues that insurers complain about. It is pivotal to note that the control is with the insurers to intervene at any of these stages above to take control of the costs following the accident.

4.12 Indeed the "state of emergency" is a situation created by at fault insurers not offering any proper services to victims. At present the at fault insurer makes no attempt to service this individual, there is no 'Copley' offer of assistance, there is no response to their attempts for a solution. The non-fault victim in the state of emergency, in effect, hits a silent brick wall. They are therefore left to seek an alternative remedy.

4.13 Following a period of hire, a client proceeds with recovery of his/her charges, normally using the services of solicitors such as Armstrongs. The client instructs solicitors to act and instructs Solicitors to pursue recovery of the hire charges. For the avoidance of any doubt, this is not a subrogated claim. This is a client pursuing a claim in their own name, in their own right, in respect of their own loss incurred as a result of a non-fault accident.

Utilising the services of a credit hire company.

4.14 If a client chooses to contact a credit hire company or is referred/recommended to a hire provider, that hire provider may or may not be an ABI/GTA subscriber. As previously set out, DAML is not a subscriber to the scheme. It provides its clients with a specialised, tailor made service and charges credit rates accordingly. It charges are reflective of the following factors:

(i) The cost of the fleet of vehicles.

Purchase and leasing costs.

Servicing/maintenance costs and fuel costs.

High Insurance costs. DAML hires to any age 17plus and is able to hire to clients for work purposes, business use and to a wide range of occupations. They are also able to hire to individuals who have had previous convictions including driving bans and individuals who may have a poor driving history. The insurance industry will no doubt appreciate the huge insurance risk that a 17 year old will pose, and the increased premium that will come with providing insurance to this individual. This is also to be coupled that this 17 year old is driving an unfamiliar vehicle, again increasing risk.

(ii) The costs of the infrastructure.

Buildings/rent/mortgages/leases

Office expenses

Staffing costs.24hour helpline. Drivers are employed to deliver vehicles to clients nationwide, so that the disruption to their life is minimal. These are clients who can't afford for example to get taxi to arrange to collect a hire vehicle.

Staff training to ensure clients' needs are met and the appropriate replacement vehicle is provided and proper advice is given to clients.

Interpreters.

IT systems - pivotal for recording logs for monitoring hire periods and ensuring high levels of client care and satisfaction.

(iii) Advertising and increasing customer awareness.
DAML promotes its services in garages/recovery and storage agents, via brokers and on the internet. It is has a good reputation across the garage network and its number of hires since 2012 (15, 087), reflects its weight in the market.

(iv) DAML's payment terms are that the hire charges are not due for payment until 11 months following the hire agreement date. The hire vehicle is provided to a client on credit terms with a client being liable for repayment of hire charges (in any event) and payment of those charges to be made by a client within 11 months of the date of the agreement and in no more than 3 instalments. It is important that the CMA appreciates that this is not a loan and the hire is in accordance with the Consumer Credit Act Exempt Agreements Order 1989 (as amended)[7]. The level of the hire charges reflect the delay in cashflow associated with the payment terms and any risk due to continued non-payment by insurers. In reality, repayment of the hire charges often exceeds the 11 months period if the claim for hire charges is litigious. [redacted]

Demand for Independent credit hire services - such as DAML

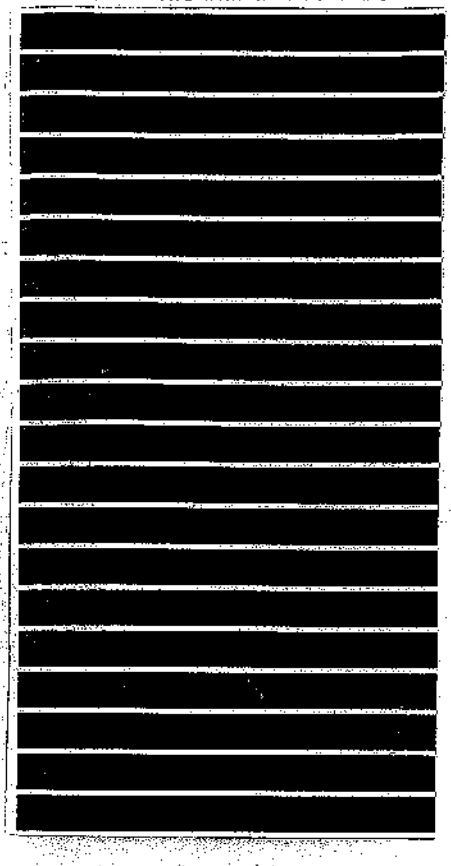
4.15 The main players in the ABI/GTA market, including companies such as Helphire have affiliations with insurance companies. If a client contacts their insurers following an accident, then the insurer may put a client in touch with an ABI/credit hire provider. The issue is, that clients need accessibility. If the above is not offered to them, they would be left without something they are legally entitled to, that being a replacement vehicle. Companies such as DAML can offer this accessible, tailor made service that meets the demands and needs of its clients.

4.16 There is a real demand in the market for the service that DAML and other non ABI credit hire companies are able to offer which is reflected by 15,087 hires being provided by DAML alone to victims of road traffic accidents since 2010.

[7] CMA explained in email correspondence dated 1st July 2014, that their understanding is that a loan from CHC to client occurs currently under a credit hire agreement. This is incorrect.

4.17 DAML operates a fleet of [redacted] vehicles; the percentage utilisation of such vehicles reflects the demand in the market for these services.

4.18 The utilisation rates are set out below for 2013, indicating a consistent high level of demand:



Note: Non-utilisation consists of vehicles requiring servicing, vehicles being off hire for a short period of time between hires, and more specialised vehicles, only being hired out when there is a justifiable and specific need.

Credit hire (non ABI/GTA) rates

4.19 It is generally accepted and perceived that credit hire rates are higher than that of the corresponding ABI/GTA rate for an equivalent vehicle.

4.20 The Judgment in **Clark v Ardington** [2002] 3 WLR 762 cannot be ignored. The Court of Appeal found that ABI GTA rates are not an appropriate comparative rate for hostile litigation involving

credit hire.[8] This case is discussed further in a separate reports by Armstrongs on the law relating to credit hire, "the Litigation report".

4.21 The reason that credit hire rates are higher than direct hire rates are numerous and can be summarised as follows:

- The client finds themselves in an "emergency" situation. The replacement vehicle cannot be booked in advance if a replacement car is needed immediately following damage to a vehicle following an accident.

- The spot hire market operates as it does at a lower rate as it operates by payment "upfront" with guaranteed payment. The ABI scheme operates to ensure payment within a short prescribed period. Conversely, non ABI/GTA credit hire means that payment is not required until 11 months after the date of the agreement. This can in reality often be longer as a result of the limited financial means of a lay members of the public, and a general inability to pay outstanding charges and/or the delay of the paying fault party (i.e. the insurer). The lay member of the public is getting an immediate service without any payment upfront.

- In addition to the hire service, companies such as DAML offer a wide range of other claims management services, including advice, reassurance and interpretation and a network to help them make all the appropriate arrangements that are needed following an accident. These services are necessary for those categories of clients as set out above. The services of DAML and other companies have been confirmed as reasonable and legitimate by the senior courts on numerous occasions since inception of credit hire (see case law). This high quality service that the credit hire market provides is not 'gold plating', nor 'rent seeking' but rather ensures that the no fault party secures their proper legal remedy. Without companies such as DAML, this category of people would be without a vehicle and deprived of their right.

- The credit hire market provides a service to customers that meets their legal entitlements, rather than the insurance 'captured' market that is focused on minimising costs, including

[8] See attached submission as to credit hire case law.

by seeking to avoid providing any replacement vehicle at all to credit hire customers. This is something that the CMA have failed to fully appreciate.

4.22 Generally speaking, DAML as a company is able to offer a tailored service to members of the public who have been involved in a non-fault accident. They are able to offer clients a vehicle that is appropriate and meets their needs, for example, if client is injured, they may need an automatic vehicle and not simply a like for like manual vehicle. If clients have large families, then they are able to offer vehicles that mean no disruption to family life. As part of the all-round service they are able to offer clients a free choice as to which garage they elect to repair their vehicle to ensure that repairs are carried out to a high standard.

4.23 Since 1st January 2010 with 15,087 hires provided, DAML have recorded [redacted] incidences of client's being dissatisfied (starting threshold being any dissatisfaction no matter how minor) as to the level of repairs and on all occasions steps have been taken to rectify the issue to the client's satisfaction. There is no issue within DAML as to what is labelled the 'cheap and poor quality' repairs issue. Clearly this is something that the OFT identified as a problem, but the CMA has not attempted to remedy. DAML's rigorous screening selection for quality garages together with client involvement and choice as to garage, leads to higher quality of repairs and increased client satisfaction.

The impecunious client

4.24 In respect of those clients it chooses to hire to, DAML has been able to calculate that from information provided by its clients prior to, or at the time of arranging hire, that [redacted]% of its clients are impecunious and as such are unable to hire on the spot market. This information is derived

[redacted]

4.25 DAML appreciates that the concept and definition of "spare funds" may differ from person to person. Indeed, it is accepted that an individual may assert that they are impecunious but not be able to satisfy the legal test of impecuniosity for a number of reasons. Indeed an individual with 'funds' may have reasons for not wanting to use those funds, e.g. savings earmarked for specific event (moving house, wedding) or simply earmarked as funds for an unforeseeable emergency.

That is a triable issue to be determined by the Court, or agreed by the parties. It is accepted that client's reasoning for not wishing to use funds may or may not stand up in law.

4.26 A more careful scrutiny of that individual's financial position, i.e. disclosure of documentation in accordance with the order of the court, may later reveal that the person may be found to have been not impecunious in accordance with the legal test. From sharing of information with Armstrongs, DAML has been able to calculate that of the cases which proceed to Court, only [redacted] of its customers on the basis of a factual assessment of evidence, cannot be said as being impecunious.

4.27 It is important to appreciate that DAML takes its clients' emergency position at face value, that face value is later to be tested by way of documentary evidence.

4.28 When cases proceed to recovery of those credit hire charges incurred (via Armstrongs or other Solicitors), the paying party in most cases raises issue with the impecunious status of a claimant, given it is the most obvious way to attempt to reduce the charges recoverable. In the overwhelming majority of clients (who utilised DAML services) they will assert that they are pecunious and assert they could afford to hire a vehicle on a spot hire rate, or afford to replace their own vehicle until they receive funds from the at fault insurer.

4.29 With the claimant asserting this impecunious status, he will be required to provide evidence to show the same. The Court and the third party often, if not always, expect evidence of the claimant's financial position with reference the production of their bank statements/credit card statements/wage slips for the period of hire and usually a period of approximately 3 months pre-hire. (See case law attachment with reference to the COA authority of *Umerji*[9] and the onus/burden placed upon the Claimant to prove). A claimant will be required to produce documentary evidence to the court and the third party, via his legal representation in this case of Armstrongs.

4.30 Armstrongs' clients, who are claiming credit hire charges as part of their claim, will all be asked to produce copies of their bank statements to establish this impecuniosity.

4.31 I now deal with an analysis of data provided from Armstrongs. Management at Armstrong obtained a list of litigated files (listed by way of reference number and name only) from 7 individual fee earners, all involving DAML clients who required an alternative vehicle.

[9] See credit hire litigation submissions

4.32 From those individuals' lists, 20 random cases were highlighted. The files were retrieved and reviewed to collect data relating to the clients' annual earnings in an attempt to demonstrate the financial position of a typical DAML client. This was obtained from information provided by clients and/or by reference to clients wage slips/earning documentation on the file.

4.33 The findings are attached hereto marked PG1. It will be noted the annual salary of a client varies from 0 (unemployed) to £44,400, thus demonstrating the broad nature of an individual who can be deemed impecunious and simply not have the surplus or available funds to direct hire.

4.34 In the attached random selection of 140 clients of DAML, the average salary of the client is £13,732.

4.3 When reviewing the 140 files selection in all instances, the clients are all asserting to be impecunious. These are the individuals that without the provision of credit hire, would simply not be able to carry on with their day to day life. They are the large portion of the population that whilst are impecunious, have that need for a vehicle to carry on with their day to day life

4.36 In the 140 cases randomly selected by Armstrongs in exhibit PG1, a review of the raw financial information proves a clear cut case of an impecunious client in 80 cases.

4.37 Using the data obtained by Armstrongs in exhibit PG1 it has been assessed that in [redacted] of those cases [redacted] it cannot be realistically said or sensibly argued that those individuals are anything else other than impecunious. Their financial documents show common features namely:

- They are overdrawn throughout the hire period and may be close to any overdraft limit.
- They have no overdraft limit and have very little spare funds.
- Any income (by way of salary or benefits) is taken up with outgoings such as rent, bills, insurance etc.
- They have no savings, or credit cards and have no spare money in any current account that could even be used to pay off a credit card, if they indeed had one.
- They may have credit cards which are "maxed out" or close to the authorised credit limit.

4.38 Armstrongs states than in the remaining [redacted] cases, there will be a dispute between the claimant and the third party as to whether a client is legally impecunious. The client's bank statements may

show no money but the third party is not satisfied that impecuniosity has been proven and for example suggest that claimant should have got a loan or a credit card to spot hire or replace their vehicle. In other cases, clients may have some, (if not a lot of) disposal income/spare cash/credit, but the client's evidence is that they cannot use these funds.

4.39 Armstrongs often has instances where third party insurers unreasonably argue that a claimant should utilise any funds, even if by using those funds, it would wipe out the claimants' reserves to zero or place the claimant in undue hardship. Armstrongs argues the contrary, citing case law as attached in the credit hire litigation submissions, that use of these spare reserve funds would place claimant in severe financial danger and amount to an unreasonable and undue sacrifice.

4.40 The following example provided by Armstrongs illustrates this. Consider the family father figure who has £750.00 spare in his current account with no overdraft and protests in the strongest possible terms that he cannot use these funds as he has 3 children and a wife to support and if he used these funds, if anything happened he would simply not have any spare money to call upon. He classes this money as his safety net. This individual falls into the category of 'impecuniosity in dispute'. He has utilised a credit hire vehicle as he has not received payment for the damage to his vehicle (repair or total loss) and is without a vehicle. No vehicle has been offered to him by the at fault insurer.

4.41 Armstrongs states that in the vast majority of 'impecuniosity in dispute' cases, clients will be found to be impecunious. In the remaining cases, clients will either found to be not impecunious or more often, not be able to provide sufficient evidence to show their impecuniosity and therefore by technically debarred from asserting his impecuniosity (even if factually this is correct). For example, I am advised by Armstrongs that a client may proceed with an entire claim asserting to be impecunious. He may be ordered by the court to disclose all of his bank statements for a period of 3 months pre hire, throughout the hire period. He has not retained copies of his bank statements so requests copies from his bank. His bank provide some, but unfortunately not all, of his bank statements in a timely manner. As a result he misses the court deadline for providing all of his bank statements. As such the court finds, that he has not proven impecuniosity and he is awarded recovery of spot hire rates accordingly. This does not mean that the client is not impecunious; it simply means that he has not proven his assertion that he is impecunious.

4.42 Armstrongs states that in reality approximately 90% of its clients are impecunious (on the face of hard evidence in the form of bank statements alone, or by way of evidence and further clarification by a client in a witness statement). This figure is clearly demonstrated by the random selection of data obtained in PG1. If clients are able to provide full evidence of this impecuniosity as ordered by the court by way of bank statements/credit card statements, this assertion will stand up to the scrutiny of the court.

5. Consequences of proposed remedy

5.1 [redacted]

5.2 [redacted]

5.3 A copy of DAML's latest accounts are attached to this report marked PG2.

5.4 [redacted]

5.5 [redacted]

5.6 [redacted]

5.7 [redacted]

5.8 [redacted]

5.9 Indeed, it is clear that even in instances where the hire charges are capped at the rates proposed, there will still be a real risk of those charges not being recoverable, e.g. liability, risk at trial and arguments regarding mitigation.

[redacted]

[10] See credit hire litigation submissions regarding additional waivers.

[redacted]

5. [redacted]

5.12 From the latest accounts of Helphire Limited, a large credit hire company with affiliated with ABI GTA, it would appear that even such a large established ABI credit hire company could not continue to operate on the new capped rates proposed. Based upon Helphire's revenue (to Dec 2013), the below table demonstrates the catastrophic effect of the proposed 'cap'

	Reported £'000	10% Redn in GTA	20% Redn in GTA	30% Redn in GTA	40% Redn in GTA	50% Redn in GTA
Revenues	204,767	184,290	163,814	143,337	122,860	102,384
Loss before Tax	(1,312)	(21,789)	(42,265)	(62,742)	(83,219)	(103,696)

5.13 In the event Helphire recovers the rates equivalent of '50% of the ABI current rate', then one of the largest ABI credit hire companies, would make a loss of over £103 million.

5.14 [redacted]

5.15 In summary: the CMA have failed to evaluate the credit hire market as a separate market and their understanding of it is deficient. In doing so they have not had regard to the rights and needs of a large section of society, who use the services of a credit hire company following an accident.

5.16 That is a particularly significant failure because the CMA has decided, in effect, that the credit hire market is the cause of the AEC in ToH 1.

5.17 The CMA has failed to understand what is distinct about the credit hire market, such failure results in CMA's analysis of the reasonable rate proposed being flawed.

5.18 Indeed, the CMA appears to have adopted a 'bottom up' approach to the price cap remedy suggested. The CMA has identified two reasons for the difference between the cost of direct hire and credit hire; frictional costs and costs as a result of referral fees.

Frictional costs

5.19 The very conclusion that there are frictional costs in the supply of credit hire vehicles is misplaced, it is accepted that costs of credit hire are higher than the costs imposed by the proposed remedial 'cap', however the 'frictional' costs identified are in fact core costs incurred in providing victims of non-fault accident to their tortious rights in law. Indeed, the law is clear the claimant will only ever recover charges for credit hire that have been reasonably incurred following a non-fault accident (with reference to need, period, rate, like to like vehicle etc.). The conclusion that costs in respect of credit hire are frictional is incorrect. The cost incurred by victims of such non-fault accidents by having to hire a vehicle on credit is as a direct result of the wholly unsatisfactory situation they are forced into by the at fault insurer. The claimants who reasonably hire a vehicle on credit following an accident do so as they simply have no other option. They are left without a vehicle, their own vehicle being damaged as a result of the collision, they have been offered no assistance or alternative vehicle by the at fault insurers, they require their vehicle to ensure life continues normally for them (with reference to working and family commitments).

5.20 The costs incurred by a credit hire company providing a replacement vehicle to a victim of a non-fault accident is the cost of the victim being correctly offered a replacement vehicle in accordance with their legal rights, their legal rights being wilfully ignored by the at fault insurer.

5.21 The cost of credit hire is at the control of the insurer, indeed if a suitable replacement vehicle is offered to a non-fault victim then the need to credit hire never arises, if the at fault insurer promptly compensates a victim for the damage to his vehicle (by immediate payment of the loss incurred to his vehicle i.e. total loss payment) then the need for an alternative vehicle and credit hire is extinguished. The frictional costs identified are in reality the cost of a credit hire company in assisting a Claimant who has simply been ignored by the very body who is liable to compensate them.

5.22 Clients of DAML, and their instructed representatives, face a daily battle with insurers to simply communicate, as demonstrated in this report insurers can go weeks, even months ignoring every piece of correspondence by a client or their solicitor due to incompetence or lack of resource within the at fault insurer. Put simply requests by clients or their solicitor for assistance and/or payment of a loss supported by expert reports are simply ignored. It is very common that insurers have backlogs of incoming post for up to 6 weeks, meaning that any engineering report or request for payment is simply not considered for up to 6 weeks. The same is simply unacceptable, it is the

exact cause of the frictional costs associated with victims being forced to hire on credit. The longer the victim is ignored, the longer the period of hire of a replacement vehicle and in turn the more substantial the cost of the replacement vehicle.

5.23 The remedy with regards to the frictional costs involved in credit hire is simple, it is to ensure the duty is imposed upon insurers to promptly deal with requests/correspondence/communications by any victim of a non-fault accident, and further for insurers to be monitored and regulated in this regard. Only then can the market and indeed the costs of credit hire be truly and correctly considered. DAML wholeheartedly welcome regulation of insurers in this regard, with financial penalties for non-compliance, the same will without question address the costs of credit hire industry; a client only hires (or is entitled to hire) for the period in which they are without remedy. Specifically DAML would welcome an insurance protocol to ensure that insurers deal with claims in a timely manner, this protocol being regulated by trustee or ombudsman figure.

Case studies

5.24 By way of example of the problems facing victims of non-fault accidents, the following case studies are provided of cases dealt with by Armstrong Solicitors.

CASE STUDY 1

5.25 The factual background (including all relevant dates) are detailed within appendix 1 to this report.

5.26 This case study one provides an example of the position a non-fault victim is placed in as a direct result of the at fault insurers refusal and/or failure to deal with their claim. In this instance the claimant was involved in a road traffic accident on [redacted] the claimant required a replacement vehicle immediately. They were provided with no such offer or service by the at fault insurer and therefore utilised the services of DAML. A formal letter of claim was sent to the at fault insurer, that letter of claim informed the at fault insurer that the claimant sought a payment for damage to their vehicle and that they were currently hiring a credit hire vehicle, the detail of the credit hire charges were disclosed. The at fault insurer was, less than 7 days after hire commenced, provided with the opportunity to gain both the cost and the control of the claimant's need to hire. The at fault insurer had two options; firstly to make a 'Copley' compliant offer to the claimant for a replacement vehicle to enable the claimant to accept that offer, and in effect hand back the credit hire vehicle to DAML or to make a payment (with the option of that payment being without prejudice) to the claimant to enable him to mitigate his loss.

5.27 The at fault insurer failed to act, and choose not to take either step. Thereafter the at fault insurer was provided with no less than 17 opportunities to allow the claimant to cease hiring by way of 'Copley' offer of an alternative vehicle or paying the total loss payment as assessed by an independent expert engineer. The at fault insurer took 203 days to make a payment of the value of the claimant's car, and required court proceedings and a court order to order it to do so. This is a matter were liability was not in dispute.

CASE STUDY 2: The factual background (including all relevant dates) are detailed within appendix 2 to this report.

5.28 Case study 2 provides an example of an at fault insurer failing to both capture the control/cost of the claim, and thereafter the huge inefficiencies within the at fault insurers' infrastructure to deal with claims in any proper or reasonable manner.

5.29 The claimant in this claim was involved in a road traffic accident on [redacted] despite a formal letter of claim being sent detailing the claimant's need to hire on a credit basis, no attempt to capture the control/cost of the credit hire was made by the at fault insurer. Despite the clear opportunities to do so, the at fault insurer ignored the claimant's need for replacement vehicle and/or payment for his vehicle. The at fault insurer simply chose not to deal with the claimant's claim, or assist the claimant in mitigating his loss. The claimant was ignored.

5.30 96 days after hiring the replacement vehicle on credit, the claimant received the first piece of correspondence from the at fault insurer, marked without prejudice, enclosing payment for the total loss of the vehicle. The claimant thereafter was able to cease hire. No further correspondence or contact was made by the at fault insurer, at all.

5.31 The claimant proceeded to 2 court hearings and obtained a Judgment for his claim. The at fault insurer being ordered to pay the claimant a Judgment in July 2013, the factual information provided in Appendix 2 provides that despite that Court order payment is yet to be received nearly 12 months later.

CASE STUDY 3: The factual background (including all relevant dates) are detailed within appendix 3 to this report.

5.32 This case further provides an example of the at fault insurer's refusal to pay a non-fault victim his total loss payment of his vehicle, and therefore placing the victim in a position where he had no option but to continue to hire on a credit basis until the Appeal Court stepped in.

5.33 The Claimant was involved in a non-fault accident on [redacted] on 5th November 2008 by way of telephone call the at fault insurer admitted liability for the accident. The at fault insurer offered no assistance or legally entitled replacement vehicle to the claimant. The claimant, who needed a vehicle, had no alternative but to hire a vehicle on credit terms.

5.34 The at fault insurer's conduct thereafter is nothing short of extraordinary. Despite, admitting liability for the accident, they put the claimant to strict proof of his losses.

5.35 Despite the claimant continually pleading for a payment for the total loss of his vehicle, the same was refused. The at fault insurer chose not to pay the total loss of the claimant's vehicle.

5.36 Despite the claimant allowing the at fault insurer to inspect his damaged vehicle, which they did, no payment was raised as the at fault insurer's agent who inspected the vehicle took photographs which were unclear.

5.37 The at fault insurer refused to pay, on a claim where liability was admitted. The claimant had no choice but to seek the intervention of the Court. Proceedings were issued, a Defence formally admitting liability was filed, an interim payment to enable the claimant to mitigate his loss was refused by the at fault insurer.

5.38 The claimant applied to the Court for an interim payment, the at fault insurer fought against the same (all the time the claimant was incurring credit hire charges). The matter came before a Circuit Judge on Appeal who was astonished at the conduct of the at fault insurer, and ordered they make a payment to the claimant to enable him to mitigate his losses.

5.39 It took the at fault insurer 537 days, and a court order, to confirm it would be raise a payment of the pre accident value of the Claimant's vehicle.

5.40 The above case summaries clearly provide factual evidence that the frictional costs incurred in credit hire are as a direct result of the conduct of the at fault insurers. The cost of credit hire only occurs whilst the Claimant has no other alternative option. The CMA has failed to address or investigate the conduct of the at fault insurers in failing to deal with non-fault victims claims, and indeed incurring and maintaining their requirement to hire on credit.

Referral Fees.

5.41 The CMA identifies referral fees as the second reason for the increased cost of credit hire. What the CMA has failed to consider, or note, is as of 1st April 2013 there was an abolition of referral fees for any claim with an associated personal injury claim (Jackson reforms). Therefore if any claim has an associated personal injury claim, e.g. the Claimant who requires a hire vehicle is also injured, referral fees are forbidden. They cannot be paid. Indeed, DAML does not pay any such referral fee. The associated personal injury claim extends to any associated personal injury claim as a result of the road traffic collision, i.e. a passenger who is injured; in such an instance a referral fee is forbidden. Therefore in the vast majority of cases there is a claim for personal injury and no CMC/CHC/Insurer or any other person can pay a referral fee.

5. [redacted]

5.43 DAML stand against any company or body paying any referral fee in any such claim with associated personal injury, indeed DAML have stood strongly against the same, having complained to their regulatory body (Ministry of Justice) in cases where they have been made aware of prohibited referral fees being paid.

5.44 DAML is fully supportive of the abolition of referral fees, on the basis that such abolition is properly policed by a regulatory body e.g. MOJ or the SRA, to avoid any company or individual not adhering to the rules in order to gain a competitive advantage.

5.45 Indeed, such referral fees do not form part of DAML business model. DAML was incorporated in 1996 at a time when referral fees did not exist. The business model of DAML does not take into account payment or receipt of referral fees. Indeed, DAML has traded through changing climates

with the introduction and abolition of referral fees during the course of its business. DAML's business model is to provide a service to a victim of a non-fault accident for the period whereby they are offered no such assistance by an at fault insurer, thereby filling the gaping hole created and sustained by the wholly insufficient conduct and practice of at fault insurers.

6. The Separation Issue

6.1 The CMA's findings concluded that there was an AEC due to: "Separation – the insurer liable for paying the non-fault drivers claim is often not the party controlling costs."

6.2 Critically, the CMA has failed to appreciate that the insurer is legally entitled to take over or intervene in the claim at any point. Indeed they are offered the opportunity to do so, most significantly supported by the Court of Appeal decision in *Copley v Lawn* (see Litigation report[11]). Notwithstanding the insurer's clear control and power of intervention to effectively "step in" to obtain control of the cost of the claim, insurers elect, for whatever reason, not to adopt those methods available to them in law to allow them to bridge the gap of separation.

6.3 Generally speaking, the insurer's complaints in terms of credit hire claims are about high charges and long rental periods. Both are entirely at the control of the insurer. Despite the ongoing complaint about both charges and period, insurers decline their legal entitlement to intervene on a claim involving credit hire at any stage in order to "take control" of the charges. This is an extremely important issue that the CMA have failed to acknowledge or mention within the report

6.4 The law allows an insurance company to step into proceedings at the outset, or at any subsequent stage (be it prior to the credit hire commencing or during the credit hire) to offer services to the Claimant in the form of a replacement vehicle arranged and paid for by them, entirely at their own selection. The Court has in *Copley v Lawn* set out certain stipulations that must be met by insurers in their "Copley offer" in order for a claimant to consider the offer put to them. The court further provides clear guidance in *Copley* as to what information is required and deemed reasonable and sufficient level of information to be provided before a claimant should be expected to elect to take this "offer".

[11] Paragraph 6 of the 'litigation report'

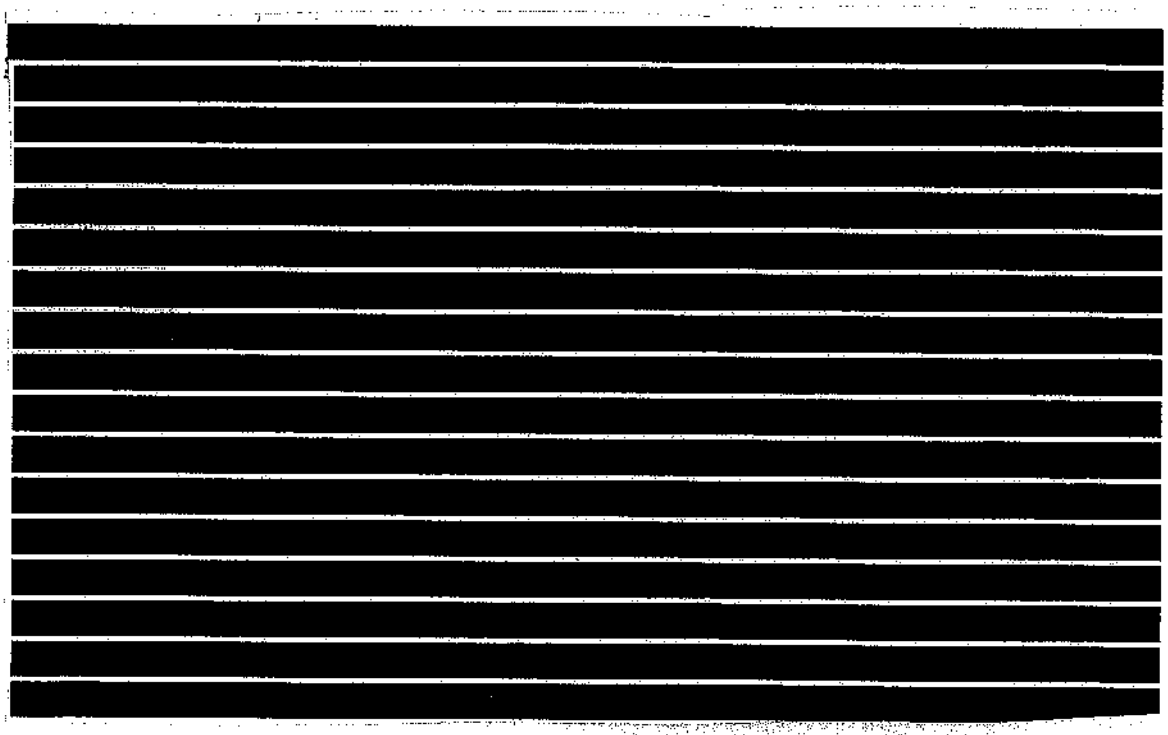
6.5 It is important that lay members of the public are protected in terms of their needs and their financial exposure and thus it would appear that this is the mind set behind *Copley*. If a claimant receives this offer with the correct information being provided, and thereafter unreasonably refuses it or ignores it, then the claimant will not be able to recover his/her credit hire charge back from the fault insurer to the full extent. Instead, those charges that the claimant can recover will be limited to the cost that the replacement vehicle would have been to the third party insurer, had they provided it.

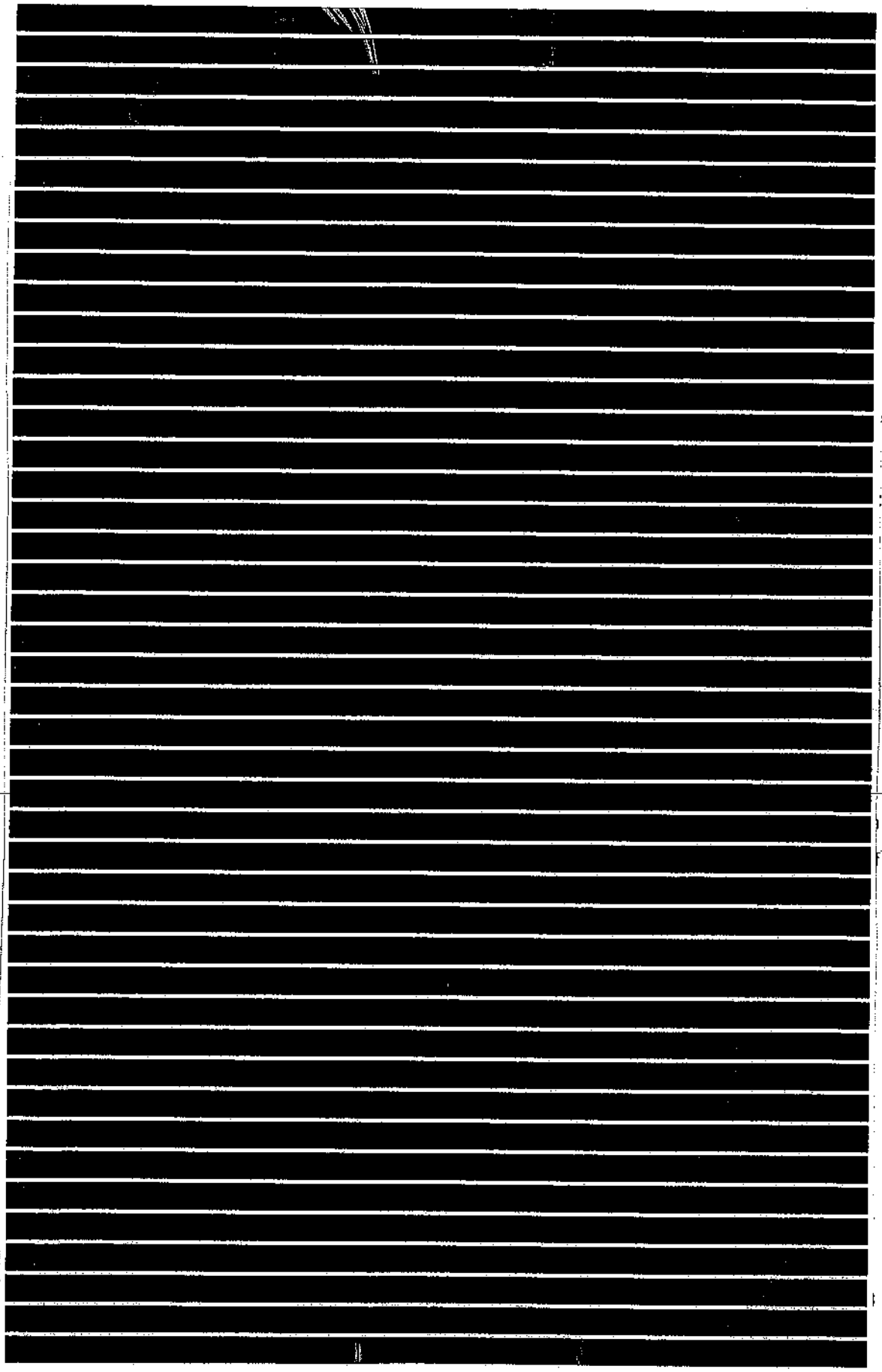
6.6 Put simply, if an insurer makes a proper Copley compliant offer and within that offer says the insurer can provide a vehicle at a cost to the insurer of £35 per day, and the insurers, not the claimant will meet that cost in any event, then if a claimant unreasonably refuses that offer and proceeds with credit hire at a higher rate, recovery of the credit hire charges will be limited to the £35 a day.

6.7 This intervention is not limited in any way as to the instances where it can be used. It could be used by every insurer in every case if they so wished. The fact remains however, that it is used rarely and if it is used, it is used inadequately or incompetently.

6.8 The perceived theory of harm identified by the CMA, and indeed the separation of cost and control therefore clearly only exists by way of the insurers choice or failure to offer the claimant a reasonable replacement vehicle.

6.9 This can be illustrated clearly by a number of case examples provided by Armstrongs.





6.11 [redacted]

6.12 [redacted]

Sce [redacted]

[redacted]

6.13 A list of the common features of these non-compliant letters is listed below:

1. Letter does not set out the costs of the replacement vehicle to the insurance company.
2. Letter does state that the client's needs will be met. There is no information with regards to the availability of a replacement vehicle, or how long it will be available. The letters use phrases such as "without prejudice to liability" or "without prejudice".
3. There are no terms and conditions attached.
4. There is no information regarding the position as to the insurance of the replacement vehicle in terms of excesses, collision damage waiver or theft waiver.

6.14 Armstrongs reply to the letters querying the offers that are made. A typical letter is set out below;

Thank you for you letter of X. We understand from our client you are attempting to offer him a hire vehicle.

In order that we can advise our client on the offer of a vehicle, please provide the following information in writing by return:

1. *What sort of vehicle would you be making available to our client?*
2. *What is the position on additional drivers of the vehicle?*
   (a) *are they allowed?*
   (b) *If so, is there any charge?*
3. *What is the position in respect of endorsements?*
4. *What is the excess on the insurance policy?*
5. *For how long can the client have the vehicle?*
6. *Are there any circumstances in which our client will be required to pay for the vehicle?*
7. *Who pays for any damage to the vehicle caused by our client?*

8. *Is there a mileage allowance?*

9. *If so, is there any charge for excess mileage?*

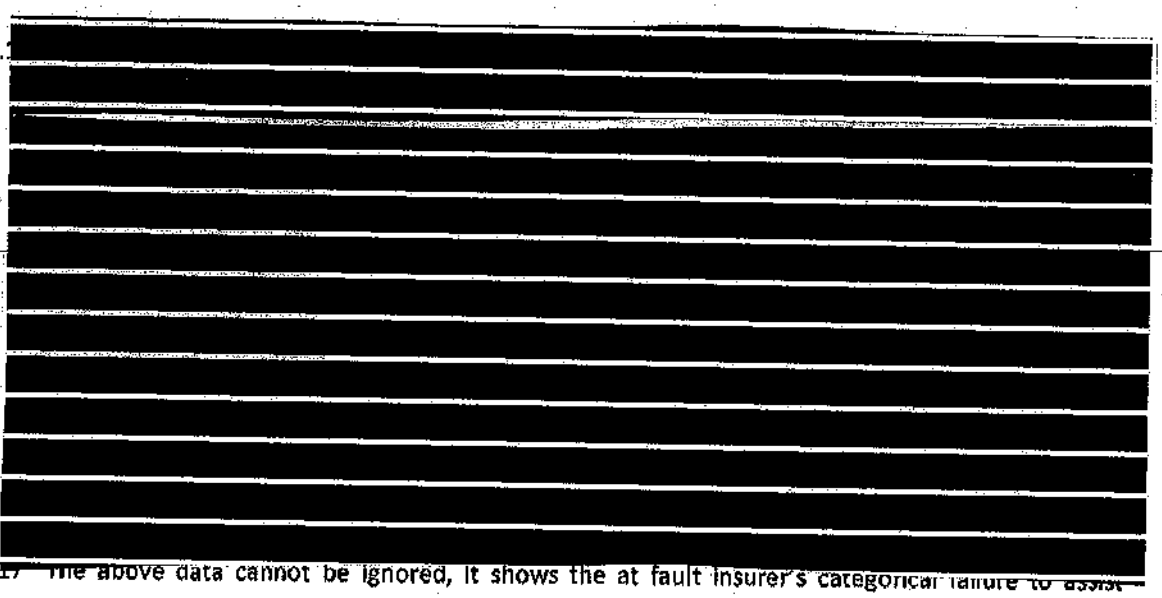
When providing answers to the above questions, please enclose a copy of the terms and conditions upon which our client would take the vehicle and a copy of the agreement he would be expected to sign.

Please also provide copy agreement and terms and conditions between you and hire provider.

Upon receipt of the above information we will thereafter review the matter further.

Yours faithfully.....

6.15 The following data has been provided by Armstrongs in respect of claims handled by the firm. It provides data of the number of client's claims which included DAML hire, where a response was written to correspondence received where an at fault insurer purported to offer a Claimant an alternative vehicle. In each one of the cases, Armstrongs had to write a response to the at fault insurer as the offer was not sufficient or 'Copley' compliant and the letter/offer was inadequate and/or unclear in its terms.

6.16 

6.17 The above data cannot be ignored, it shows the at fault insurer's categorical failure to assist victims of non-fault accidents, and failure to capture or gain control of the cost of credit hire when given the clear opportunities to do so. It clearly demonstrates the reason for frictional and credit hire charges being incurred; namely that the at fault insurer failing to offer any remedy to a claimant who finds themselves without use of their vehicle through no fault of their own.

6.18 Since its inception in 2006, Armstrongs advise it has never received a satisfactory compliant response to the reasonable queries raised. Armstrongs cannot recall a single incident where the third party insurance company have provided them with a copy of the hire agreement their clients would be expected to sign. This is staggering behaviour on the part of the insurance companies.

6.19 It simply cannot be said that the insurers are left guessing following *Copley* or following receipt of Armstrongs' request for clarification, as to what any offer has to consist of and what information has to be provided so that a lay person can be properly advised and take an informed decision upon offers made to them. The common feature of DAML and Armstrongs' clients have already been set out herein and it is re-iterated that these are the types of people who are unlikely to be able to understand legal terminology.

6.20 There is a significant omission on the part of the CMA by failing to address this very real "control" that is placed firmly in the hands of Insurers. Even if credit hire has commenced, the third party insurers still have the control to intervene and offer a vehicle at reduced costs, thus reducing their exposure to any ongoing credit hire charges.

6.21 [redacted]

6.22 The following case facts have been provided by Armstrongs and illustrate the inefficiencies/errors on the part of the Insurers when dealing with "Copley" letters.

Case example 1:

6.23 Claimant was involved in an accident on [redacted] and hired a replacement vehicle from DAML on 22nd September 2012. The TPI sent a letter to Claimant dated 21st September 2012 (attached marked **PG4**) received by the claimant on 26th September 2012, they further telephoned the claimant, and the claimant's evidence was that they pressured her regarding their 'offer', the claimant felt bullied and unsure regarding the terms of the offer, it was unclear to her. The client continued to hire through DAML until she received payment for the pre accident value of her vehicle from the TPI, which was not until sometime later with hire ceasing on 29th October 2012. Despite the alleged intervention letter, no payment for the total loss of her vehicle was promptly made to enable the claimant to cease hiring.

6.24 The Defendant maintained that the only hire charges payable were 7 days at £12.99 per day (despite not paying the Claimant the value of her damaged vehicle for over 4 weeks).

6.25 The matter came before His Honour Judge Platts; the Claimant was substantially cross examined on the point. The Judge found that the phone call and content of the insurer's advances were most inappropriate and sought to force the claimant to settle without any legal advice. He held the claimant was entitled to refuse to deal with the Defendant's insurers. He found the letter was unclear as to what it offered, it was not clear when the car would be available or for how long and the claimant needed a vehicle for her work, it was not clear the position on insurance, it was not clear the position on liability (note letter marked without prejudice as to liability) and that the Defendant could have reneged on liability and raise it as an issue, the claimant had legitimately entered into a contract with DAML and that given the above there was no reason why she should have cancelled that contract.

6.26 The Judge held the claimant acted entirely reasonably and allowed the period and rate of hire in full.

6.27 This is a clear example of the Defendant insurers position regarding intervention, and indeed the real lack of desire to actually offer a replacement vehicle to a claimant. Indeed it demonstrates the tactics involved in dealing with non-fault, impecunious clients who are most unsophisticated participants in the legal/insurance market. In this instance despite the letter, no total loss payment was raised to the client. Indeed if it had been raised promptly the claimant would have ceased to hire (as she did when she received the payment, eventually). The Judge's findings are clear; they are in accordance with Court of Appeal authority.

6.28 Indeed, it shows how indeed the separation of cost/control is indeed within the defendant insurer's control, and it is simply employed as a tactic to reduce credit hire without truly seeking to compensate or assist the victim of the tort. The third party insurer's position is further undermined by the delay in raising payment to the claimant. The example is a real example of the reality of the insurance industry and the control they possess but choose tactically not to implement.

6.29 Conversely, DAML does take over claims where clients have tried to deal through third party insurance and have been dissatisfied with the service.

6.30 The following case facts have been provided by Armstrong from a recent case that went to trial. Whilst the names have been omitted, the facts remain.

Case example 2:

6.31 This is a claim arising from a road traffic accident on [redacted] Liability was admitted but quantum was in dispute. The heads of loss claimed by the claimant were for the hire of a replacement vehicle, repairs of the claimant's damaged vehicle, an engineer's fee and miscellaneous expenses.

6.32 Whilst the accident was in 2012, the claimant did not contact DAML until some 12 months later. Following the accident she made numerous attempts to contact the third party insures to try to make arrangements for them to repair her vehicle. She called them repeatedly, sent them quotes which they claimed to have misplaced. Her witness evidence before the court was able to recall 8 specific dates which she had called the insurers to no avail. Using the claimant's own words, the claimant had "just about had enough and felt let down" by the service they had experienced from the third party insurers.

6.33 The matter proceeded to trial and below is an excerpt from the note of the Judgment, the judge recognising the delays and poor service that the Claimant had experienced when dealing with the third party insurers.

"I have heard from the Claimant about how she and her partner tried to arrange for her vehicle to be repaired through the Defendant's insurer. She said in her evidence which I accept was honest and genuine that she chased the Defendant's insurer on a number of occasions and was given the run around. Eventually she had enough and decided to have it repaired herself....." (using the services of DAML)

"I am satisfied that the Defendant behaved unreasonably in giving the Claimant the run around. I am prepared to award her miscellaneous expenses considerably higher than the £50 claimed because I accept what the Claimant said in her evidence that she had spent a lot more than £50. She said that she had probably spent about 3 times as much and I think that £150 is appropriate."

6.34 I am advised by Armstrongs and DAML that this case illustrates a common theme that is present in claims where DAML have taken over dealing with claims in place of third party insurers. Clients do not get the service they want and are legally entitled to from insurers so they some to companies such as DAML.

7. The CMA's proposed remedy will not address the AEC identified.

7.1 Based on my full review and understanding of the credit hire market I do not consider that there is an AEC in the sector, other than is attributable to the conduct on insurance companies.

7.2 The control of the claim and any losses arising therefrom in respect of a replacement vehicle are firmly in the hands of the third party insurers. They have a procedural path paved for them, cemented in law in cases such as *Copley*. The true position is that they always have an opportunity to take over the claim but in reality their use of this readily available option is rare or inefficient. This needs to be viewed in the context of the instances where insurers simply fail to acknowledge or deal with a claimant's claim following its submission. The claim and correspondence is ignored. The actions, indeed inactions, of the insurers need to be questioned. The criticism does not come well from the very party who has the option to take control and chooses not to do so through choice or ignorance.

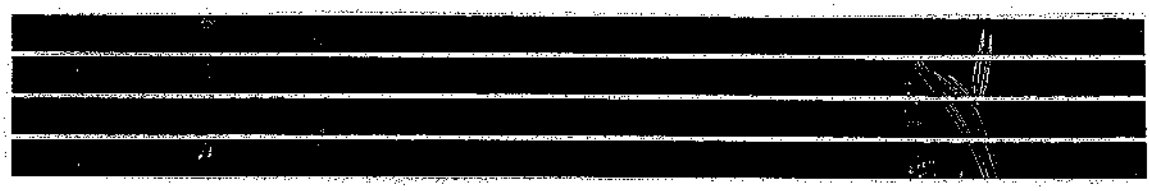
7.3 To the extent that any alleged 'separation' is a genuine problem, that is a consequence of insurers' modus operandi: they do not take over management of claims even where fault has been admitted despite their power and right to intervene. There is a real financial punishment set out for those claimants who chose to ignore a proper/compliant Copley offer and the insurers still fail to adequately act in this respect.

7.4 Companies such as DAML provide the provision of a proper/tailored service that meets the client's true legal entitlement. If DAML (and companies like DAML) were not providing this service, then the needs of these clients would not be met and they would be deprived their entitlement in law. This provision is a service that meets the needs of the most vulnerable and often least empowered members of society. These are individuals who fall under one or more of the following categories: they are impecunious; they do not speak English or English is not their first language; they are unsophisticated; they have difficulties understanding what they are entitled to in law; they have been placed in an emergency situation where their needs are specific

and immediate; they have no additional benefits under their policy of insurance and may be insured third party only.

7.5 

7.6 This is a consequence of the failure to treat credit hire as a separate market.

7.7 

7.8 The remedy provides a perverse incentive for insurers to act unreasonably. The commercially logical route is to admit liability to obtain the cheaper rate, wait until hire has ended, then challenge liability again. Alternatively, the insurers could admit liability to obtain a period at a cheaper rate and then deny liability and the hire continues. All of this time, the client is having the added aggravation, stress and worry that they do not know what stance the third party is taking. Lay claimants will not understand this tactic playing and indeed, it is unfair and unjust for them to have to play a silent bystander in all of this.

7.9 I do not wish to cast aspersions on the industry but I have operated within it for many years and I foresee these types of actions as inevitable, indeed I fear that it will become the standard practice, adding significant further friction within the market.

7.10 The remedy is an anti-competitive step. It sets a top rate and the CMA itself admits that it does not expect meaningful competition below that level.

7.11 The further consequential position also arises; a claimant's claim in tort is against the tortfeasor, and indeed any litigation is primarily against that tortfeasor (i.e. litigation will be between the parties involved in the accident A v B), such a legal right remains. The at fault insurer has a duty under the Road Traffic Act 1998, and in accordance with the policy of insurance with its insured to indemnify the insured for any claim brought them/it. The proposed remedy limits the amount payable by the 'at fault insurer' in respect of credit hire, it does not alter the claimant's legal entitlement to seek damages in tort against the tortfeasor, thereby creating the lacuna whereby

the charges over and above the proposed 'cap' could be sought against the tortfeasor in litigation. Thus providing the position where an insured person responsible for an accident is pursued for the charges above and beyond the 'cap' with no indemnity from his insurer.

8. **Conclusion:**

8.1 Credit hire has long been a forum for litigious battle over the years and continues to be so with frequent incidences of cases involving credit hire going to the Court of Appeal.

8.2 It is long established that an individual who has been involved in a non-fault road traffic accident is entitled to a replacement vehicle. The law recognises that an impecunious client is entitled to hire a vehicle at "credit hire" rates, those rates it is acknowledged are higher than the corresponding spot hire or ABI/GTA rate. That individual can successfully recover those charges back subject to being able to meet any challenges that may be raised as to their need for a vehicle and their impecuniosity. The judiciary in cases such as *Copley* have affirmed the insurers' right to "step in" and take control and have laid down the warnings to claimants who fail to deal with any complaint offer that is communicated to them. The senior judiciary have come to a conclusion that balances the interests of the consumer and the insurer. The CMA has paid no regard to that carefully developed reasoning.

8.3 The CMA has paid no regard to the interests of the consumer who has been the victim of the accident. The needs of the impecunious client and those other categories of clients set out within this report have not been considered and it is these very people who will be denied their rights if the remedies were to be implemented.

8.4 The CMA properly concluded that its estimation of detriment in relation to ToH 1 (the detriment from the separation of cost liability and cost control) was flawed. It was welcomed that the CMA would revisit its position and workings in this regard. However the revised report falls far short of the proper investigation into the market, and indeed the required proper investigation into the real causes of the separation and any alleged detriment.

8.5 It appears the CMA continues to fail to address the credit hire market in full terms, namely that there appears to be no proper consideration of the market in which DAML operates. The CMA finds in the revised workings as to detriment, that the cost of credit hire to the at fault insurer is £618 (paragraph 11). What the CMA fails to consider at all is the at fault insurer's opportunity, in

every instance where a need to credit hire arises, to capture the claim thereby removing any separation between cost and control. The CMA fails to consider that the costs of £618 per claim can presently be avoided by every at fault insurer, the at fault insurer's salvation being all too simple; make a clear, unequivocal and documented offer to the non-fault party of a free replacement vehicle thus removing both the need and the cost of credit hire. Indeed the cost to the at fault insurer would certainly not be £618 to gain control of the claim. There is no explanation as to why at fault insurers fail to exercise their legal right to gain control of the claim and the associated cost.

8.6 The answer as to why at fault insurers do not seek to gain such control is plain; they have a cost incentive to under provide. It is my opinion that by choosing not to offer all victims a replacement vehicle they undoubtedly save costs, as it is inevitable that they will "lose" claims along the way, and victims unknowing to their legal right to a replacement vehicle, will simply continue unaware. The CMA note that a large proportion of the frictional costs which arise in interaction between insurers and CHCs were due to the inefficiencies within the insurers claim processing procedures. With such clear inefficiencies noted, it is staggering that the CMA appears to overlook such inefficiencies in the insurers or offer no remedy. Indeed it is acknowledged by the CMA at paragraph 25 that in the absence of separation insurers would have an incentive to under provide on serve as well as control costs. What is again staggering is that the CMA simply concludes the same with no remedy in this regard.

8.7 I do not agree with the CMA's finding that the main cause of frictional costs is the nature of the interaction, it is clear the behaviour and approach adopted by at fault insurers clearly provides a cost saving incentive to them, in knowing that in failing to deal properly, fairly and promptly with all victims (in accordance with their legal rights) that claims will not be made. It is false and absurd to suggest in paragraph 43 that if a at fault insurer fails to put the Claimant back into their pre accident condition that the lay victim will in effect take on the insurer and litigate against them. This is a lay member of the public, who has been offered no assistance by any company with legal knowledge (i.e. CMC, CHC or solicitor) who has solely dealt with insurers. These are people who may not have the funds to litigate against the large insurer, and will simply take what it is offered because in reality they have no other choice. In reality any other remedy i.e. litigation, is simply too expensive and puts the Claimant at financial risk.

8.8 The CMA appears to overlook, and wrongly conclude on a number of matters when considering the quality difference between direct hire and credit hire and the cost of additional services. When considering the submission of Enterprise (paragraphs 55-57) what appears staggering is the non-consideration of the clear quality difference in service offered. It is no wonder that many clients of Enterprise choose to collect replacement vehicles rather than have then delivered, indeed Enterprise confirms this is because clients could obtain the vehicle more quickly that way. In effect, this is a victim, in an emergency situation - considering how to get to work the next day, how to take the children to school being offered a vehicle that day, needing a vehicle as soon as possible. Their only alternative to collection is waiting days for delivery of a replacement vehicle. It is therefore clear why clients of Enterprise will choose collection, it is so they can try and gain normality as quickly as possible. Compare the same to the service offered by CHCs who can within 2-4 hours (evidence as per paragraph 57) arrange a delivery to a customer; this can be to a home address or to work address. It will include out of hours services and weekend deliveries, it will allow the individual to continue with minimal disruption.

8.9 Further, the CMA's conclusions in respect of additional charges are flawed, when considering CDW the CMA conclude (footnote 17) that CDW cannot be recovered from the at fault insurer under terms of the GTA. This is not law; it is simply an industry agreement. DAML's clients are entitled to protect the vulnerable position in which they have been placed, by taking of CDW and TEW (theft excess waiver) in respect of the rental of the hire vehicle. A CHC's insurance is undoubtedly one of the largest operating costs, it reflects the great risk of insurance to the insurer of the hire company in provision of hire vehicles to individuals who are treated as high risk (i.e. 17 year olds, those with driving penalties which can include previous bans etc.) as such the excess of such a large insurance policy are high. The excess on DAML insurance policy is minimum £2500, it is a well-established principle of law that such cost (CDW and TEW) is recoverable from the at fault insurer (see Marcic v Davies and affirmed in Bee v Jenson[12]). The client placed in the uncertain position of having to credit hire (by the very definition, unable to pay for direct hire) is left at risk of having to pay a large excess on the hire vehicle. Indeed the requirement of CDW could not be more clear, and justified, hence the reason Accident Exchange will offer it free of charge (as they have agreed by affiliation with the GTA to waive the right to recovery). The CMA has further concluded, and acknowledges the conclusion is drawn without evidence, that the

[12] See paragraph 5 of litigation report

service received by clients under direct hire is generally no worse than what they are entitled to in law. This is another example of a conclusion with no evidence or explanation whatsoever. Indeed, the law is not "general" as to your entitlement to be fully and equally compensated following your accident.

8.10 It appears that despite revisiting its investigation, the CMA has again failed to properly direct itself in its investigation and has again come to conclusion with no regard to the law, and indeed those conclusions are contrary to the law that applies.

8.11 Therefore, the AEC identified is not a real one and the remedy is misguided.

EXHIBIT PG1

Fee earner 1

Case	Annual Income
1	Unemployed
2	£12,740.00
3	Unemployed
4	£15,600.00
5	£11,595.00
6	£14,560.00
7	£17,342
8	£13,000.00
9	Unemployed
10	Unemployed
11	£15,080.00
12	Unemployed
13	Unemployed
14	£14,716.00
15	£10,302.76
16	£21,882.60
17	£44,400.00
18	£13,992.00
19	£8,788.00
20	Unemployed

Fee Earner 2

Case	Annual Income
1	£5,150.08
2	£18,018.00
3	Unemployed
4	£6,720.00
5	£18,200.00
6	£12,000.00
7	£14,300.00
8	£26,000.00
9	£22,800.00
10	£22,984.00
11	£10,400.00
12	£9,800.00
13	£21,500.00
14	£23,400.00
15	£28,000.00
16	£12,000.00
17	£14,000.00
18	£8,200.00
19	£32,000.00
20	£11,440.00

Fee earner 3

Case	Annual Income
1	£11,400.00
2	Unemployed
3	£7,280.00
4	Unemployed
5	Unemployed
6	£15,600.00
7	Unemployed
8	£41,600.00
9	Unemployed
10	£9,600.00
11	Unemployed
12	£4,160.00
13	Unemployed
14	£11,500.00
15	£9,600.00
16	£19,800.00
17	£15,600.00
18	£21,000.00
19	£11,600.00
20	£21,000.00

Fee earner 4

1	£10,000
2	£14,500
3	£8,000
4	£7,800
5	£25,000
6	£10,000
7	£9,900
8	£13,500
9	£16,500
10	£19,200
11	£24,000
12	£28,000
13	£8,900
14	£16,300
15	£16,500
16	£1,440 (student)
17	£21,000
18	£15,600
19	£20,000
20	£16,500

fee earner 5

1	£18,500
2	£47,000
3	£12,500
4	£35,000
5	£20,000
6	unemployed
7	unemployed
8	£30,000
9	unemployed
10	£13,000
11	unemployed
12	retired
13	£12,000
14	£26,000
15	£18,000
16	£38,000
17	£4,800 (student)
18	£24,000
19	£40,000
20	£18,500

fee earner 6

1	£9,152.00
2	£10,119.96
3	unemployed
4	£34,404.12
5	unemployed
6	£9,194.52
7	£7,650.00
8	£9,339.48
9	£13,782.84
10	unemployed
11	£23,202.68
12	£9,619.92
13	£18,695.56
14	£21,175.92
15	£10,851.53
16	£15,816.84
17	unemployed
18	£3,259.96
19	£14,517.37
20	£5,808.16

fee earner 7

Case 1	£18,200.00
Case 2	£13,000.00

Case 3	£18,720.00
Case 4	£13,000.00
Case 5	£17,680.00
Case 6	£26,000.00
Case 7	£8,450.00
Case 8	£8,164.00
Case 9	£24,076.00
Case 10	£23,400.00
Case 11	£10,400.00
Case 12	£15,600.00
Case 13	£15,600.00
Case 14	£20,800.00
Case 15	£18,200.00
Case 16	£6,760.00
Case 17	£8,320.00
Case 18	£15,600.00
Case 19	£17,160.00
Case 20	£16,640.00

EXHIBIT PG3

Vehicle Charges	Ormskirk	Hatfield	ABI Rate	50% ABI Rate	ABI Group (or range of groups)
Small car	£88.50	£88.50	£33.57	£16.79	£31.46 (S1) - £35.67 (S2)
Medium car	£99.50	£102.50	£39.42	£19.71	£38.04 (S3) - £40.79 (S4)
Large car	£119.50	£112.50	£53.81	£26.91	£43.15 (S5) - £64.47 (S7)
MPV 7 seater	£200.50	£210.00	£67.97	£33.99	£58.09 (M1) - £77.85 (M3)
Small van	£94.50	£95.50	£38.01	£19.01	PV1
Short wheel based van	£107.50	£107.50	£44.11	£22.06	PV2
Long wheel based van	£140.00	£140.00	£47.75	£23.88	£44.11 (PV2) - £51.39 (PV5)
Luxury specialised	£216.00	£222.50	£127.81	£63.91	£81.33 (P1) - £174.29 (P6)
Medium estate	£108.00	£117.50	£40.79	£20.40	S4
Large estate	£121.50	£124.50	£44.57	£22.29	£43.15 (S5) - £45.98 (S6)
4x4	£200.00	£200.00	£101.08	£50.54	£97.59 (F1) - £104.57 (F2)
Crew cab pick up	£206.50	£206.50	£59.27	£29.64	£51.72 (CP1) - £66.81 (CP3)
Large tipper	£205.50	£205.50	£69.74	£34.87	£54.98 (CV1) - £84.49 (CV4)
Mini specialised	£98.50	£100.50	£40.79	£20.40	S4
Medium specialised	£157.50	£164.50	£44.57	£22.29	£43.15 (S5) - £45.98 (S6)
Black cab	£271.50	£268.50	£118.50	£59.25	T8
Saloon private hire	£258.00	£258.00	£101.67	£50.84	£92.95 (T2) - £110.39 (T4)
MPV private hire	£279.00	£279.00	£188.81	£94.41	£174.29 (T10) - £203.32 (T12)
Chauffeur driver vehicle	£423.50	£423.50	N/A	N/A	N/A
4x4 luxury 5 seater	£280.00	£301.00	£149.30	£74.65	£112.71 (F3) - £185.89 (F5)
4x4 luxury 7 seater	£385.00	£405.00	£226.57	£113.29	£209.14 (F6) - £243.99 (F7)
Sports car	£250.00	£250.00	£176.03	£88.02	£137.10 (SP5) - £214.95 (SP7)
S group	£501.00	£501.00	£268.88	£134.34	£238.19 (SP8) - £299.17 (SP10)
Range Rover	£440.00	£440.00	£216.11	£108.06	£112.71 (F3) - £319.51 (F9)
Small car (dual control)	£118.50	£118.50	N/A	N/A	N/A

EXHIBIT PG4

[redacted]

Dear [redacted]

Our Claim Reference: [redacted]
Our Insured:
Date of Incident:
Your Registration:

WITHOUT PREJUDICE TO LIABILITY

We are sorry to hear you were involved in an accident with one of our customers.

We want to do everything we can to minimise the inconvenience that this accident may have caused you. We pride ourselves on our customer service and would welcome the opportunity to deal with you directly.

We are able to offer a wide range of services designed to assist you and we have a team of people ready to help you.

The main benefits of dealing direct are: -

1. **We can supply you with a Renault Clio sized car as a replacement vehicle, this will be at no cost to you, and we will pay £12.99 per day for this**

   If you do not require the above vehicle, or it is not suitable to your needs, we will be able to obtain many different makes, models and classes of vehicle in order to find a vehicle that will fulfil your needs for the period whilst your own vehicle is off the road. Again this will be at no cost to you, and we will pay for this

2. **The claim will not effect your No Claims Discount**
3. **Free collection and delivery service, if necessary**
4. **There is no excess to pay**
5. **There are no forms to complete**

We can arrange for your vehicle to be taken to one of our Approved Repairers to repair any damage caused by this collision. We will arrange the authorisation of repairs directly to the

Insurers pass information to the Claims and Underwriting Exchange Register, run by Insurance Database Services Ltd (IDS Ltd) and the Motor Insurance Anti-Fraud and Theft Register, run by the Association of British Insurers (ABI). The aim is to help us to check information provided and also to prevent fraudulent claims. We will be passing information relating to this incident to the appropriate register(s). In dealing with your claim, we may search the registers. Insurers and other organisations check and supply details to various databases and fraud prevention agencies, to which the police and other insurers have access. If false or inaccurate information is provided and fraud is identified, details will be passed to fraud prevention agencies to prevent fraud and money laundering. Further details of the fraud preventing agencies and explaining how the information held by fraud prevention agencies may be used, can be obtained by calling 0870 052 0144.

garage and supply you with a replacement vehicle, at no cost to you, whilst your vehicle is off the road. The repairs are guaranteed and any work carried out will comply with any applicable manufacturers' warranty currently in place.

If your vehicle is beyond economical repair we can arrange to deal with your claim. We will arrange a cheque for the pre-accident value of your vehicle less any salvage value and supply a replacement vehicle, at no cost to you, whilst you are waiting for the payment.

If you choose to use a repairer of your own choice, we can arrange authorisation of the repairs and also arrange a replacement vehicle, at no cost to you. Even if you are making a claim via your own insurance company, we are still able offer you a replacement vehicle, at no cost to you.

If you have already been supplied a replacement vehicle, we would advise you to contact your representatives immediately to inform them of this offer.

If the Public Carriage Office licenses your vehicle, we encourage you to not hire a replacement vehicle at a cost greater than your daily earnings. It may be more economical to not work whilst your vehicle is off the road, rather than hire a vehicle at a daily loss. In order to prevent you incurring an ongoing loss of earnings, we may be able to issue an interim payment in respect of your earnings as a substitute to a replacement vehicle.

Please contact us on receipt of this letter to let us know whether we can help. If there is anything contained within this letter that you are unsure of, please contact one of our advisors on 0871 882 6200 ext 64 3165 who will be happy to assist.
We look forward to hearing from you.

Insurers pass information to the Claims and Underwriting Exchange Register, run by Insurance Database Services Ltd (IDS LTD) and the Motor Insurance Anti- Fraud Theft Register, run by the Association of British Insurance (ABI).

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Yours sincerely

Written submissions detailing case law relating to credit hire litigation

'The Litigation Report'

Report to supplement the written submissions and reports on behalf of Direct Accident Management Limited.

Prepared by: Armstrong Solicitors Limited

Contents

1. OVERVIEW

1.1 The purpose of this written submission is to provide an overview of the last 25 years of credit hire litigation. It addresses four questions:

a. The lawfulness of credit hire *per se;*

b. The principles applied by the courts when quantifying damages;

c. The entitlement of hirers to recover the cost of additional waivers; and

d. The rights available to the insurer, should it wish to 'limit' the cost of credit hire.

1.2 The written submissions and case law demonstrates how insurance companies can within the context of the current legal framework adequately protect themselves from credit hire claims.

2. INTRODUCTION

2.1 The credit hire industry, as will be demonstrated developed from the 1980s onwards as a result of the simple fact that many innocent but impecunious victims of road traffic accidents, whose cars were damaged or destroyed, found themselves inconvenienced and undercompensated.

2.2 The poorer echelons of society, use vehicles of modest value, insured on a third party only basis, which are nonetheless of immense value to them in their daily activities enabling them to travel easily and conveniently to work, and to enhance their own domestic and social lives.

2.3 If as a result of such an accident, the vehicle is rendered an economic write off or physically destroyed the motorist will usually be without savings or resources, to immediately replace it, or to hire a substitute vehicle.

2.4 Moreover although such a motorist, will have a good claim for "loss of use" in respect of the destroyed vehicle what the motorist will really want is a replacement of the vehicle he has lost.

2.5 Even if a motorist does have a comprehensive policy of motor insurance they may choose not to claim upon it, either to avoid affecting their own claims history or the loss of a "no claims bonus", or because the benefits provided under the policy, such as a small courtesy car do not adequately mean their needs.

3. CONTEXT

3.1 Insurance companies would prefer to pay modest damages for loss of use, rather than pay for a replacement vehicle because it is much cheaper for them. The litigation between credit hire companies and insurance companies is underpinned by the essential conflict between the credit hire companies who provide services to innocent victims of road traffic accidents and pass on their costs and profit to the insurance industry, and the insurance companies who would rather they did not and had no obligation in law to pay such claims.

4. THE LAWFULNESS OF THE CREDIT HIRE SECTOR AND THE RATES THAT MAY PROPERLY BE RECOVERED

Champerty and maintenance: Giles.v.Thompson [1994] 1 AC 142

4.1 Cases started to be fought through the courts from the 1980s onwards, as the insurance industry sought to stifle the credit hire industry at birth. One set of arguments which reached the then highest court, the House of Lords concerned whether the very existence of the credit hire companies and their role in supporting the prosecution of claims, was unlawful by reason of the principles of champerty and maintenance.

4.2. This decision of the House of Lords repays careful consideration, not so much these days for the actual decision on the arguments of champerty and maintenance (the credit hire companies won) but because it set the scene for many of the arguments that followed.

4.3. Lord Mustill noted the following at pages 154 to 155 of the law report:

> ***The question has arisen in this way. A substantial proportion of motor accidents take place in circumstances where there is little room for doubt that one party is exclusively to blame: typically, where the car of one driver (hereafter "the motorist") is stationary, for example at a traffic light, and where a car driven by another person ("the defendant") is carelessly driven into the back of it. There are two types of damages which may be awarded to the motorist in any resulting litigation. First, there are damages for any personal injury which the motorist may have suffered. These will usually comprise general damages for pain, suffering and loss of amenity, and special damages for past and future loss of earnings. Secondly, there are damages related to the loss of or damage to the motorists's vehicle. These will or may have two elements: a figure representing the diminution in value of the motorist's vehicle, and another figure representing the financial loss suffered by the motorist because he or she cannot use the vehicle whilst it is either being replaced (if written off) or undergoing repairs. In practice these various elements are dealt with in various ways. The damage to the car itself is settled between insurers, apart from the excess on the motorist's policy, which he may not trouble to pursue except as an appendage to a larger claim. The motorist's claims for personal injuries may be substantial in amount, and will be made the subject of an action, if the motorist can finance the action either from his own resources, or from some form of insurance, or (if he is of very limited means) by legal aid.***
>
> ***There remains the claim for loss of use of the car. In principle, if such a claim is made it will often be quantified by reference to the cost of hiring a substitute vehicle, and will be recoverable upon proof that the motorist needed a replacement car whilst his own was off the road. I say "if such a claim is made" for two reasons. First, because the loss of use is not recoverable under a comprehensive policy, so that there are no subrogated insurers to stand behind the claim, and in situations where***

there is no personal injury claim and where the damage to the motorist's vehicle is dealt with as between insurers there are few motorists who will have the time, energy and resources to go to law solely to recover the cost of a substitute vehicle. Secondly, because there are many motorists who lack the inclination or the ready cash to hire a substitute on the chance of recovering reimbursement from the defendant's insurers. Thus, there exists in practical terms a gap in the remedies available to the motorist, from which the errant driver, and hence his insurers, frequently profit.

4.4. It is hard to resist the conclusion, that Lord Mustill identified a very real social problem, in that there innocent motorists who were not being compensated for the true extent of the losses they were entitled to claim for a common law.

4.5. The role of the credit hire companies in addressing this problem was commented on by Lord Mustill at page 155

In recent years a number of commercial concerns (hereafter "the companies") have identified this gap and have sought to fill it in a manner advantageous alike to motorists and to themselves, by offering to motorists with apparently solid claims against the other parties to collisions the opportunity to make use of the company's cars whilst their own are off the road. The terms on which this opportunity is given are said to be, in broad outline, as follows. (1) The company makes a car available to the motorist whilst the damaged car is under repair. (2) The company pursues a claim against the defendant, at its own expense and employing solicitors of its choice, in the name of the motorist for loss of use of the motorist's car. (3) The company makes a charge for the loan of the replacement car, which is reimbursed from that part of the damages recovered by the motorist from the defendant or his insurers which reflects the loss of use of the motorist's car. (4) Until this happens the motorist is under no obligation to pay for the use of the replacement car. (5) These arrangements are conditional on the co-operation of the motorist in pursuing the claim and any resulting legal proceedings. (6) The companies aim to confine the scheme to cases where the motorist is very likely to succeed in establishing the defendant's liability, without any contributory negligence on the part of the motorist.

4.6. He went on to note the response of the insurance industry:

Transactions on these general lines have been entered into in large numbers, to the discomfort of the defendants' insurers, who have been faced with claims of which an element reflects the cost of a replacement vehicle which would not have been hired but for the existence of the scheme. The insurers have counter-attacked by alleging that the hiring agreements are champertous and

accordingly unlawful, or otherwise contrary to public policy. Whilst no longer contending that actions which include an element of damages referable to the charges made, or said to be made, by the companies are an abuse of the process of the court, and should be therefore be struck out in their entirety, the insurers say that damages cannot be awarded for the hiring charges, since to do so would enable the motorist to rely on an unlawful contract.

4.7. Lord Mustill noted at page 165 that it was contended by the insurance industry that this would lead to inflated claims. He ruled against this proposition, by pointing out the "tools" that a shrewd and experienced insurance company could readily deploy to prevent inflated claims.

*The other danger to the administration of justice, of which the defendants and their insurers urge the court to beware, is that the existence of the scheme will encourage motorists to hire cars which they do not really require, at inflated rates, which have to be paid for by the insurers. As to rates of hire, shrewd and experienced insurers will be well equipped with information about local tariffs for the hire of cars of the same type as the motorists' damaged vehicles, with which they can expose any exaggeration. and as to the possibility that the scheme will encourage motorists to hire cars which they do not need, at the ultimate expense of the insurers, I am confident that resourceful lawyers are well able *165 to press by interlocutory measures for a candid exposure of the motorist's true requirements, and, if all else fails, to fight the issue at an oral hearing, as happened in the present case. If the motorists are found to have been tempted by the hire companies into the unnecessary hiring of substitute vehicles, the claims will fail pro tanto, with consequent orders for costs which will impose a healthy discipline upon the companies.In these circumstances I find the perils to the proper administration of justice much exaggerated.*

4.8. Finally at page 167 he noted that in order for a claim for credit hire charges to be made at all, it had to be demonstrated that there was a need for a replacement vehicle.

Whilst I have sympathy with this point of view I think it too broad. The need for a replacement car is not self-proving. The motorist may have been in hospital through the accident for longer than his vehicle was off the road; or he may have been planning to go abroad for a holiday leaving his car behind; and so on. Thus, although I agree with the judgments in the Court of Appeal that it is not hard to infer that a motorist who incurs the considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as the result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might otherwise arise.

Consumer protection compliance and rates: Dimond.v.Lovell in the House of Lords [2002] 1 AC 384

4.9. The issue of the recoverability of credit hire charges returned to the House of Lords in this case some years later. The first point was that the credit hire agreements in the case, were regulated by the Consumer Credit Act 1974, and were unenforceable having been drafted in breach of requirements imposed by the Act and secondary legislation made under it. Applying the rule against "double recovery" the motorist who was then under no liability to pay the credit hire company could not recover damages to discharge a debt she did not have to pay.

4.10. The second point which has proved far more significant and long lasting, is the ruling by the House of Lords on how the rate of credit hire charges should be calculated by the courts in order to reach a result which the common law regards as a reasonable and just result. The focus by the House of Lords was on the concept that there was nothing wrong in an insurer having to pay a market rate, referred to as a "spot rate" for the credit hire car, which was the same rate a motorist who had gone to a normal hire company would have paid.

4.11. The House of Lords in drawing up an objective standard, did not at this stage, save for the dissenting speech of Lord Nicholls draw a distinction between the financial circumstances of a motorist, who had the cash to pay hire charges up front and an impecunious motorist, who could not do so, but whose loss was in any event fixed according to the same objective standard.

Lord Hoffmann

4.12. Lord Hoffman set out the principles he judged should be applied at 392 to 393. First of all he reiterated the clear social utility provided by credit hire companies when it came:

> ***The services thus offered by an accident hire company, in providing the car on credit and assuming the burden and risk of pursuing the claim, have filled a gap in the market. Many comprehensive motor insurance policies cover damage to the vehicle but not the cost of hiring a replacement. The owner of a damaged car can arrange for his car to be repaired in the knowledge that the bill will be sent to the insurance company. Whether his company meets the cost itself or recovers it from the other driver's insurer is (apart from the question of a no-claim bonus) not a matter which need concern him. If, however, he wants to hire a replacement vehicle, he will have to make the arrangements at his own expense and claim the cost from the other driver himself. Faced with such a prospect, many drivers will make do without a car while their vehicle is off the road. Accident hire companies enable them to have a replacement car without cost, trouble or risk.***
>
> ***The accident hire business has increased the cost of third party claims against motor insurance companies such as CIS. Motorists not only hire replacement cars when they would not previously have done so but also, since they are not themselves paying, do not necessarily exercise the closest***

scrutiny over the rate that is being charged. Partly for this reason and partly because the companies have to be compensated for the credit and additional services that they provide, claims by accident hire companies are generally at rates substantially above the market or "spot" rates that an ordinary hire company would have been willing to offer for ready money. Motor insurance companies have therefore tried to resist such claims. The first attempt was based upon the theory that the arrangements between motorist and accident hire company were champertous. It was rejected by your Lordships in Giles v Thompson [1994] 1 AC 142 . The present case is a return to the charge by other means. Your Lordships were told that many other cases, both at first instance and in the Court of Appeal, wait upon the result.

4.13. On the calculation of rates he observed as follows:

How does one calculate the additional benefits that Mrs Dimond received by choosing the 1st Automotive package to mitigate the loss caused by the accident to her car? The hiring contract does not distinguish between what is attributable simply to the hire of the car and what is attributable to the other benefits. But I do not think that a court can ignore the fact that, one way or another, the other benefits have to be paid for. 1st Automotive have to bear the irrecoverable costs of conducting the claim, providing credit to the hirers, paying commission to brokers, checking that the accident was not the hirer's fault and so on. A charge for all of this is built into the hire.

*How does one estimate the value of these additional benefits that Mrs Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay 1st Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car. As the judge said, 1st Automotive charged more because they offered more. The difference represents the value of the additional services which they provided. I quite accept that a determination of the value of the benefits which must be brought into account will depend upon the facts of each case. But the principle to be applied is that in the *403 British Westinghouse case [1912] AC 673 and this seems to me to lead to the conclusion that in the case of a hiring from an accident hire company, the equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided.*

<u>Lord Nicholls</u>

4.14. Lord Nicholls dissented on the question of the measure of damages at 390 to 391 He noted the basic problem that victims of no-fault accidents were left without redress:

These proceedings arise out of an everyday occurrence. Momentary inattention by a driver results in his car running into and damaging another vehicle. The damaged car needs repair and is off the road for some days while being repaired. The owner of the damaged car requires a replacement vehicle. Many car insurance policies make no provision for a replacement if the insured car is

damaged in an accident. So the victim of a no fault accident has to make his own arrangements to tide himself over the days he is without his car.

4.15. He also emphasised the practical difficulties, facing motorists of modest means, who could not afford to hire a replacement vehicle:

Under an ordinary car hiring arrangement, the hirer has to produce the hire charge up front. Usually the amount of money involved is not large, but for many people it is still a considerable sum to have to find. Further, there is no certainty the money will ever be recovered from the insurers of the car whose driver was at fault. The innocent motorist has no clout when it comes to seeking payment from someone else's insurers. And no one would wish to become involved in court proceedings to recover the money from the insurers. So there are many cases where innocent motorists make do as best they can. They manage somehow without a car, or borrow one from a relation, or get lifts from friends. Either that, or they hire a car and write off the hire charge as just one of those things.

4.16. His conclusion was that the role played by credit hire companies was of real practical utility when dealing with the aftermath of an accident:

So it comes about that accident car hire companies are fulfilling a real need. They provide replacement cars and additional services as well. The hirer does not have to produce any money, either at the time of the hiring or at all. The hire company pursues the allegedly negligent driver's insurers. The hire company is not deterred by having to bring court proceedings should this become necessary. If the claim is unsuccessful, in practice the hire company does not pursue the hirer.

4.17. He would also have developed the common law to enable the no fault driver to recover the full cost of the credit hire charges:

*These are valuable additional services. At first sight there seems to be no reason why the negligent driver's insurers should have to pay for these additional services. If a car owner wishes to have these services he should *391 pay for them himself. I consider this would be to take too narrow a view of the position in which the no-fault driver finds himself. The position in law is that the negligent driver, backed by his insurers, is liable to pay reasonable charges incurred in hiring a replacement car if this is reasonably necessary. For many motorists the existence of this liability of the other motorist can be more theoretical than real. In practice this source of recompense frequently does not yield money, or even an acceptance of liability, in time to be of use. In Giles v Thompson [1994] 1 AC 142, 155a , Lord Mustill observed that: "there exists in practical terms a gap in the remedies available to the motorist, from which the errant driver, and hence his insurers, frequently profit."*

4.18. Lord Nicholls concluded:

> ***The additional services provided by accident car hire companies bridge this gap. They redress the imbalance between the individual car owner and the insurance companies. They enable car owners to shift from themselves to the insurance companies a loss which properly belongs to the insurers but which, in practice, owners of cars often have to bear themselves. So long as the charge for the additional services is reasonable, this charge should be part of the recoverable damages.***

4.19. Some 14 years ago, the ABI, proposed to extend no fault hire more generally. This initiative has found fruit in the last few years, with a number of insurers being willing to offer hire. But it is worth noting what was contemplated many years ago as an economically efficient way of dealing with the needs for replacement vehicles. The ABI initiative as proposed in 2000 was noted in these terms at page 391 by Lord Nicholls:

> ***This House was told by counsel of a scheme or proposed scheme, the "ABI initiative", whereby insurance companies and car hire companies will provide hire vehicles to victims of no fault accidents. Depending on its terms, a scheme of this nature may meet the need which has given rise to the accident car hire business. Until that happens, the accident car hire arrangements provide a reasonable basis by which no-fault victims can in fact obtain the benefit of the right which the common law and compulsory third party insurance seek to give them against careless drivers. A measure of damages which does not achieve this result would be sadly deficient. The law on the measure of damages should reflect the practicalities of the situation in which a wronged person finds himself. Otherwise it would mean that the law's response to a wrong is a right to damages which will often be illusory in practice. I do not believe this can be the present state of the law in a situation which affects thousands of people every year.***

<u>Clark v Ardington: evolving arguments [2003] QB 36</u>

4.20. A number of conjoined appeals were determined by the Court of Appeal. The cases involved considerations of the enforceability of the credit hire agreements in those cases, which are largely of historical interest. Of ongoing significance are the observations on the recoverability of the credit hire charges, and the consideration of what was a reasonable rate, and how this might be determined. The Court of Appeal stated, rejecting the notion that average rates could be looked at, that the normal legal principles of the common law should apply:

> ***146 We believe that Mr Milligan's criticisms of the judge's adoption of Mainz plus 10% are justified, as were his criticisms of the suggestion that it provides a working solution. If Mainz plus 10% is justified to arrive at the reasonable charges incurred in hiring a replacement car, then it must be capable of application whether or not an accident hire company is involved. That cannot be right. A***

person who needs to hire a car because of the negligence of another must, subject to mitigating his loss, be entitled to recover the actual cost of hire not an average derived from the Mainz report. If the principle adopted by the judge is correct then it would seem appropriate also to apply that principle to the cost of car repair, namely a claimant may only recover the average of the charges of garages. But a person whose car is damaged should in appropriate circumstances recover the cost to him of repair and loss of use. His recovery should not be restricted to an average of car repair or hire rates nor should he be able to recover that average cost if the actual cost is less. We believe that the solution is to apply normal legal principles.

4.21. The Court of Appeal emphasised the fundamental principles of compensation and how this could include in appropriate cases recovering charges at what were termed the "top of the range" of car hire rates:

147 The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use and he establishes a need for a replacement, he is entitled to the cost of hiring a replacement car. He can go round to the nearest car hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances.

4.22. The Court of Appeal further noted that in principle it is a relatively stralghtforward exercise to quantify what is the appropriate rate, in any given case.

*148 We do not anticipate that the application of the correct legal principles will lead to disproportionate costs in small cases. The claim will be based on evidence as to the rate charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates. Thereafter the evidential burden passes to the insurers to show that it would not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate. What is reasonable and whether a loss is avoidable are questions of fact, not law, which district and county court judges regularly decide. It can arise in many different types of cases, ranging from damage to chattels to a failure to take action. We do not believe that a decision on such *87 issues in respect of car hire charges will be any more difficult than in respect of car repair charges.*

Impecunjosity Lagden.v.O'Connor: [2004] 1 AC 1067

4.23. The issue of whether it was appropriate to take into account a motorist's personal financial circumstances when deciding whether he could recover the full credit hire rates or was limited to spot hire rates was revisited by the House of Lords.

4.24. The essence of the arguments was that it was unrealistic and artificial to limit a motorist's damages to spot hire rates, if as a question of fact, they could not have afforded to pay those rates up front and instead would have had to hire from a credit hire company and pay credit hire rates.

Lord Hope

4.25. The principal speech was provided by Lord Hope who stated at pages 1080 to 1081:

> ***34 Of course, the facts in these two cases were quite different from those in this case. But I think that the principles on which they were decided are of general application, and it is possible to extract this guidance from them. It is for the defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted.***

4.26. The emphasis in Lord Hope's speech was on choice: what were the options open to the innocent motorist and how much would those options cost.

> ***35 Applying those principles to the present case, I would hold that the defendant's insurers have not made out a case for the deduction which they seek. The evidence showed that Mr Lagden had no choice but to use the services of the credit hire company and that, if he was to make use of these services, he had no way of avoiding the additional benefits that were provided to him. The principles which I would apply are of general application. But it by no means follows that the same result must follow in every case where the innocent motorist uses the services of a credit hire company. The criterion that must be applied is whether he had a choice—whether it would have***

been open to him to go into the market and hire a car at the ordinary rates from an ordinary car hire company.

4.27. Lord Hope found that an impecunious motorist, one who had no choice but to hire a replacement vehicle on a credit hire basis, was entitled to the full cost of the credit hire. He went on to suggest a simple test for determining whether someone had a "choice" or was impecunious and without choice;

> ***36** In practice, for reasons that are obvious, companies which offer cars for hire in the open market insist on payment of the rental up front before the *1081 car is collected, together with a sum to cover the risk of damage to the car while it is on hire. Payment is usually made by means of a credit card or a debit card. Some companies may accept cash, but if they do the sum that will have to be paid up front will not be small. Many car owners are, of course, well able to provide what is needed to satisfy the hirer that the money which is needed to pay for the hire is available. If they choose to use the services of a credit hire company they must accept as a deduction from their expenditure the extra cost of doing so. The full cost of obtaining the services of a credit hire company cannot be claimed by the motorist who is able to pay the cost of the hire up front without exposing himself or his family to a loss or burden which is unreasonable.*

4.28. This rule of thumb focused on whether someone had ready means by which to pay for hire as an upfront cost, or not:

> ***37** But it is reasonably foreseeable that there will be some car owners who will be unable to produce an acceptable credit or debit card and will not have the money in hand to pay for the hire in cash before collection. In their case the cost of paying for the provision of additional services by a credit hire company must be attributed in law not to the choice of the motorist but to the act or omission of the wrongdoer. That is Mr Lagden's case. In law the money which he spent to obtain the services of the credit hire company is recoverable.*

4.29. This ruling did not offend against public policy. He expressly dealt with considerations of public policy at 1083 in these terms:

> ***43** I recognise that, if an exception is to be made in favour of the car owner who is impecunious, there may be some cases where motor insurers will feel that they have no alternative but to take the case to court in order to resolve the question of fact as to whether the claimant had no choice but to use the services of a credit hire company. This may lead to an increase in contested small claims. I do not think that we are in a position to assess the scale of that increase. But motor insurers will be as anxious as anybody to *1083 keep these cases out of court with a view to keeping costs to a minimum. This suggests that the better course is to leave it to the insurance market to find its own solution to this problem. We must bear in mind, too, that the object of the law of*

damages is to put the injured party into the same position as he was before the accident. It would defeat this object if we were to arrive at a decision on policy grounds that would deprive the impecunious motorist of the opportunity of minimising his loss of use while his car is being repaired by obtaining the hire of an alternative vehicle.

44 For these reasons I would hold that the policy objections do not justify a departure from what I take to be the law as to the assessment of the damages that are recoverable

Lord Nicholls

4.30. The approach taken by Lord Nicholls echoed the speech he had given in the earlier case of Dimond and is to be found at pages 1072 to 1073

5 In Dimond v Lovell Mrs Dimond could have found the money needed to hire a replacement car until she was reimbursed by Mr Lovell or his insurers. The case proceeded on this basis. Understandably enough, she preferred to take advantage of the services of an accident hire firm. But what if the innocent motorist, like many people, is unable to afford the cost of hiring a replacement car from a car hire company? Unlike Mrs Dimond, he cannot find the necessary money. So, unless he can use the services of a credit hire company, he will be unable to obtain a replacement car. While his car is being repaired he will have to make do as best he can without a car of his own. If this happens, he will be without his own car and in practice will receive little or no recompense for the inconvenience involved.

4.31. Of concern to him, was to emphasise that credit hire companies provide a reasonable means of providing replacement vehicles, and the absence of the credit hire companies, would enable insurers to shuffle away from their liabilities:

6 My Lords, the law would be seriously defective if in this type of case the innocent motorist were, in practice, unable to obtain the use of a replacement car. The law does not assess damages payable to an innocent plaintiff on the basis that he is expected to perform the impossible. The common law prides itself on being sensible and reasonable. It has regard to practical realities. As Lord Reid said in Cartledge v E Jopling & Sons Ltd [1963] AC 758 , 772, the common law ought never to produce a wholly unreasonable result. Here, as elsewhere, a negligent driver must take his victim as he finds him. Common fairness requires that if an innocent plaintiff cannot afford to pay car hire charges, so that left to himself he would be unable to obtain a replacement car to meet the need created by the negligent driver, then the damages payable under this head of loss should include the reasonable costs of a credit hire company. Credit hire companies provide a reasonable means whereby innocent motorists may obtain use of a replacement vehicle when otherwise they would be unable to do so. Unless the recoverable damages in such a case include the reasonable costs of a credit hire

*company the negligent driver's insurers will be able to shuffle away from their insured's responsibility to pay the cost of providing a replacement car. A financially well placed plaintiff will be able to hire a replacement car, and in the fullness of time obtain reimbursement from the *1073 negligent driver's insurers, but an impecunious plaintiff will not. This cannot be an acceptable result.*

4.32. The point that he made was where credit hire charges were recoverable, this was a predictable result not of those charges being excessive, but the innocent motorist's limited means, which meant it cost him more to be put back into his pre-accident position, than a more affluent motorist.

7 The conclusion I have stated does not mean that, if impecunious, an innocent motorist can recover damages beyond losses for which he is properly compensatable. What it means is that in measuring the loss suffered by an impecunious plaintiff by loss of use of his own car the law will recognise that, because of his lack of financial means, the timely provision of a replacement vehicle for him costs more than it does in the case of his more affluent neighbour. In the case of the impecunious plaintiff someone has to provide him with credit, by incurring the expense of providing a car without receiving immediate payment, and then incur the administrative expense involved in pursuing the defendant's insurers for payment.

4.33. The decision of the House of Lords necessitated overturning a case which had stood for 70 years: the **Liesbosch**, which suggested that a victim's lack of financial means, should not be taken into account when calculating damages.

8 In your Lordships' House the appellant sought to derive assistance from Owners of Liesbosch Dredger v Owners of SS Edison (The Liesbosch) [1933] AC 449 and Lord Wright's much discussed observations, at pp 460-461, regarding not taking into account a claimant's want of means when assessing the amount of his loss. For the reasons given by my noble and learned friends, Lord Hope of Craighead and Lord Walker of Gestingthorpe, these observations, despite the eminence of their source, can no longer be regarded as authoritative. They must now be regarded as overtaken by subsequent developments in the law.

4.34. This led to his observations on who would be impecunious: the simplicity of the test he suggested was grounded in common sense. As financial decisions are dictated by priorities, if the payment of hire charges would involve unreasonable sacrifices on the part of the hirer.

9 There remains the difficult point of what is meant by "impecunious" in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff

could not reasonably be expected to make. I am fully conscious of the open-ended nature of this test. But fears that this will lead to increased litigation in small claims courts seem to me exaggerated. It is in the interests of all concerned to avoid litigation with its attendant costs and delay. Motor insurers and credit hire companies should be able to agree on standard enquiries, or some other means, which in practice can most readily give effect to this test of impecuniosity. I would dismiss this appeal.

4.35. The approach of the House of Lords followed on from long standing authority and a very famous statement of principle in the case of **Banco de Portugal.v.Waterlow and Sons Limited [1932] AC 452**.

4.36. In that case Lord MacMillan noted at page 506

Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

5. WAIVERS AND EXCESS

Marcic v Davies (Unreported Court of Appeal 20th February 1985) : Extras and excess

5.1. One of the issues that often arises is the question of additional daily charges to waive an excess that might apply in the result that the car is damaged, which are charged by credit hire companies in addition to a daily rate of hire. These elements have always proved recoverable.

5.2. Some 30 years ago the argument that collision damage waiver (CDW) incorporated an element of betterment was decisively rejected by the Court of Appeal. The same considerations would apply to any analogous charges such as theft excess waiver (TEW).

5.3. In his judgment Browne-Wilkinson LJ found:

I do not accept that submission. In accordance with the ordinary rule of damages the plaintiff is entitled to be put back, as far as possible, into the position in which he would have been had the collision not occurred. If there had been no collision the plaintiff would never have come under any contractual liability to the car hire company. It was accepted that it was reasonable for him to hire

the car from the car hire company. Since he could only do this by effecting comprehensive insurance in the full amount or by bearing the excess of £150, if he had elected to bear the excess himself, he would, under the terms of his hiring contract with the hire company, have come under a contractual liability to pay £150 to the hire company in respect of damage. What is more that would be damage not to his own motor car but to the hire company's motor car. Accordingly, this liability for £150 that he would have had to the hire company if he had not paid the waiver fee would have been a contractual obligation which he would never have been under had it not been for the original collision with the defendant...

The element of betterment to which Mr Tudor-Evans referred would only have arisen if during the period of the hire the plaintiff had in fact had a further accident. It is true that if that had happened to his own motor car he would have had to bear the whole cost of the damage to his motor car if he had decided to have it repaired, whereas if the hire car had crashed during that period he would not have had to bear such cost. But in fact no such accident occurred. What we are concerned with is the covering the plaintiff against a contractual liability that he was bound to enter into and the cost of so doing. In my judgment the learned judge was right to include the waiver fee as an item of recoverable damage.

Bee v Jenson [2006] EWHC 3339 (Comm): excess in the modern era

5.4. More than 20 years later the observations in the Marcic case were applied agains. In the Commercial Court Morrison J observed as follows:

15. On the question of quantum, it is now clear on the evidence that the rate charged by Helphire, with a nil excess, was very good value for money, by comparison with other spot rates. Many hire companies are unwilling to remove the excess; some will merely reduce" it. Had the point been live, I would have held that it was reasonable for the replacement vehicle to have been provided with a nil excess regardless of the excess which applied to Mr Bee's own car. I do so for the reasons advanced by Mr Butcher. I quote from paragraph 35 of his skeleton argument, with which I fully agree:

"The fallacy in [the Defendant's expert witness'] case on [collision waiver damage] is that whilst asserting the betterment of the nil excess, he disregards the detriment [Mr Bee] suffered by being placed in a car belonging to a hire company. He treats Mr Bee as if on receiving the hire car, he was in the same position after the accident as he was before it. Obviously, he was not. He was not in his own car; he was in somebody else's. He was obliged to return the car in the same state as he received it. Were his own car damaged, he could defer repairs, perform amateur or temporary repairs or not bother with repairs. These would not be options with Helphire. Moreover, were [Mr Bee] to blame for damage to that vehicle, he would be subject not only to a claim for the cost of

repair, but also for Helphire's loss of profit whilst it was out of commission. In other words, by forcing [Mr Bee] into a hire vehicle, [the Defendant] was exposing him to risks which he did not previously face, such that his insurance needs were different. As such, it is impossible to portray the nil excess as a betterment. It was a reasonable arrangement, consequential on the tort. "

16. In any event, there is a decision on this issue in an unreported decision of the Court of Appeal given on 20 February 1985 Marcic v Davies. There, the court held that the claimant who hired a replacement vehicle and paid the waiver fee to achieve a nil excess when his own excess had been £150 was entitled to recover that fee since if there had been no collision the claimant would "never have come under any contractual liability to the car hire company". "It was entirely reasonable that he should pay the waiver fee to cover himself against a contractual liability which he would otherwise never been under." per Lord Justice Browne-Wilkinson. Mr Flaux accepts that this case is binding on me. I have no hesitation in following it for the reasons expressed above.

6. MECHANISMS FOR CONTROLLING THE COST OF CREDIT HIRE

Copley v Lawn [2009] EWCA Civ 580: making amends

6.1. In this case a powerful weapon was provided to the insurance industry, to enable them to curtail claims for credit hire, by sanctioning the right of insurers to intervene in credit hire claims, by offering a replacement vehicle sourced by the insurance company to make amends to the motorist, and where the cost was controlled by the insurance company.

6.2. However the Court of Appeal set out clear guidance which should be followed so that any such offer was put in appropriate terms and ensured that the interests of the motorist were not subordinated to costs considerations of the insurance company. This option exists over and above the fact that where impecuniosity is not relied upon, the measure of damages is in any event, the cost of spot hire.

6.3. In giving judgment Longmore LJ noted:

3 No doubt defendants' insurers wish to take steps to inhibit unreasonable car hire costs incurred by claimants. But not the least curious thing about the dispute which has arisen in these standard running-down cases is that it is well settled that, although a claimant can recover the cost of hiring a replacement car, he can only recover the reasonable rate of such hire; that has been held in Dimond v Lovell [2002] 1 A C 384 *to be the market or "spot" rate. Thus to the extent that the Helphire rate contained an element of uplift due to the fact that payment of hire was deferred or the claimant was given easy credit terms or the fact that the possibility of failure to recover from the defendant was covered by insurance, that uplift could not be recovered. It is not usually difficult to ascertain the spot hire rate for cars equivalent to a claimant's car and one would therefore*

expect any argument between claimants and their insurers on the one hand and defendants or their insurers on the other hand to be confined to ascertainment of the "spot" or market rate.

6.4. The propriety of making an offer of amends by a replacement vehicle was not in dispute: sending innocent motorists obscure or threatening correspondence was deprecated by the Court:

4 Mr Butcher QC for the claimants did not, however, feel able to submit that the doctrine of mitigation had no application at all to claims for loss of use of a car whenever a claim for the "spot" rate was made. He accepted that if a defendant's insurers could obtain an equivalent replacement car and offered to provide it to a claimant, the question could arise whether it was reasonable for a claimant to reject that offer. His submission was first that on the facts of the present case it was not unreasonable for Mrs Copley and Captain Maden to have taken no (or no positive) action in response to KGM's letters and secondly that, if it was unreasonable to have failed to respond, they could nevertheless recover the rate that the defendants' insurers would themselves have had to pay. Since the defendants' insurers had never stated what rate they would have had to pay, there was no basis for making any deduction from the rate claimed which should be recoverable in full.

6.5. The letter written to the innocent motorist was set out at some length:

8 KGM's letter to the claimants needs to be set out, regrettably at some length:-
"We are sorry to learn that you have been involved in a road accident with a KGM customer. We would like to assist you in trying to make the process of pursuing your claim as painless as possible. We are able to offer you the benefit of our own approved repairer scheme to repair any damage to your car caused by this collision.
PROVIDED YOUR VEHICLE IS ECONOMICAL TO REPAIR, YOU WILL BE ENTITLED TO THE FOLLOWING:

- *1. A vehicle to suit your need will be made available at no cost to you for the period your own vehicle is off the road.*
- *2. Free transportation of your vehicle to and from the repairer.*
- *3. Inspection and authorisation of repairs, with the account sent direct to us for payment.*
- *4. A three-year repair guarantee.*
- *5. You will not have to pay any excess.*

IF YOUR VEHICLE IS CONSIDERED TO BE BEYOND ECONOMICAL REPAIR, WE CAN PROVIDE THE FOLLOWING:

- *1. An inspection of your vehicle by an independent engineer with a copy of the report sent to you.*

- *2. A cheque representing the engineer's considered pre-accident market value of the vehicle, less any salvage value.*
- *...*
- *5. A hire vehicle to suit your needs will be made available at no cost to you for the period it takes for the engineer to inspect your vehicle, and a cheque will be sent to you for the market value.*

Should you wish to use your own chosen repairer, please provide us with their details or their estimate to enable us to authorise repairs to them. Our offer to provide a replacement vehicle free of charge will still be applicable.
Even if you have already intimated a claim through your own insurer and choose not to use our approved repair service, we are still able to offer the benefit of a free replacement vehicle whilst your own is off the road.
If your vehicle is off the road and you are already in a replacement, please check the agreement you have signed as, unless the replacement provided is a free courtesy vehicle, we would like to substitute this with a vehicle supplied by us, at no cost to you.
Should you elect not to accept the offer of our services, but instead utilise credit repair or credit hire facilities from another source, then we will refuse payment of any such claim made on your behalf. You will appreciate that if we do refuse payment of the claim for credit hire and/or credit repair, then you may be found liable for any payment that the credit hirer/repairer does not recover from us. No doubt, this will be explained to you when you sign the proposed agreement. We urge you to read the terms of the agreement very carefully.
The reason for this is that you have a common-law duty to minimise your loss when making a claim and by choosing to ignore our offer and continuing with repairs and/or hire on a credit basis, you would clearly be failing to satisfy that duty.
We reserve the right to bring this letter to the attention of the Court in any subsequent legal action brought against our Policyholder or us."

6.6. The Court of Appeal was scathing about the terms of the letter:

9 It is very difficult to know what an average driver would make of all of this. It comes (within a day or two of the accident) from the insurers of a defendant who has negligently caused damage to the claimant's car and perhaps his person too. It has an unpleasant threatening tone to it and does not even suggest that the recipient should pass it to his insurer or solicitor for advice as to its contents. It is tempting to say that any recipient should be entitled to ignore it completely. But that is not a course which any of the judges below adopted. What is completely clear to me is that the cold

telephone call to Mrs Copley was inappropriate. If that is KGM's practice it should be discontinued forthwith.

6.7. The Lord Justice noted at paragraph 17:

17 This conclusion carries with it an important consequence. If it is right to take into account the fact that insurers on both sides are involved (as is explicit in relation to the defendants and implicit in relation to the claimants), any offer made by the defendants' insurers must contain all such information as will be relevant for the claimants and their advisers or representatives to make a reasonable response. One piece of information missing from KGM's letter was the cost to KGM of hiring the cars. Whereas it might be said that that would be of no interest to Mrs Copley and Captain Maden as individuals, it would undoubtedly be of great interest to their advisers or representatives, since, if KGM could genuinely obtain hire cars more cheaply than the claimants could, it might be unreasonable to use the services of Helphire and a mitigation argument might get off the ground.

20 In that case the comparative cost was clear from the beginning and the claimant could make an informed choice. In the present cases no such informed choice was available to either the claimants or their advisers and I do not see how they can be said to have acted unreasonably in not accepting the offer in the form it was presented to the claimants. The claimants and their advisers need to know the true cost to the defendant and his insurers since it might, as Mr Butcher pointed out, be the case that the cost of the defendants' insurers hiring the replacement car was actually the same as (or more than) the cost of hiring a replacement from Helphire. If that were the true position it could scarcely be said that it was unreasonable for the claimants to pay the Helphire cost.

21 Mr Walker submitted that the cost to the defendants' insurers was entirely irrelevant. If they were prepared to bear that cost in its entirety (whether for good commercial reasons or completely altruistic ones) that was of no concern to the claimants. Judge Langan agreed with the submission but I cannot accept it. The present dispute is an ordinary commercial dispute and the court cannot close its eyes to the obvious fact that hiring cars is a profitable business from the point of view of the supplier and a cost–incurring exercise from the point of view of the hirer. A claimant who has been deprived of the use of his car by the negligence of a tortfeasor only has to take reasonable steps to mitigate his claim for that loss of use and he cannot, in my judgment, be said to act unreasonably if he makes (or continues) his own arrangements with his own hire company, unless he is made aware that this commercial enterprise can be undertaken more cheaply by the defendant than by his own arrangements.

22 It follows from this that, if a defendant or his insurers does make an offer of a replacement car to an innocent claimant and he makes clear that he is going to pay less for such a car than the claimant is intending to pay (or is paying) for a car from a company such as Helphire, then (other

things being equal) it may well be the case that a claimant should accept that lower cost replacement.

23 Mr Walker also submitted the decisions of the judges below were "findings of fact" and should not be interfered with by this court. There is no question of any interference with any finding of primary fact; questions of mitigation are however, questions of evaluation and judgment and there is no reason why this court should not interfere, if the judge's conclusions are, in its considered opinion, wrong.

24 For the reasons given, I do not think that Mrs Copley or Captain Maden (whether by themselves or through their agents) acted unreasonably in failing to accept KGM's offers or in failing to explore them further. I would, therefore, allow these appeals.

6.8. In conclusion the Court of Appeal summarised the position as follows:

32 I would therefore conclude

i) that, looking at the matter objectively, it is not unreasonable for a claimant to reject or ignore an offer from a defendant (or his insurers) which does not make clear the cost of hire to the defendant for the purpose of enabling the claimant to make a realistic comparison with the cost which he is incurring or about to incur;

ii) that, following Strutt v Whitnell , if a claimant does unreasonably reject or ignore a defendant's offer of a replacement car, the claimant is entitled to recover at least the cost which the defendant can show he would reasonably have incurred; he does not forfeit his damages claim altogether.

If this is correct, the general rule that the claimant can recover the "spot" or market rate of hire for his loss of use claim is upheld, unless and to the extent that a defendant can show that, on the facts of a particular case, a car could have been provided even more cheaply than that "spot" or market rate.

6.9. The issue of a direct offer of a replacement vehicle was further considered in the case of **Sayce.v.TNT (UK) Ltd [2011] EWCA Civ 1583** where if anything the position was strengthened, where the Court of Appeal concluded that a motorist who unreasonably refused the offer of a replacement vehicle was not entitled to any measure of damages, extending the principle in **Copley.v.Lawn** noted above:

29 I confess that I also have difficulty with the conclusion that a claimant who has unreasonably refused an offer from the defendant of a free car can recover "at least the cost which the defendant

can show he *[i.e. the defendant] would reasonably have incurred" (paragraph 32). That, it seems to me, reflects the approach taken in the first part of the judgment, namely that one must look at the matter from the defendant's point of view, but it is not an approach that is reflected in the earlier authorities. Nor, with respect, do I think that it is one that is easy to reconcile with the principle relating to avoidable loss to be derived from the leading cases and summarised in* McGregor on Damages *18th ed., paragraphs 7-004 and 7–014. It is right to note, however, that the decision in Copley v Lawn has received support in paragraph 7-068 of the same work*

6.10. However whilst extending the Copley principle it was emphasised that full and proper information of the alternative vehicle must be provided and also the facility to take independent advice. The Court of Appeal was keen to emphasise all aspect of public policy, not only the concerns about costs expressed by the insurance industry, but also adequate safeguards for innocent motorists, in what is after all an adversarial situation. Aikens LJ stated:

44 What, in my judgment, is not acceptable is a tortfeasor being permitted to dictate to his victim what the victim must do to mitigate his loss. He is under a duty to mitigate his loss and must act reasonably in doing so. That is fundamental. Moreover, there is a public interest in keeping down the damages and costs which may follow from road accidents. The higher they are, the higher the insurance premiums paid by members of the public to obtain insurance. In the present case, Miss Sayce was properly warned to take independent advice (Moore-Bick LJ, paragraph 2).

45 The offer may not, however, be the best reasonable offer available from the victim's viewpoint. In circumstances such as the present, there is also the risk of the cold telephone calling which occurred in Copley . The victim of a road traffic accident, such as the young woman in this case, can be expected to be in a vulnerable state of mind following an accident. Accepting the offer of a "free" vehicle from the tortfeasor will not always be the only, or best, way in which to mitigate loss. The victim may reasonably prefer to deal with a company in which she has confidence, based possibly on previous dealings. What is reasonably required by way of mitigation depends on the facts of the particular case.

46 The victim is entitled to a reasonable opportunity to consider what vehicle is an appropriate temporary replacement, bearing in mind his needs. A further very important consideration is the insurance cover to be provided, particularly as to third party liability, and whether it accords with the cover enjoyed by the victim under his existing arrangements. These may provide, for example, for the cover of any authorised driver, or for named drivers, possibly drivers under the age of 25. Arrangements would need to be set up, and any additional premium provided for. The victim may have his own particular needs, and obtain what from his viewpoint is a better deal, from his own sources. Tortfeasors may need to descend to particulars.

Pattni.v.First Leicester[2011] EWCA Civ 1384: restatement of the principles

6.11. Perhaps the most important case of recent years, is the opportunity taken by the Court of Appeal to restate or codify the principles governing the calculation of damages for credit hire: The leading judgment of the Court of Appeal restating the principles summarised them as follows:

> ***29 Three House of Lords and one Court of Appeal decision have established certain principles concerning (a) the basis on which a claimant can recover damages for car hire costs when he is the innocent victim of an RTA and he has hired a replacement car on credit hire terms and (b) what sums can be recovered as damages or otherwise. The authorities have all been concerned with cases where the claimant car driver was entirely without fault, had entered into a credit hire agreement with a credit hire company for a replacement car and that agreement provided that the hirer will not have to pay the hire charges until the successful prosecution of a claim for damages against the negligent driver. The cases are Giles v Thompson,*** [15] ***Dimond v Lovell, Burdis v Livsey and Lagden v O'Connor.***

6.12. The Court then proceeded to state the principles in a methodical fashion:

> ***(1) the loss of use of a car as a result of the car being damaged by the negligence of another driver is a loss for which, in appropriate circumstances, the innocent claimant can recover damages, even where the car is "non-profit earning". It is the duty of the innocent claimant to mitigate his loss. If the loss of use of a car can be mitigated or avoided by the hire of a replacement car, the cost of that replacement car will be the measure of damages recoverable for the loss of use of the car.***
>
> ***(2) A claimant who hires a car on credit terms as a replacement vehicle suffers a loss which is recoverable as damages, even though, by the terms of the credit hire agreement, the hirer is not liable to pay the hire until there has been a judgment in the hirer's favour against the negligent driver. In that circumstance there is, generally, a "real liability, the incurring of which constitutes a real loss to the motorist. Whatever the publicity material may have conveyed, the provision of the substitute car was not free". If a claimant has had the use of a replacement car and he has had to pay for it, then the claim may more aptly be characterised as one for special damages; however, if he does not have to pay for it Longmore LJ has stated that: "..It may be difficult to say that he can recover special damages at all. It may be that he can only recover general damages".***

6.13. In the next principle, the Court of Appeal took as its starting point that a motorist is entitled to hire a like for like replacement for his damaged vehicle, it being open to the insurance company to argue he has in fact hired a better quality one.

> ***(3) The injured party cannot claim reimbursement for expenditure that is unreasonable. If the defendant can show that the cost that was incurred was more than was reasonable, either by proving that the***

claimant had no use for a replacement car in part or at all, or because the car hired was bigger or better than was reasonable in the circumstances, the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent to the damaged car. [23] *As Lord Mustill put it in Giles v Thompson, "...The need for a replacement car is not self-proving".*

6.14. They re-emphasised that the law would compensate innocent motorists for additional costs they had incurred which would not be recoverable by affluent motorists.

(4) Even if it was reasonable for the innocent claimant to hire a replacement car on credit hire terms, the measure of damages recoverable will not necessarily be the amount of the credit hire that the claimant agrees to pay the credit hire company. It will depend on the financial circumstances of the claimant. If the claimant could afford to hire a replacement car in the normal way, ie. without credit terms and by paying in advance, then the damages recoverable for loss of use of the damaged car will be that sum which is attributable to the basic hire rate of the replacement car.

This basic hire rate has often been referred to as the "spot rate", but that is, with respect, a misnomer. The term "spot rate" is more appropriately applied to rates of freight or charter hire, or the price of a commodity in open, often international markets, where the service or commodity is bought for delivery today, as opposed to some time in the future. I think it would be better if, in the context of credit hire cases, the term "spot rate" were not used in future and the term "basic hire rate" or "BHR" were used instead. That term more accurately describes what is the basic measure of damages recoverable in cases where the claimant could afford to have hired a car by paying in advance, ie. not hiring the car on credit.

(5) The difference between the BHR and the credit hire rate (assuming there is one) takes account of the additional services that a credit hire company provides to the hirer, viz. credit, handling the claim and effecting the recovery from the negligent driver, taking the risk of not recovering from the latter and an element of profit. Those elements are not part of the recoverable loss of a claimant who has hired a replacement car on credit hire terms but who could have afforded to do so by paying in advance. However, it is for a defendant to demonstrate, by evidence, that there is a difference between the credit hire charge agreed between the claimant and the credit hire company and the BHR.

(6) If it was reasonable for the claimant to hire a replacement car but he could not afford to hire a replacement car by paying in advance, (in the word used in the cases, that he is "impecunious") then, prima facie, he is entitled to recover the whole of the credit hire rate he has paid, provided that it was otherwise a reasonable rate to pay in the circumstances. If the claimant is "impecunious" then, on the assumption it is reasonable for him to hire a replacement car and it was

a reasonable type of car that he hired, he is said to have had "no choice" but to hire on credit terms. In Lagden v O'Connor Lord Hope of Craighead suggested that a rule of thumb test on whether a claimant hirer is "impecunious" might be whether he has the use of a recognised credit or debit card. In practice whether someone is "impecunious" will depend on the facts of a particular case and Lord Hope's rule of thumb test is not necessarily determinative of the issue of whether a claimant can afford to pay hire charges day by day, which is the key question.

(7) If the credit hire agreement provides that the hire will not be due and payable until judgment has been obtained against the negligent driver and there are no express terms in the hire agreement about the payment of interest on the hire charges then interest should not be awarded, at least under the terms of section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984 . This is because, in such circumstances the hirer has not been "kept out of his money"; he was not contractually obliged to pay the hire charges to the credit hire company whilst the claim against the negligent driver was being assessed and (if necessary) litigated. No hire charges were then owed to the credit hire company.

(8) In the judgment of the Court of Appeal in Burdis v Livsey , the court considered the method by which judges could calculate the BHR and so the measure of damages for loss of use in circumstances where the claimant was not "impecunious". The court canvassed three possible methods. The first was to break down the charge made by credit hire companies so as to enable the additional elements (for credit, claim handling etc) to be stripped out. That method was rejected because it was said it would entail detailed disclosure and analysis which would be cumbersome in small cases and the costs would be disproportionate to the sums claimed in most of this type of case. I agree that may well be so in most cases. But I do not understand this court to be saying, at [137] of Burdis v Livsey , that it is wrong as a matter of law to consider direct evidence on this issue from the actual credit hire company that hired the replacement car to the claimant, eg. in the form of the company's published credit hire rates and BHRs. If there is such direct evidence it might be the best evidence of any difference between the credit hire rate charged and the BHR for that type of car in that area at the time the replacement car was hired. But if there is not such direct evidence, then it is unlikely that indirect evidence from the car hire company (such as its assertion of what its BHR would have been had they had one) will be useful. It would also probably entail disproportionately costly disclosure.

6.15. This restatement, forms the principal resource which county court judges draw upon when deciding credit hire claims, as it forms a code for applying all the law decided in earlier cases, to the particular case before them.

7. CLAIMANT'S DUTY TO MITIGATE

Umerji.v.Khan [2014] EWCA Civ 357: comprehensive insurance and mitigation

7.1. A recent point which is certain to be ventilated in argument in the next year, is the key argument that where a motorist does have comprehensive insurance and elects not to use it and hires a car through credit hire, that will constitute a failure to mitigate the accrual of avoidable loss. This argument trailed in the Umerji case, if correct, will limit the practical recovery of credit hire charges, to motorists who only have third party insurance and are likely to be in the poorer echelons of society. The point was raised but not decided in this case:

> ***42 The Appellants wish to pursue that point in this court – that is, that the Claimant's duty to mitigate meant that he should have claimed on his own comprehensive insurance policy and so remedied his own impecuniosity and been able to buy a replacement. Mr Turner submitted that this would involve no conflict with the well-established rule in Bradburn v Great Western Railway (1874) LR 10 Ex 1 ; the Appellants wished to rely on the policy in order to avoid their liability not for the loss of the vehicle itself but for a different (uninsured) loss which could have been avoided or reduced if the Claimant had acted reasonably.***
>
> ***43 The point is an interesting one and plainly of some general importance. But I do not believe that we should consider it on this appeal. It was not pleaded at any stage, nor indeed was it foreshadowed in any way until Ms Hicks sought to raise it as I have described. No doubt that is not necessarily an absolute bar to the point being taken. Both counsel came prepared to argue it, though in Mr Nowland's case only if his initial objection to it being taken were unsuccessful; and we were*** referred to several authorities, in particular Parry v Cleaver [1970] AC 1 ; Martindale v Duncan [1973] 1 WLR 574 ; Mattocks v Mann [1993] RTR 13 ; ***McMullen v Gibney [1999] NIQB 1 ; Seddon v Tekin (HH Judge Harris QC 25.8.00, unreported) ;*** Bee v Jenson [2007] EWCA Civ 923 ; ***and Clarke v McCullough (above). But I do not think that the issue can be treated as one of pure law which can be decided in a factual vacuum. Even if the Appellants' case that the Claimant should have claimed on his policy is not precluded as a matter of principle – as to which I express no view – it would be necessary to consider the full circumstances, including the terms of the policy as regards excess and/or no claims bonus, before we could reach a view as to whether he had acted reasonably in not doing so. None of this was explored in evidence. This battle will have to be fought, if insurers are so inclined, on another field.***

8. CONCLUSION

8.1. The history of the "credit hire wars" set out above demonstrates an evolution of the legal principles upon which credit hire claims are made and are quantified by the courts in order to derive at a just result.

8.2. By definition when a court awards damages for credit hire, the amount that it awards is just and reasonable on the facts of that particular case. If an insurance company takes the view that an award is unjust, then it can simply appeal.

8.3. But an insurance company has a choice as to which cases it chooses to fight to a trial, or to settle on the basis of what are now well established principles of quantification of damage, which ensure that the accident victim is awarded the measure of damages he is entitled to by law. Equally an innocent motorist who fails to act to mitigate his loss, will not be able to recover it at law by reason of his unreasonable choices.

8.4. It has it within its gift, as soon as a claim including damages for credit hire is notified to it, to deal simply and inexpensively with the claim either by admitting liability and making a swift payment in respect of the repair costs or pre-accident value of the damaged motor vehicle.

8.5 It can also utilise the guidelines set out in the Copley.v.Lawn case noted above, to make a clear and transparent offer of a replacement motor vehicle to the accident victim.

8.6. In short the common law provides all the tools that the insurance industry needs to control the level of credit hire claims within the framework of adversarial disputes, provided the insurance companies respond efficiently to claims made against them.

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