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# Letting and Hiring Agreements

Rent, Hire, and Headaches: Letting & Hiring Agreements That Go Wrong

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# Opening and Orientation

## SESSION 1

### The legal landscape for SME accountants

- Statutory obligations and ethical duties
- Engagement letters and negligence traps
- Understanding the legal terrain

## SESSION 2

### Risk management in practice

- Interactions with clients, regulators, and third parties
- How everyday decisions create legal exposure
- Navigating that terrain

## SESSION 3

### The Law of Agency and Estoppel

- What it means
- What are your obligations
- How to deal with this in your letters of engagement

## SESSION 4

### Purchase and Sale Agreements

- Identifying transaction types
- When ownership and risk transfer
- Warranties, red flags, and accounting implications

## SESSION 5 - TODAY

### Letting and Hiring Agreements

- Risk allocation and common disputes
- The legal frameworks governing these agreements
- Practical tools for accountants advising clients

# Links to Previous CPD's

**How Not to Get Prosecuted (or sued) - A Legal Survival Guide for Accountants - [cpd.myciba.org](https://cpd.myciba.org)**

**One Signature Can Cost You Everything - [cpd.myciba.org](https://cpd.myciba.org)**

**Law of Agency and Representation: Acting for Others Without Getting Burnt - [cpd.myciba.org](https://cpd.myciba.org)**

**Purchase and Sale Agreements That Turn Into Costly Disputes - [cpd.myciba.org](https://cpd.myciba.org)**

# Session Overview

## What we will cover today

- The legal nature and key distinctions of letting & hiring agreements
- The substance-over-form principle and its real-world consequences
- BC Plant Hire CC v Greco (SA) – the leading authority on risk allocation
- Common failure points: where agreements break down
- Statutory framework: CPA, NCA, LRA, BCEA, POPIA
- Payment default, termination, and early exit consequences
- Dispute resolution mechanisms and enforcement challenges
- Six risk management practices for accountants and advisors



# Introduction to Letting and Hiring Agreements

## The core concept

- One party provides an asset or service; the other pays for temporary use
- Owner retains ownership throughout – only possession and use rights transfer
- Contrast: hire-purchase and conditional sale contemplate ownership transfer on full payment

## Three types under Roman-Dutch law

- *Locatio conductio rei* – letting of a thing (lease of property, equipment, vehicle)
- *Locatio conductio operarum* – hiring of services (labour hire)
- *Locatio conductio operis* – hiring of work (contractor for specific result)

## Why accountants must understand this distinction

- Determines which party bears risk of loss; which statutes apply; what remedies exist
- Affects financial reporting: operating lease vs. right-of-use asset



# Substance Over Form: The Plus Valet Principle

*"When a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be." — Innes J, Zandberg v Van Zyl 1910 AD 302*

## What this means in practice

- Courts examine the economic substance of the transaction – not the label the parties give it
- A 'rental agreement' may be recharacterised as a sale if it operates as one
- Recharacterisation changes: who bears risk; which statute applies; available remedies
- Kilburn v Estate Kilburn 1931 AD 501: courts will 'rend aside the veil' of the transaction

## Key implication for advisors

- Clients cannot structure around risk by choosing a favourable label – substance governs
- Review the economic reality, not merely the document heading



# BC Plant Hire v Grenco - Background and Facts

**Case: BC Plant Hire CC t/a BC Carriers v Grenco (SA) (Pty) Ltd [2003] ZAWCHC 70; 2004 (4) SA 550 (C)**

- **Grenco supplied and custom-fitted a refrigeration unit onto BC Plant Hire's truck trailer (March 1997) for R62 700**
  - **BC Plant Hire's director inspected the unit several times during installation and requested modifications**
  - **Parties expected ABSA (Bankfin) to conclude a credit agreement and pay Grenco; the agreement was never finalised**
  - **On 7 May 1997 – before the bank finalised formalities – the vehicle was in an accident; the unit was destroyed**
- Grenco claimed R62 700. BC Plant Hire's argument:**
- **It was never the purchaser – the bank was to have been the buyer; ownership never passed; res perit domino applied**
  - **No insurance had been arranged by either party for the period between delivery and finalisation of financing**

# BC Plant Hire v Grenco - The Courts Analysis

Van Zyl J applied the plus valet maxim

- Examined substance: Grenco supplied and installed the unit → characterised as emptio venditio (sale) + locatio conductio operis (installation)
- Considered and rejected commodatum (loan for use): never discussed or intended by either party

The risk consequences

- Sale analysis: risk passes on perfecta (price and thing determined; agreement unconditional) → periculum est emptoris
- Locatio conductio operis analysis: risk fell on BC Plant Hire once the work was complete and the unit delivered
- Either way: BC Plant Hire bore the risk

The court's conclusion

- "If the appellant was foolish enough not to insure the unit as part of its vehicle, it has no one to blame but itself. It is simply a matter of common sense."
- Appeal dismissed. Cross-appeal on costs also dismissed.



# BC Plant Hire v Grenco - Four Key Lessons

## 1. Form does not govern

Courts examine economic substance, conduct, and commercial context. The label on the agreement is irrelevant to how courts characterise the transaction

## 2. Financing does not suspend risk

Taking delivery and using an asset commercially passes risk even if financing is not yet finalised. Only an express clause can defer this.

## 3. Failure to insure is fatal

Common sense requires the party in possession and use to insure. No trade usage needs to be proven. The loss falls where it lands.

## 4. Poor drafting compounds costs

R62 700 dispute required magistrate + two High Court judges + 42-paragraph judgment. Van Zyl J noted "eminently good reasons to deprive the parties of their costs."

# Risk Allocation - Core Principles

## The Roman-Dutch baseline

- Risk generally passes with possession – the party in possession bears risk of loss, damage, or destruction
- Unless: the parties have explicitly agreed otherwise, or a statute imposes a different allocation

## In practice: most agreements fail to address this explicitly

- Silence does not produce a neutral state – courts determine risk from substance and conduct
- *Pahad v Director of Food Supplies* 1949 (3) SA 695 (A): parties must be deemed to have accepted the risk implied by law
- *Pieterse v Theron*: 'fair market rental' was so vague the renewal clause was unenforceable

## The questions every agreement must answer

- Who bears risk if the asset is lost, stolen, damaged, or destroyed?
- Who must insure? Against which perils? At what coverage limits?



# Three Key Junctures of Risk

## 1. Commencement of possession

Has the party taking possession accepted the asset 'as is'? Has the lessor warranted fitness? Disputes arise about defects and baseline condition without documentation.

## 2. During the period of use

Which party is responsible for insurance, maintenance, and repair? Dual-insurance structures often have gaps. Normal wear vs. damage disputes are common.

## 3. Termination or return

Was the asset returned in the agreed condition? Who authorises and pays for repairs? Condition documentation at commencement is critical to resolving return disputes.

# Insurance Obligations And Coverage Gaps

## What agreements must specify

- Which party insures against which perils; minimum coverage limits and deductibles
- Obligation to maintain coverage throughout the term; provide insurance certificates
- What happens if insurer denies a claim or the insured value proves inadequate

## BC Plant Hire v Grenco – the insurance failure

- Three Grenco witnesses confirmed the industry norm: party taking delivery insures immediately – 'like putting warm water into instant coffee, you just don't do it'
- BC Plant Hire arranged no insurance; the court needed no trade usage – common sense was sufficient

## The insurable interest requirement

- Without insurable interest, an insurance contract is unenforceable as against public policy
- Agreements silent on insurable interest create disputes when both parties claim under policies



# Common Failure Points 1 - 4

## 1. Ambiguous or vague terminology

- Terms like 'reasonable maintenance', 'fair market value', or 'as-is condition' without definition make provisions unenforceable or subject to adverse interpretation (contra proferentem)

## 2. Failure to address payment default and remedies

- Silent on late fees, acceleration, and repossession procedures → creates self-help repossession risk and conversion claims

## 3. Insufficient clarity on termination rights and procedures

- Agreements stating 'either party may terminate' without specifying notice, grounds, or consequences → disputes about validity and proper exercise of termination rights

## 4. Failure to allocate insurance responsibility and adequacy

- The most consequential failure – BC Plant Hire v Grenco: no agreement on who insures → one party bore both the risk and the uninsured loss

# Common Failure Points 5 - 8

## 5. Inadequate damage assessment and repair authorisation provisions

- Who authorises repairs? Original manufacturer parts or aftermarket? Rental equipment often imposes OEM-only requirements without addressing cost disputes

## 6. Lack of clarity on breach and cure opportunities

- Failure to distinguish material from immaterial breaches; omission of cure periods. SA courts require good faith – termination clauses without cure periods may be unenforceable

## 7. Insufficient specification of asset condition at commencement

- Without photographs and written condition records, disputes about pre-existing vs. hirer-caused damage are unresolvable

## 8. Poor pleading as a consequence of poor drafting

BC Plant Hire v Grenco: the respondent advanced five alternative causes of action because no written agreement existed. Van Zyl J called the pleadings 'gobbledygook' – the court reached a just result at enormous

# Statutory Framework - CPA and Rental Housing Act

## Consumer Protection Act No. 68 of 2008

- Applies to lease agreements involving natural persons; cannot be contracted out of
- Mandatory 20 business days' written notice before termination, allowing remedy opportunity
- Maximum 24-month fixed-term lease (longer only with clear financial benefit to tenant)
- Early termination: landlord limited to reasonable cancellation penalty – no fixed 6-month penalties

## Rental Housing Act No. 50 of 1997

- Implied warranty of habitability (residential): cannot be contracted out of
- Rental Housing Tribunal: binding decisions on rent, deposits, maintenance, and eviction

## Protection of Personal Information Act No. 4 of 2013 (POPIA)

- Lessor as data controller must collect and process lessee personal information only for specified purposes, securely and lawfully. Agreements must include POPIA-compliant privacy notices



# NCA and Employment Law Dimensions

## National Credit Act No. 75 of 2005 – hire-purchase & conditional sale

- Credit provider retains ownership during hire-purchase term → bears risk of loss unless insurance is maintained
- Mandatory plain language disclosure; finance charges per statutory formulae; consumer right to early termination upon paying 50% of total – cannot be contracted out of
- The BC Plant Hire gap: NCA-compliant procedure requires insurance confirmation and release note before delivery – exactly the gap that led to the dispute

## Labour Relations Act No. 66 of 1995 & BCEA No. 75 of 1997

- If a hiring arrangement constitutes employment, all LRA/BCEA protections apply regardless of how the agreement is styled
- Test: Does the lessor/service provider exercise excessive control over how the work is performed or how the asset is used?
- Recharacterisation triggers: unfair dismissal protection, minimum wage, leave, and notice obligations



# Payment Default and Early Termination Consequences

## What agreements must specify on payment

- Exact payment date, acceptable form, grace periods, late payment fees, and acceleration triggers
- Acceleration clauses: must comply with statutory protections and good faith; unreasonable acceleration may be unenforceable

## Early termination by the hirer without lawful justification

- Typically triggers forfeiture of deposit and liability for the lessor's cost of finding a replacement lessee
- Conventional Penalties Act No. 15 of 1962: courts reduce penalties grossly disproportionate to actual harm – e.g. 12 months' future rent unenforceable if premises were re-let within two weeks

## CPA early termination right

- Consumer may cancel at any time upon giving 20 business days' notice; landlord limited to a reasonable cancellation penalty calculated by reference to remaining term, interest, and replacement costs



# Dispute Resolution Mechanisms

**CCMA Arbitration – employment-related hiring disputes**

- Referral → pre-arbitration meeting (narrow issues, often settle) → formal arbitration → binding award

**Rental Housing Tribunal – residential leasing**

- Faster and less expensive than court; binding on rent, deposits, maintenance, and eviction; appeals to Magistrate's Court

**Magistrate's Court & High Court**

- Magistrate's Court: jurisdiction up to approximately R100 000. *BC Plant Hire v Grenco* illustrates the cost trajectory of a R62 700 claim progressing to the Cape of Good Hope Provincial Division

**AFSA Arbitration – commercial disputes**

- Neutral arbitrators, established procedural rules, more efficient than court. Clauses must preserve access to courts for urgent interdict relief

**Enforcement challenges**

- Winning is not collecting. Where the debtor is insolvent, negotiated partial settlement is often more practical than full enforcement through attachment or sequestration

# Risk Management: Best Practices for Accountants 1 - 3

## 1. Insist on clear and unambiguous language

- Every key term must be precisely defined: rent, payment date, late fees, maintenance, insurance, damage responsibility, termination, and remedies for breach. Avoid 'reasonable' and 'fair' without objective criteria

## 2. Allocate risk explicitly – do not rely on default legal principles

- Specify which party bears risk of loss from fire, theft, vandalism, floods, equipment failure, and negligence. Address underinsured losses: if insurance is inadequate, which party absorbs the excess?

- State clearly whether risk passes on delivery, on payment, on financing finalisation, or at another specified moment – BC Plant Hire v Grenco answers the alternative the hard way

## 3. Document asset condition at commencement and return

- Photographs and written condition reports at the start of every letting or hiring relationship. Establish clear inspection procedures on return to resolve wear vs. damage disputes



# **Risk Management: Best Practices for Accountants 4 - 6**

## **4. Build in dispute resolution procedures**

- **Include provisions for notifying the other party of disputes, exchanging documentation, attempting negotiation within a specified period, and if necessary pursuing mediation or arbitration before litigation**

## **5. Comply with all applicable statutory protections**

- **Ensure agreements comply with the CPA, NCA, Rental Housing Act, LRA, BCEA, and POPIA**
- **Terms purporting to waive statutory protections are void and unenforceable – do not include them. Verify NCA registration of credit providers before clients enter hire-purchase agreements**

## **6. Maintain adequate insurance throughout the agreement term**

- **As lessor: maintain insurance covering the asset and third-party liability; review limits annually**
  - **As hirer or advisor: ensure insurance requirements in the agreement are actually met; obtain and hold copies of certificates of insurance throughout the term**
- 

# Conclusion

Five recurring failure points – each an intervention opportunity

- Ambiguous terminology | Unclear payment and remedies | Insufficient termination clarity |

Insurance gaps | Inadequate damage provisions

BC Plant Hire v Grenco – doctrinal and practical touchstone

- Doctrinal: courts characterise by substance – plus valet quod agitur. The parties' label is irrelevant

- Practical: three failures (no written agreement; no express risk allocation; no insurance) caused years of litigation at a cost exceeding the R62 700 in dispute

The solutions are preventative

- Draft clear agreements with explicit risk allocation, insurance requirements, and dispute procedures

- Comply with applicable statutes; document asset conditions; maintain adequate insurance

throughout

Primary case citation

- BC Plant Hire CC t/a BC Carriers v Grenco (SA) (Pty) Ltd (Case No A 1090/2002) [2003] ZAWCHC

70; 2004 (4) SA 550 (C) (12 December 2003), Van Zyl J, Cape of Good Hope Provincial Division



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