IN THE COUNTY COURT AT CENTRAL LONDON

Claim G71YJ116
Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 20th June 2024

Before:

HIS HONOUR JUDGE SAUNDERS

Between:

Claimants

LUAN PHILLIPE PEREIRA AND OTHERS

- and –

JERMAINE CHAMBERS AND OTHERS **Defendants**

-and –

DIRECT ACCIDENT MANAGEMENT LIMITED **Respondents**

Mr Roger Mallalieu KC of Counsel (instructed by Keoghs LLP**) for the Defendants**
Mr Benjamin Williams KC of Counsel (instructed by in – house solicitor) **for the Respondent**

Hearing date: 18 April 2024

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ SAUNDERS:

1. These are 4 (four) applications, each dated 28 February 2023, made by successful defendants in motor claims for non-party costs orders (hereinafter called "NPCO"). The applications are against Direct Accident Management Limited (hereinafter called "DAML"), a credit hire company. In view of their similarity, they were all listed before me to be dealt with together on 21 March 2024. The applications are opposed.

2. These applications are significant in that they raise the question of whether it is appropriate to make a costs order against non-parties which provides services to claimants after accidents, in the expectation that they will be paid out of any damages recovered.

3. It is perhaps telling that both parties have instructed leading Counsel for the purpose of this application. In the case of the applicant, from Mr Roger Mallalieu KC, Mr Benjamin Williams KC represents DAML. For that reason, I appreciate this decision will be of some significance to the parties, as such arrangements are common, and by no means confined to companies like DAML.

4. The facts of the cases are not in dispute. I have attached 4 schedules to this judgment which set out the circumstances of each case. They are marked A, B, C, and D.

5. It is common ground that all the claims relate to road traffic accidents. Two of these cases occurred where the Claimants were riding motorcycles where the credit hire agreement was with DAML trading as McAMS. The other two could be described as being more conventional in the claimants were driving cars (where the trading name for the credit hire agreement is DAMS). There is no significant distinction because the relevant terms of the contract were identical, whether it was a McAMS or DAMS case.

6. In the 1st and 2nd Claimant's claims, there was an element of modest personal injury claim; in the 3rd and 4th Claimants' claims, no personal injury claim was advanced.

7. In each claim, the claim for credit hire was on the basis of rates substantially in excess of basic hire rates – and claimed upon the basis that the claimant had a need for hire and was impecunious. In each case, the Claimants were represented by the same firm of solicitors, Bond Turner, who were recommended by DAML and who the Claimants were bound to instruct under the terms of the hire agreements, which were, as I have indicated, the same in each case.

8. The outcome of each case was different. In the cases of Pereira (the 1st Claimant) and Edhouse (the 2nd Claimant) the claims came to an end by the acceptance of a Part 36 offer – it is said for substantially less than the original claim. In Nasri (the 3rd Claimant), the case had been struck out for non – payment of a court fee. In the final case, Ali (the 4th Claimant), was dismissed after the evidence was heard at trial on the question of liability.

The Evidence (generally)

9. At the hearing before me, neither party sought to cross – examine the other party's witnesses. It was common ground that this is a summary process – in line with the decision in *Centrehigh Limited v Amen [2013] EWHC 625(Ch) at [41]*.

10. The evidence before me, largely consists of the outcome of the Claimant's application for specific disclosure. Consequently, the parties rely upon the following witness statements and their exhibits:

(a) A witness statement from Mr Scott Warwick Croft dated 28 February 2023 setting out the background to each respective claim and an initial explanation of the Defendant's position in relation to the application for an NPCO.

(b) A bundle of disclosed communications between DAML and Bond Turner in each case.

(c) A witness statement from Ms. Paula Levens on behalf of DAML dated 10 May 2023 in response to the original application in the Pereira case. It deals with that alone as the lead case.

(d) A witness statement from Ms. Jenny Milburn on behalf of the Defendant which responds to (b) and acts in support of the specific disclosure application.

(e) Two further witness statements from Ms. Milburn which deals with issues of disclosure.
(f) A further witness statement from Ms. Levens dated 21 February 2024 responding to the substance of the application.

Summary of that Evidence

11. In Ms Levens' initial witness statement dated 20 May 2023, she asserts the following:
    (a) That DAML agrees to joinder, without prejudice to its case that it should not be subject to a NPCO.
    (b) That DAML is part of the Anexo Group Plc.
    (c) That Bond Turner, who were the solicitors instructed in relation to these cases, were also part of Anexo Group Plc.

12. In Ms Levens' second witness statement dated 21 February 2024, she goes into more detail. That can be distilled down to and summarised as follows:
    (a) DAML is prepared to accept that it maintains a commercial interest in the claim, but then so it is argued, do other companies in a similar position where a legal claim is involved.
    (b) That, in her opinion, applications for NCPOs may be related to the introduction of QOCS (Qualified One -Way Costs Shifting).
    (c) That DAML 'vet' claims such that, following a recommendation, an assessment is carried out to establish that a prospective client is not at fault, and has a reasonable need for a replacement vehicle.
    (d) If that assessment is positive, then a vehicle is offered on 'standard terms'.
    (e) DAML then recommends the appointment of Bond Turner – but it is claimed that their appointment is not required, as such, and that the client is free to use a different solicitor (but that may mean that DAML may decline hire).
    (f) If the recommendation is accepted, Bond Turner are joined to the call, and a commercial link is established.
    (g) DAML then leaves the call and sends the information provided by the client to Bond Turner. The Credit Hire Agreement ('CHA') is then signed by the client upon delivery of the vehicle.

(h) DAML does not conduct the proceedings, fund it or provide an adverse costs indemnity.

(i) The services that DAML provides includes free transport to court if the matter proceeds to a trial. The DAML representative will be aware of the outcome as they are present at court.

(j) DAML accepts whatever apportionment of damages that Bond Turner has advised the client to agree to.

(k) In the case of the client's non – cooperation, clients will not be pursued if they have insufficient means or cannot be contacted.

(l) Where they do cooperate, DAML will usually accept the sum recovered from the proceedings in respect of credit hire in full and final settlement.

13. DAML has drawn my attention to paragraphs 44 and 54 of Ms Levens' second witness statement, which it identifies as relevant:

> *"44. DAML has no involvement in the claims process itself. It is not supplied with statements of case or copies of witness statements. It is not involved in authorising the issue of proceedings. DAML is not consulted on whether offers and made, rejected or accepted, or on whether a case should be taken to trial. All these decisions are left to its customers acting on the advice of Bond Turner. In effect, DAML leaves the customer and Bond Turner to pursue the claim which includes its charges, and leaves matters to their judgement. …*
>
> *54. … DAML plays no role at all in the claims and litigation process. It does not fund the claims, control them, have access to documents, give instructions, or get consulted on tactics, strategy or settlement. It is completely arms-length. The suggestion, commonly made by defendants… that the involvement of DAML in the claims process is to be equated to an insurer conducting a subrogated claim is therefore completely misplaced."*

14. DAML submits that the documents disclosed in each case reveal that DAML took no part in the proceedings and that there are fundamental differences in the 4 cases.

15. In Pereira, liability was disputed, and the claimant brought a personal injury action. In that case, the applicant obtained a costs order because the claimant made a late acceptance of a Part 36 offer. It did not seek to dis- apply QOCS in relation to the non – personal injury element of the claim or to enforce the costs order (even though the claimant had ATE insurance).

16. In Edhouse, liability was admitted, but the claimant also pursued substantial non – hire losses. Causation was disputed. In terms of costs, a similar situation arose as in Pereira because a Part 36 offer was accepted late.

17. In Ali, there was again a substantial non – hire claim and liability and causation were disputed.

18. In Nasri, the claimant claimed PAV as well as hire, and liability was disputed.

The Terms of the Hire Agreements

19. At the hearing, the parties agreed to consider the Hire Agreement dated 6 May 2020 (which deals with the First Claimant's claim) as the basis of the parties' respective arguments, acknowledging that, in each of the 4 cases, the agreements are for different periods and different rates. What is consistent is that they are all identical in terms of the rights and obligations that they impose.

20. The material clauses, I consider, for this application are as follows:

Clause 5

"Where the hire is consequent upon the Hirer's own vehicle being unroadworthy as a result of a road traffic accident;

i) The Lessor will allow the Hirer to defer payment of the hire charges until the earlier of (i) the conclusion of a claim for damages including the hire charges which is made against the party or (ii) the expiry of 11 months, starting with the date of this agreement….

ii) The Hirer shall diligently pursue a claim for the hire charges against the third party and shall appoint solicitors nominated by the Lessor for this purpose. The

Hirer shall thereafter use all reasonable endeavours to recover the hire charges from the third party and shall fully co-operate with the Lessor and the appointed solicitors in this respect."

Clause 6

"If, and only if, the Hirer is in default of condition 5(ii) then the deferred payment facility allowed by the Lessor to the Hirer shall be terminated and the hire charges will be due from the Hirer to the Lessor 14 days from the Lessor giving notice thereof to the Hirer by reference to this condition (6)."

Clause 10

"The Hirer will at the request of the Lessor do all required by the Lessor and permit his name to be used by the Lessor for enforcing any rights or remedies against parties in connection with the vehicle."

The Respective Arguments on the Evidence

21. In many ways, the way in which the parties approach the assessment of the evidence are remarkably similar.

22. Indeed, DAML has made it clear that it does not dispute much of the Defendant's evidence. It is accepted that the corporate group in which DAML belongs, includes Bond Turner. As it says, all this is a matter of public record. Bond Turner and DAML are part of the same AIM – listed corporate group, which derives its income from post – accident assistance services.

23. From the Defendant's point of view, I suspect that it is one of emphasis. The Defendants do not claim that that the arrangements are improper, and that must be correct. However, in my view, it is the effect of the terms of the hire agreement (similar in all 4 cases) that does have some relevance.

The Respective Arguments as to Terms

24. The Defendants submit, and I agree, that the practical effect of the terms is directly relevant to this application.

25. From my reading of these terms, as soon as the hirer agrees to hire a vehicle in accordance with them, the hirer is bound to bring a claim for recovery of hire charges for payment to DAML, and, moreover, is bound into an agreement whereby they must use Bond Turner to act upon their behalf.

26. That means that the hirer is bound to co- operate (with both Bond Turner and DAML) and then falls under their direction concerning the hire, including bringing proceedings in their own name.

27. Mr Mallalieu submits, and I agree with him, that, in each of these cases, the claimant who claims impecuniosity and presents themselves to DAML upon this basis was placed in a position whereby they were allowing DAML to charge significant sums in respect of credit hire. In the 4 cases, these amounted to £14,480.84, £71,710.64, £13,920.96, and £31,502.64 respectively.

28. In each case, nothing like these amounts was recovered. The Claimants have (and are extremely unlikely) to have been pursued for any of these outstanding amounts. That is consistent with the corporate strategy already discussed whereby recoveries are only sought from the Defendant's insurers.

29. The Defendants do not contend that the terms are improper. Even so, it is argued that they do not need to be improper to be relevant to consideration of an NPCO. The terms are analogous to a commercial funding agreement (where NCPOs can be made) and, in this case, even if it were shown that terms were commonplace to the credit hire industry that it would not necessarily follow that an NCPO would be inappropriate.

30. The Defendants have picked out some additional documents which are said to be supportive of their case. These include:

(a) The AIM Group Admission Statement dated June 2018.

(b) The interim results presentation for Anexo dated September 2019.

(c) The interim results presentation Power Point.

31. In these documents, it is said, that certain key points emerge:

(a) DAML is part of a 'specialised [fully] integrated credit hire and legal services group' including a specialist legal practice (Bond Turner, the Claimant's solicitors) as part of a '*complete litigated claims process…principally to support the recovery of credit hire costs and repair disbursements'*, with the credit hire business being *'responsible for the collation of initial information and assessment of the validity of the claim, supported by Bond Turner as required'*. It provides an '*integrated end to end service…including the provision of a credit hire vehicle …through to the management and recovery of costs and the processing of any associated personal injury claim*'.

(b) The fact that there may be a personal injury claim allied to most credit hire claims is "*a by-product of a credit hire claim rather than the focus of the business*". "*Bond Turner typically litigate PI claims only as part of the customer's credit hire and repairs claim'*. "*…the Group is able to increase fees recovered as part of a core credit hire claim by also processing associated PI claims*".

(c) The integrated service allows the group to '*effectively manage the process with a legal division motivated to recover the credit hire charges for the benefit of the wider Group'* and "*…allows management to make decisions for the overall Group, maximising recovery from both legal fees and hire charges"*.

(d) The business focusses on impecunious customers.

(e) This allows the business to *'recover significantly higher rates than spot hire or GTA rates'* and which are typically 2-3 times higher than GTA rates– namely the rates charged by DAML under the credit hire contracts.

(f) The business increasingly focusses on motorbikes because they tend to be cheaper to put on the road and tend to be longer hires. '*By targeting much more write-offs*[1] *and repairs not only are we driving the hire period, but we've managed to increase the average value of an individual claim by 28%*' – this, of course, cannot be the

value of any ancillary personal injury element – it reflects a business model to increase the value of the credit hire claim.

(g) The business uses experienced claim handlers to assess claims, who are then supported by Bond Turner. This is to ensure recoverability from the defendant insurer.

(h) The business model operates on the basis of the recovery of the credit hire rates from the defendant insurers. The entire group model rests on successful recovery from the opponent. It is no part of the business model to expect recovery of the rates from the hirer – as noted, hirers are specifically targeted because of their impecuniosity.

(i) This is supported by a historical 99% success rate in settled cases, in that neither the business itself nor the hirer are usually required to make any payment. In most cases, the outcome is that all such costs are recovered from the defendant insurer.

(j) The issuance of proceedings is driven by the need to *'...maintain momentum and to secure settlement*…' in circumstances where *'…the at fault insurer may refuse to settle the claim at a hire rate acceptable to the Group'*. It is done to '*…try and drive settlement from the credit hire element and recover... our repair costs'*.

(k) "*The vast majority of claims are settled by negotiation, partly driven by the Group's need to preserve working capital. This has historically restricted settlement recovery rates to around 50 to 60 per cent. of the gross hire claim.*"".

(l) Where recovery is not made from the defendant insurer, it appears that DAML usually writes off the balance and does not pursue any recovery from the hirer. DAML is dependent on recovery of money from the insurer on a successful outcome and if the claim is unsuccessful no money is received. DAML appears to make the decision on what sum it is acceptable to agree in respect of credit hire charges recovery (or rather in practice does so by virtue of its close relationship with BT and the fact that group policy means that DAML will usually accept whatever settlement for credit hire BT agrees to).

(m) The Anexo Group appears to consider it can '*settle existing claims in progress'.*

(n) The Anexo Group has been focussed on driving up the percentage settlement offers it has been prepared to accept, aiming to go to court and win if it does not think the settlement is high enough, with a view to driving up overall settlements from insurers.

(o) Anexo regards itself as *'...control[ling] the litigation in-house, through our in-house legal team, which is Bond Turner*.'

(p) Anexo recognises the risk of adverse costs as a part of its 'highly litigious' business model.

32. This combined evidence is enough, the Defendant says, to establish that the 'real party' to the claim, particularly in relation to credit hire charges, is DAML.

33. DAML's exposure to a potential adverse costs order is, it argues, a natural consequence of operating a business where claims are pursued in its own financial interest, but in the name of a third party.

34. That it seeks to mitigate that risk by then disputing that it should be liable for an NPCO at all is a legitimate business tactic but should not be allowed to obscure a just outcome.

35. DAML argues to the contrary that its position is that no case is made out for an NPCO. All it did was supply each claimant with a replacement vehicle after an accident, the claimant having indicated a need for such a vehicle. There is no suggestion in any of the cases that DAML intermeddled, to supply vehicles which were not in fact required, or to promote claims which would not otherwise have been made. Nor is there any basis it says, to conclude that DAML was the 'real party' to the litigation, so that the claims, or substantial parts of them, were brought for its exclusive benefit, with the claimants merely lending their names.

36. The Defendant, it says, must show that there was intermeddling, that it acted as the real party, or there had been misconduct. In this case, none of those examples exist, and so the application should be refused.

37. In particular, it relies on the evidence (which is all the court has) set out in paragraphs 44 and 54 of Ms Levens' second witness statement, which I have set out above.

38. DAML states that the Defendants' evidence is confined to that of the corporate group, and that is not enough.

The Relevant Legal Principles

39. The parties agree that the court has a wide discretion to make a NPCO provided it is just to do so - *Deutsche Bank AG v Sebastian Holdings Inc [2016] EWCA Civ 23, [2016] 4 WLR 17.*

40. The question for the court to determine is whether it is just in all the circumstances. In *Deutsche Bank,* it is said, at paragraph 62*:*

> *"We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind."*

41. *Dymock Franchise Systems (NSW) Ltd v Todd [2004] UKPC 39* was cited in *Deutsche Bank*. Where Dymocks is important is that it provides some guidance on establishing whether a non – party costs order should be made, indicating that (a) it should be exceptional, and (b) that consideration should be given to whether a party is not so much facilitating access to justice by the named party but is itself gaining access to justice for its own purposes.

42. 'Exceptional' in this context is, in my view, something outside the ordinary run of litigation, not that the case must be an exceptional case.

43. This has certain applications in relation to credit hire.

44. The Defendants say that a good example of its application is contained in *Farrell v DAML [2009] EWCA Civ 769,* where DAML was made subject to a NPCO having

hired a vehicle to a claimant, on credit hire terms, where he was later found to be fraudulent.

45. The facts and outcome of that case are informative, albeit that they are different to these cases.

46. The credit hire terms in that case differed in form from these but not significantly in substance (whilst the Farrell terms expressly gave DAML a right to pursue an action in the claimant's name, in fact in Farrell the action was pursued by the claimant himself and, in any event, DAML has similar rights (albeit less explicit) under the present credit hire agreements at Clause 10). For the avoidance of doubt, it is said, by DAML, that the Defendant misunderstood Clause 10, in that it is said to give DAML rights to pursue remedies in its customer's name if DAML's own vehicle is damaged by a third party when out on hire.

47. There was a material difference in that as well as the claimant entering into a CFA with the solicitors (Coyne Learmonth and, in part it seems, Armstrongs, an earlier incarnation of Bond Turner), from part way through the Farrell claim DAML also had a Collective Conditional Fee Agreement ('CCFA') with the solicitors. There is no such CCFA in these cases I accept – Anexo has altered its business model. However, it is notable that, having read the judgment, the presence of the CCFA did not form part of the reasoning of the judge at first instance for the making of the NPCO, nor did it form any substantial part of the reasoning in the Court of Appeal.

48. The reasoning behind the judgment in the Court of Appeal is clear: the business was directed to pursuing the hire costs by the proceedings themselves, in a real sense, it was the instigator of the litigation, it had controlled that litigation, and, finally, stood to benefit from it.

49. In analysing the Court of Appeal judgment, these conclusions were endorsed and that, in particular, the initiation and prosecution of the litigation were a 'direct consequence' of the hire of the car.

50. Further, the Court of Appeal identified an element of funding - due to DAML's funding of the hire of the car and that being a 'essential catalyst' for the claim.

51. Mr Williams says there is a substantial caveat on this approach. This deal with the question of who the real party is and is targeted specifically towards insurers.

52. He submits that Dymock is referring to both funding and control. Later, Lord Brown stated that the 'all-important' factor was that the non-party had funded the appeal (paragraph 30).

53. Further assistance is given by the Supreme Court in *Travelers [2019] UKSC 48, [2019] 1 WLR 6075*. It shows that while a commercial interest in the outcome of litigation may be necessary for a real party test to be satisfied, it is not sufficient.

54. Lord Reed DP made the same point at paragraph 96, approving a prior statement in a Scottish case: it is not enough that a third party might have *'some ultimate consequent benefit in the issue of [a] suit'*. What is required is a party '*with a direct interest in the subject-matter of the litigation, and, through that interest, master of the litigation itself, having the control and direction of the suit, with power to retard it, or push it on, or put an end to it altogether*.'

55. As paragraph 98 of the judgment, Lord Reed added (quoting another Scottish judge): 'The interest must… be: *"the true interest in the cause, and by true interest I mean the entire interest… denoting the whole interest for all practical purposes."*'

56. Hence, the respondent, whilst accepting that, per *Dymocks*, there may be more than one '*real party'* in respect of any given case, to be such a real party one must, per *Travelers*, have the <u>entire</u> interest in at least the relevant part of the case.

57. This analysis is also consistent with the comprehensive review of authority in *Travelers* concerning NPCOs against insurers. As Lord Briggs shows (paragraph 32-53), NPCOs will not be made against insurers as 'real parties' – even when they directly fund and control the defence of a claim – where they are acting in the <u>shared</u> interest of themselves and their insureds. It is only when they act <u>exclusively</u> in their own interests (that is so, as Mr Williams says, that they have the 'entire' interest in Lord Reed's taxonomy) that a NPCO will be made. That is supported by Lord Sumption.

Causation

58. The respondent says that this is an essential requirement – and that it must be shown in every case.

59. The respondent relies upon *Travelers*, paragraphs 65, 80, 90 and 99. As Lord Briggs says at paragraph 80: '*... causation remains an important element in what an applicant… has to prove, namely a causative link between the particular conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered… If all those costs would have been incurred in any event, it is unlikely that an [NPCO] order ought to be made.*'

60. On the face of it, that should be clear but, as with all general propositions of law, there are always scope for exceptions. Interestingly, Mr Mallalieu has referred me to two authorities, *Total Spares & Supplies Ltd v Antares SRL [2006] EWHC 1537 (Ch)* (not reported elsewhere) at [54], where it was held that causation was not always a necessary precondition to an NPCO. That was also the decision of the Court of Appeal in Turvill *v Bird [2016] EWCA Civ 703.*

61. I agree with the approach in *Turvill*, where it was said, at paragraph 69:
"*Mrs Toman submitted that there had to be causation in the strict legal sense of a loss to the Claimant of that or any identifiable sum before a non-party costs order can possibly be made. I do not accept that submission as a matter of law. The only requirement to make an order is it should be just, and strict consideration of causation can sometimes interfere with the Court's discretionary power to do justice."*

62. I accept that the causation approach may be useful, in, say, cases of intermeddling, which is not claimed in this case.

63. My views are somewhat replicated by the submission that consideration of causation is just one tool that can be used in order to determine the overriding question, which is whether it is 'just in all the circumstances' to make an NCPO.

CPR 44.16

64. CPR 44.16 is relevant here.

65. CPR 44.16 was introduced with effect from 1 April 2013 as part of QOCS. As we know, there are exceptions to QOCS. Under CPR 44.16 (2) (a) one of the exceptions is where the relevant proceedings include a claim made for the financial benefit of a person other than the claimant. In such circumstances, the court has a discretion to allow enforcement of a costs order against a claimant to the extent it considers just – interestingly, a similar test.

66. What is also significant is that CPR 44.16(3) expressly identifies that if CPR 44.16(2)(a) applies, the court may make a costs order – a NPCO - against the person for whose benefit the whole or part of the claim was made.

67. The Practice Direction ('PD'), at paragraph 12.2 gives examples of such a claim. One of the two examples given is a claim for credit hire. The PD further indicates at 12.5 that in such circumstances the court will '*usually*' order the '*other*' person to pay the costs of the proceedings or the costs of attributable to the issues to which CPR 44.16(2)(a) applies and that allowing enforcement instead against the Claimant would be unusual.

68. Neither CPR 44.16 nor the PD create a new jurisdiction to make an NPCO. If an NCPO is to be made, then it must be made in accordance with established jurisprudence. The Defendant says that, at the very least, this is indicative of what the policy makers expected to be just.

69. Mr Williams submits that this approach is wrong – and that this is so as a matter of law. In his submission, the PD wrongly elides a credit hire claim, with a subrogated claim, because it is intended to defray personal indebtedness (otherwise it fails).

70. If I can conflate his argument, NCPOs are a remedy of last resort, he refers to a string of authorities, but I cite *Topalsson v Rolls Royce [2024] EWHC 297 (TCC)* in this respect.

71. To my mind, the Defendants rely upon a series of cases which are, at worst illustrative, and, at best, binding and which, in my view, show best how the courts approach should work in practice.

72. I begin with *Select v Esure [2017] EWHC 1434 (QB), [2017] 1 WLR 4436* ,determined by Turner J, which sets out the proposition, relied upon by the Defendants, that credit hire companies should pay the costs of proceedings to recover the costs of credit hire. That does not seem surprising.

73. Turner J, in that case, made the following point at paragraph 32 of his judgment:

> "*In a conventional credit hire case, the claim for the hire charges will be made for the financial benefit of the credit hire organisation. … The party making the claim for costs against the credit hire organisation does not have to prove that the actual agreement was a profitable one... The financial benefit is made out because, however good or bad the original deal, it is to the financial benefit of the credit hire organisation to recover the monies due under the hire agreement through the process of the claimant's litigation. Some money is better than no money*."

74. That seems a sound practical sense of the arrangement. It is what it is. I accept the contrary argument that credit hire companies should be exposed to the risk of orders against them, but I reply, why not? It is all dependent upon the facts – and I agree with Mr Mallalieu that this is a direct consequence of their business model.

75. In *Amjad v UK Insurance Limited [2023] EWHC 2832 (KB)* which was not an NPCO case, but a QOCS case – the issue being whether a decision by the first instance judge under CPR 44.16(2)(a) and CPR 44.16(2)(b) to allow partial enforcement of a costs

order against a Claimant in circumstances where his claim succeeded in part, but failed in relation to a credit hire claim, should be upheld.

76. In that case, I note that the appeal was allowed and the decision set aside. I accept the submission that core to the judge's reasoning on the appeal was that the claim for credit hire was made for the credit hire company's financial benefit. This was therefore a CPR 44.16(2)(a) case where, as the rule and PD identified, the 'target' should be the credit hire company, not the Claimant. It is also notable that, in deciding whether the financial benefit was that of the Claimant or the credit hire company, Ritchie J observed, at his paragraph 58:

"In CHC [Credit Hire Company] charges claims the claimant can only recover damages if he has a lawful and sufficiently drafted contract so that he has a contractual debt to the CHC which is recoverable from the defendant in the proceedings, albeit deferred. Therefore, by definition the claimant has some interest in succeeding to alleviate that potential debt. However, the CHC has a far stronger interest in the success of the CHC charges claim because all the money awarded will end up with the CHC. The whole of the financial benefit in money terms goes to the CHC. All the claimant will achieve, should the head of claim be awarded, is to be relieved of any residual liability to the CHC. I bear in mind that the claimant's liability is partly illusory, because in most or many of such arrangements there is a tacit agreement that the CHC will not enforce against the (generally impecunious) claimant if the legal claim is lost…"

77. I accept that those observations are particularly applicable in the context of a business model such as DAMLs which relies on 'capturing' impecunious claimants and plainly operates on an expectation that recovery will be limited to the sums, if any, paid by the third-party insurer.

78. I also accept that Amjad is of assistance. First, it illustrates, in practice, how costs recovery is likely to work in such cases. Where there is a failed credit hire claim, Defendants will not usually be able to obtain costs recovery from the Claimant – that is true in many cases.

79. Secondly, DAML's business model must anticipate that the claim generated by the hire of a vehicle will often be accompanied by a personal injury claim, even if that is very modest in nature. QOCS will apply. It is known that, from experience, removal of QOCS protection under CPR 44.16(2)(a) will be exceptional.

80. That gives the Claimant substantial protection in respect of costs.

81. In my view, that balance must be redressed by taking into account the credit hire company's business practices, and the business model under which they clearly operate. That, interestingly, is the approach referred to in CPR 44.16 and the PD, whether that is correct.

82. The final case that Mr Mallalieu took me to, was the case of *Kindertons v Murtagh [2024] EWHC 471 (KB).*

83. It is helpful to me for several reasons.

84. It is primarily a case about control of the litigation. It was an appeal against an NPCO having been made by the court below. There two arguments before the court: First, that the judge below had failed to perceive a need to establish 'control' of the litigation by the credit hire company. Secondly, that the judge had failed to apply causation.

85. It is interesting to note that, in relation to control, Turner J said (at paragraph 44 of his judgment):

"There is a danger that the concept of "control" is wrongly treated as if it were a traffic light, governing access to the exercise of court's discretion to make a non-party costs order, which is showing either red or green. Control is almost invariably a matter of degree. As a concept, it is relevant to the extent that, in any given case, the greater the level of control exercised by the non- party the more likely it will be that the court will exercise its discretion in favour of making a NPCO."

86. In terms of the facts of that case, he held that the necessary level of control was made out because, at paragraph 46:

"*The contractual terms identified above tied Mr Ibrahim into bringing a claim and continuing it at the risk of incurring serious financial consequences in the event that he was to fail to comply. It matters little, if anything, that such consequences were not, in the event, visited upon Mr Ibrahim. It is the threat and not the execution of repercussions which forms the usual basis for control."*

87. That analysis is, I agree, consistent with the approach in *Farrell*.

88. I accept that control has many forms, and that the facts of each specific case will be relevant to that determination.

89. The question, here, is whether that is so on the particular facts of this case.

Is it just to make an NPCO, on the facts of this case?

90. I accept that, in accordance with the law, I must find that the case is 'exceptional', albeit that this means that this case is outside the course of 'ordinary' cases in litigation.

91. Mr Williams makes the compelling argument that, in the vast majority of these cases, they will not be exceptional – indeed, it could be argued commonplace due to the close relationship between credit hire claims, and road traffic claims generally. I accept that it is often standard practice for third parties to have a financial interest, and that there will be many cases, on an interpretation of the facts, where the case will not be exceptional.

92. However, in my view, this case has several distinguishing features that set it apart from the norm, that is that make it exceptional.

93. The principal reason is that, on any reading, the initiation and prosecution of the case is directly linked to the hire of a vehicle on credit hire terms.

94. The secondary reason (and of no less importance) is that the funding of the vehicle by the credit hire company is what has been described as the "essential catalyst" for the claim for credit hire charges.

95. If one considers the practice, in cause and effect, the principal financial reward is for the credit hire company (accepting that the claimant must benefit as well) – I do not consider it beyond reason, that the real instigator of the proceedings is the credit hire company because, often impecunious, a claimant will simply not consider or launch such a claim without the CHC's assistance.

96. That, in my view, makes them the ‘real party’.

97. The third party may suggest (as they do) that instructions in the action will come from the Claimant. That is undoubtedly correct. However, there must be some semblance of control established by the CHC – that is set up by the business model which, albeit is not demonstrated by oral evidence, is sufficient to demonstrate how that works in practice.

98. If I were concerned about the degree of control, then I will have to look no further than the terms of the credit hire contract. They provide that the claimant is obliged to pursue a claim for credit hire charges as part of the litigation.

99. Moreover, the terms are strict. If the claimant chooses not to pursue them, they will face adverse financial consequences. They are also directed towards appointing one firm of solicitors, who are within the same corporate structure, Bond Turner, with whom they must fully cooperate.

100. I am of the view, for reasons stated above, that there is no requirement of ‘but for’ causation. It is simply a factor in determining what is ‘just’.

101. I also accept that the fact that the claimant may have other heads of loss and that it may be said that the claimant might or would have pursued those heads of loss anyway. However, that, in my opinion, is not a bar to the NPCO being required to pay some or all of the general costs of the claim. Subject to consideration of the facts of any specific case, where the credit hire claim is a substantial element of the claim and where the credit hire agreement was entered into shortly after the accident, the claim may properly be regarded as having been initiated by and as being a direct consequence of the hire of the vehicle on credit hire terms whether or not other claims might or would have also been brought. That must follow but will be fact specific.

102. These conclusions are underpinned by CPR 44.16 (3) and PD 12 upon my interpretation above – where it is indicated that the credit hire company should pay appropriate costs in such circumstances.

103. It is then important to look at the arrangements in the round to establish whether it is 'just' to make the order. It cannot be avoided that the respondent conducts its business (and operates its business model) knowing full well that it charges much higher rates of hire (than say the usual hire spot rates) and does so, intending to make substantial profit.

104. It provides this service knowing that it seeks to recover all or part of its charges from the defendant in the action. As part of its contract, it requires the claimant to pursue their claim for the third party's own financial benefit, or, in default, either face an unpayable financial burden and/or allow the third party to pursue the claim in their name.

105. It must follow, therefore, that the third party should bear the risk – and that is an order for costs against them. To do otherwise, would be unjust in this overall scenario.

106. I, therefore, find that it is just in all the circumstances of these cases, to make NCPOs against the third party.

Conclusion

107. The costs sought in each case are set out in a number of costs schedules within the bundle.

108. In the Ali case, I understand that the sum claimed is the amount of the summary assessment made by the court at the conclusion of trial in November 2022

109. In both the Pereira and Edhouse cases, the costs are described as being the 'post end of relevant period' costs, where the Part 36 offers were accepted late.

110. In each of Nasri and Ali the claims were either struck out or dismissed and the costs are the costs of the claims (already assessed in the Ali case).

111. The respondent has submitted that these costs ought to be reduced on a causation basis.

112. I have not been addressed on the question of costs (or their quantum). This remains outstanding. This could be determined by summary assessment, if not agreed.

113. I invite the parties to notify the court if the costs issue needs to be heard by me, along with any other consequential directions as to the future conduct of this matter.

HHJ Saunders

20 June 2024