IN THE CENTRAL LONDON COUNTY COURT **CASE NO : A16YJ076**

B E T W E E N :

MR AMEYRTHARATNARAJAH NATHANMANNA

Claimant

and

UK INSURANCE COMPANY LIMITED

Defendant

and

EURONEX RENTALS LIMITED

Respondent

Before District Judge Avent

5th May 2016

Mr Ian Meikle of Counsel (Instructed by Messrs Dunne & Gray, Solicitors) appeared for the Claimant

Mr Paul McGrath of Counsel (Instructed by Keoghs LLP, Solicitors) appeared for the Defendant

Mr Andrew Hogan of Counsel (Instructed by Messrs Coyne Learmonth, Solicitors) appeared for the Respondent

Pursuant to CPR PD 39A no official record need be taken of this Judgment and copies of this version as handed down may be treated as authentic.

JUDGMENT No2

Introduction

1. At the heart of the substantive application which this judgment addresses lies the question as to what interpretation and construction should be placed upon the provisions CPR 44.16(2) and (3) and in particular the phrase:

> ".....the proceedings include a claim which is made for the financial benefit of a person other than the claimant....."

2. Both Mr McGrath and Mr Hogan, Counsel respectively for the Defendant and the Respondent, informed me that neither of them has been able to find any authority on the point. That should not perhaps come as any particular surprise given that this provision, under the Qualified One Way Costs shifting regime, is a relatively new initiative ushered in on 1st April 2013 as part of the Jackson Reforms.

3. The application also raises other issues which, to date, do not appear to have received any particular judicial scrutiny.

4. Given that this case also involves credit hire one can only hope that it does not represent the opening paragraphs in a new chapter in what Aikens LJ in *Pattni v First Leicester Buses & Dent v Highways and Utilities Construction & Allianz Insurance [2011] EWCA Civ 1384* described, in paragraph 1 of his judgment, as:

> ".... the saecular war that has now been conducted for over 20 years between the motor insurance market and credit car hire companies....."

Background Facts

5. In the early evening of Friday, 21st June 2013 the Claimant, Mr Ameyrtharatnarajah Nathanmanna ("Mr Nathanmanna") was involved in a road traffic accident in East London. The driver of the car who he claimed negligently collided with him, a Mr Jeffrey Hammerslag, was insured by the defendant, UK Insurance Company Limited ("UK Insurance"). Mr Nathanmanna sustained a whiplash type injury to his neck, right shoulder and lower back which was expected to resolve in about 14 months.

6. On or about 3rd July 2013 Mr Nathanmanna began hiring an alternative vehicle on credit terms from the Respondent, a concern called Euronex Rentals Limited ("Euronex"). He hired this vehicle until approximately 13th March 2014 during which time he amassed credit hire charges of about £47,850.

7. On 17th January 2014 Mr Nathanmanna issued these proceedings against UK Insurance claiming damages for his personal injury and other losses including the credit hire. He claimed that he was impecunious.

8. The proceedings did not go well for him by reason of the fact that he failed dismally to comply with his disclosure obligations. Indeed, following his failure to comply with an

'unless' order made by District Judge Goodchild on 6th March 2015, his claim was struck out by District Judge Dodsworth by order of 12th May 2015. His subsequent application for relief from sanctions was refused by myself after a full hearing for the reasons which were contained within my written judgment dated 23rd November 2015. It is not necessary to go into any further detail here although a reading of the facts and of my analysis and conclusions in that case might assist in understanding how matters originally progressed.

9. That judgment was handed down in the absence parties but there was a further hearing on 9th December 2015 at which it became clear for the first time that UK Insurance wished to seek their costs of the action from Euronex. I therefore ordered that a properly constituted application should be made in this regard and I adjourned all aspects of costs so that they might be dealt with together. It is that application to which I now turn.

UK Insurance's Application

10. The application dated 17th December 2015 was in the following terms:

> "The Defendant seeks an order as follows:
>
> 1. Pursuant to part 46.2 CPR, Euronex Rentals Limited be joined into the proceedings for the purpose of costs only.
>
> 2. The Court to exercise its discretion under section 51(3) of the Senior Courts Act 1981 to make an Order for costs against Euronex Rentals Limited.
>
> 3. Upon the Claimants claim being struck out by virtue of the Order of DJ Avent dated 23.11.15, handed down on 2.12.15, the claimant and/or Euronex Rentals Limited, jointly and severally to pay the Defendants cost of the action such costs to be assessed on the standard basis if not agreed.
>
> 4. QOCS be dis-applied against the Claimant pursuant to CPR 44.15(b) and (c) and/or permission is granted to enforce any costs orders in this action against Euronex Rentals Limited pursuant to CPR 44.16(2)(a) / Para 12.2 of PD44.
>
> 5. All the costs of and incidental to his Application be the Defendants in any event."

11. I subsequently ordered that Euronex be joined as a party for the purpose of costs only and the application was then listed.

12. In support of that application the Defendant's Solicitor, Miss Hamida Khatun, filed a witness statement dated 17th December 2015. If I may paraphrase her evidence, UK Insurance rely upon the following factors:

a. The claim for hire charges was the largest head of claim. Out of a special damages claim of £60,000 Mr Nathanmanna was unlikely to have benefited by more than £8 - 10,000 whilst almost £48,000, representing the hire claim, would have been for the direct benefit of Euronex.

b. The Hire Agreement and Terms of Hire conferred certain rights on Euronex to pursue litigation in Mr Nathanmanna's name; they imposed an obligation upon him to cooperate; and, provided a right for Euronex to be paid his damages. Miss Khatun relied upon the following specific clauses:

> "6(b) The Lessor shall have the right to pursue an action in the Hirer's name against the Third Party.
>
> 6(c) The Lessor shall have the right to pursue through the County Court or the High Court and the Hirer must cooperate in the conduct of the action and, if required by the Lessor, attend any hearings that the court appoints.
>
> 11. The Hirer will be at the request of the Lessor [sic] do all required by the Lessor and permit his name to be used by A. Lessor [sic] for enforcing any rights or remedies against the parties in connection with the vehicle.
>
> 28. I irrevocably authorise my Solicitors that any payment made in relation to my accident including vehicle damage and General damages by Third Parties Insurer or their representatives should be made first payable to Euronex in respect of Hire charges incurred by me and balance paid to myself."

c. Given that Mr Nathanmanna lived in Woodford Green in North-East London and his instructing solicitors were based in Cheshire it was highly likely that the solicitors were instructed by Euronex particularly given the fact that Mr Nathanmanna did not speak English.

d. That Mr Nathanmanna was a man of straw who pleaded impecuniosity and who was therefore unlikely to have funded this litigation himself and that therefore there was likely to be some funding arrangement between Euronex and the solicitors.

e. That an engineers report had been sent to Euronex rather than Mr Nathanmanna's Solicitors, indicating a connection to the litigation process.

13. On 3rd July 2013, Mr Nathanmanna also signed what was termed as a 'Mitigation Statement' in which he confirmed, by his signature, that he understood the duty to keep his losses to a minimum and that he should not hire a vehicle if he did not need one or there was another suitable vehicle available to him, and that he recognised that where practical he had an obligation to effect temporary repairs.

14. Miss Khatun summed up matters in this way at paragraph 30 of her witness statement:

> "The evidence set out above shows that Euronex Rentals was the real party in this claim who drove this litigation and stood to benefit from the claim or a significant part of it. It is highly unlikely that the Claimant's Hire Company could have believed that it could recover hire charges contractually from the Claimant in the absence of a successful claim against the Defendant. Thus, the payment of the hire charges was entirely dependent on a claim being commenced and brought to a successful conclusion on behalf of the Claimant against the Defendant. In this way Euronex Rentals had a direct and obvious financial interest in the outcome of the claim, the principal component of which was its hire charges. The recovery and storage, general damages and physiotherapy claim being very modest elements in comparison."

15. In fact, at the hearing, it quickly became apparent that UK insurance would not be able to rely upon factors (d) and (e). In the first instance there was evidence on the Court file that Mr Nathanmanna's Solicitors were acting under a Notice of Funding dated 14th January 2014 and, secondly, the engineers report related to a vehicle which Mr Nathanmanna had hired from Euronex, as opposed to his own vehicle (as mistakenly thought by Miss Khatun) which had been involved in the index accident.

16. Somewhat belatedly, given that notice of the hearing was dated 10th March 2016, Euronex filed evidence in reply being a witness statement from a Mr Kamal Ahmed dated 25th April 2016. The purport of his evidence was that:

a. He dealt with the existence of Mr Nathanmanna's Notice of Funding and the fact that Miss Khatun had referred to the wrong vehicle (as above).

b. Mr Nathanmanna had had the Hire Agreement explained to him in his own language.

c. Euronex had not instigated and/or controlled or managed the case. He asserted at paragraph 4 that:

> ".... Euronex Rentals do not get involved in cases where they hire vehicles. The claim is the Claimant's claim and it is [a] matter for a Claimant and his or her Solicitors to pursue the claim in whatever way they consider best."

d. Neither clause 6 nor clause 11 of the Hire Agreement had been invoked by Euronex and that Mr Nathanmanna had pursued the claim himself. At paragraph 16 he explained:

> "These clauses exist to protect Euronex Rentals in case there were ever any difficulties with the Hirer for example, if the Hirer went abroad or was too sick to pursue the claim in his or her own right or indeed if the Hirer suddenly died. I can tell the Court that during my tenure as Managing Director those clauses were never in fact invoked and I believe that since I left the Company Euronex has not had cause to invoke these clauses."

e. As regards clause 28 of the Hire Agreement the effect, Mr Ahmed explained, at paragraph 17 was to:

> ".....authorise the Hirer's Solicitors to pay any monies received for whatever head of damages to Euronex Rentals on account of the hire charges."

17. The witness statement of Mr Ahmed however raised perhaps more questions than it answered. He had declared at paragraph 1 that:

> "I established Euronex Rentals Ltd in 2009. I was one of the Directors from inception and was in fact the Managing Director until the end of 2014...."

18. However, a Company Search, undertaken by UK Insurance's Solicitor's disclosed that far from being the Managing Director, Mr Ahmed had only been the Company Secretary and had resigned that position on 7th July 2010.

19. I ordered a further witness statements to be filed, firstly, in support of that assertion by Miss Khatun and, secondly, from Mr Ahmed by way of reply. His witness statement dealing with this, dated 18th May 2016, clarified that he had indeed resigned in July 2010 but thereafter he had acted in the role of Managing Director although he was not a company officer. He apologised to the Court "for not being more careful with my language".

20. I am not persuaded that it was a matter of care rather than deliberation. Mr Ahmed would have appreciated that he was signing a Court document and that care was needed but it seems that his original witness statement was signed without any proper consideration or evaluation as to whether that part of it was true or false but, nevertheless, he allowed it to be advanced as if it were true and, more importantly, would be perceived to be true.

Qualified One Way Cost Shifting

21. It is not possible to advance too much further without mentioning the process of qualified one way costs shifting or as it is more colloquially known "QOCS", because it is that which gives rise to the current dilemma. In contemporary litigation QOCS are a recent innovation and require a little explanation.

22. In modern times, at least, the guiding principle as to the costs between parties has been that they follow the event or, in other words, that the loser pays the winner's costs. This is encapsulated in the current CPR 44.2(2)(a) which provides:

> "(2) If the court decides to make an order about costs –
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party....."

23. That Rule has from time to time been modified with regard to certain classes of litigants the best example perhaps being the protection that a legally aided litigant enjoyed against having to pay a successful opponents costs and which still applies (see: Section 26 Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO")). In certain regards Group Litigation Orders or cost capping orders might also be regarded in the same light.

24. In the personal injury litigation arena that proved to be extremely popular but, over the years, it also had the effect of becoming an increasing burden on the public purse to the point, in the 1990s, where legal aid for personal injury actions was for the most part abolished.

25. This obviously created a vacuum and somewhat of a conundrum: how would a deserving claimant be able to pursue a claim, if he did not possess the financial means to do so and, even worse, open himself to a liability to pay a successful defendant's costs if he lost?

26. The answer was the introduction of 'No Win, No Fee' arrangements or, more formally, Conditional Fee Agreements ("CFA's"). By this means a claimant could protect himself from an adverse costs order if he lost (he would have no costs to pay unless he won) and his solicitor's would balance the risk of losing (and therefore not getting paid) by charging a "Success Fee". This Success Fee, which was often claimed at the maximum 100% would then, over time, compensate the solicitors for the costs that they were unable to recover on cases they might lose.

27. By contrast, the defendant who had successfully defended a claim was expected to rely on After the Event insurance ("ATE") to reimburse their costs. Such insurance covers a litigant against any future liability for the costs of an opposing party. But, as Jackson LJ noted at paragraph 1.4 of Chapter 14 of his "Review of Civil Litigation Costs: Preliminary Report" in May 2009:

> "ATE insurance is taken out by claimants far more often than by defendants. It is more difficult to define "winning" when the insured is defendant to a suit. Also defendants are more likely than claimants (a) to have pre-existing insurance or (b) to have sufficient resources to contest the claim. Nevertheless, defendants do sometimes secure ATE insurance. Indeed it is possible for both sides of the same action to have ATE insurance, if their respective insurers take different views of the merits".

28. The problem which emerged from this arrangement was essentially twofold. Firstly, ATE insurance proliferated and, secondly, solicitors were unlikely to act in cases where the risk of losing was high and so tended to act in cases (with attendant large Success Fees) in which they considered they would be successful. Jackson LJ, in the Mustill Lecture 2015 at paragraph 2.4: noted that:

> "During the first decade of the twenty first century recoverability emerged as one of the main drivers of excessive litigation costs. It distorted incentives and added a new layer of costs to the litigation process. Recoverability also became an instrument of oppression. One party could crush the other party into submission (regardless of the merits of the case) simply by dint of its superior position on costs".

29. The solution arrived at by Jackson LJ was to abolish the recoverability of success fees and insurance premiums as between litigants (see: sections 44 and 46 LASPO) but at the same time to introduce QOCS which reintroduced the concept of protection from costs, or at least to a degree, for a claimant.

30. It is relevant to this case because Mr Nathanmanna was claiming for a personal injury and this mere fact meant that QOCS would apply (see: CPR 44.13(1)(a)).

31. The effect of QOCS is set out, so far as relevant, at CPR 44.14 in these terms:

> "(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant."

32. There are two important exceptions contained within CPR 44.15 and CPR 44.16 which again, so far as relevant, provide that:

> "44.15 Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –
>
> (a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
>
> (b) the proceedings are an abuse of the court's process; or
>
> (c) the conduct of –
>
> (i) the claimant; or
>
> (ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,
>
> is likely to obstruct the just disposal of the proceedings.

44.16 (1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

33. This new regime is supplemented by an addition to the Practice Direction at CPR 44 the material parts of which state:

"12.1 This subsection applies to proceedings to which Section II of Part 44 applies.

12.2 Examples of claims made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 within the meaning of rule 44.16(2) are subrogated claims and claims for credit hire.

12.3 'Gratuitous provision of care' within the meaning of rule 44.16(2)(a) includes the provision of personal services rendered gratuitously by persons such as relatives and friends for things such as personal care, domestic assistance, childminding, home maintenance and decorating, gardening and chauffeuring.

12.5 The court has power to make an order for costs against a person other than the claimant under section 51(3) of the Senior Courts Act 1981 and rule 46.2. In a case to which rule 44.16(2)(a) applies (claims for the benefit of others) –

(a) the court will usually order any person other than the claimant for whose financial benefit such a claim was made to pay all the costs of the proceedings or the costs attributable to the issues to which rule 44.16(2)(a) applies, or may exceptionally make such an order permitting the enforcement of such an order for costs against the claimant.

(b) the court may, as it thinks fair and just, determine the costs attributable to claims for the financial benefit of persons other than the claimant.

12.6 In proceedings to which rule 44.16 applies, the court will normally order the claimant or, as the case may be, the person for whose benefit a claim was made to pay costs notwithstanding that the aggregate amount in money terms of such orders exceeds the aggregate amount in money terms of any orders for damages, interest and costs made in favour of the claimant."

Section 51 Senior Courts Act 1981 and CPR 46.2

34. Before I come to the various submissions, it is appropriate to refer to section 51 of the Senior Courts Act 1981 ("the Act") because that is relied upon by Mr Hogan not only as the bedrock of cost orders against third parties but also in relation to the case law which it has spawned. The section reads:

"(1)Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in.....

(b) any county court,

shall be in the discretion of the court.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

35. In terms of translating that into the Civil Procedure Rules this is done by CPR 46.2 which provides:

"46.2 (1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –

(a) be added as a party to the proceedings for the purposes of costs only; and

(b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

The Dilemma

36. Finally, in order to put the submissions, particularly those of Mr McGrath, into context it is appropriate to outline the dilemma which he complains UK Insurance faces.

37. As defendants to this action they had no choice but to respond to the proceedings and seek to defend them which, in the event, they have done successfully by having Mr Nathanmanna's claim struck out. They ought therefore to be regarded as the 'successful' party and be entitled to an order for costs. However, as against Mr Nathanmanna that costs order is valueless if, as seems to be the case, he has no money or assets by which to discharge it.

38. Conversely, the bulk of the litigation, in terms of credit hire, was conducted on behalf of Euronex. However, unless the Court is satisfied that Euronex derived 'financial benefit' sufficient to make an order for costs against that company then UK Insurance will find themselves in the invidious position of having been successful but, essentially, having to bear their own costs which are not insubstantial and, in the context of this case, that would be unfair and unjust.

The Submissions

39. The cost issues obviously fall into two categories. Firstly, there is the claim for costs by UK insurance against Mr Nathanmanna and, secondly, its claim for costs against Euronex.

The Costs Claim against Mr Nathanmanna

40. Mr McGrath noted that the order of District Judge Dodsworth of 12th May 2015 which struck out the claim also provided that Mr Nathanmanna should pay the costs of the action and therefore UK insurance not only seek their costs up to that point but also since that time.

41. Mr McGrath submitted that his client was entitled those costs and was entitled to the benefit of the exception in either CPR 44.15(b) or (c) or both. He contended that he was either

entitled to an order on the ground that Mr Nathanmanna's conduct had obstructed the just disposal of the proceedings or that the proceedings had been an abuse of the court process. Mr McGrath had taken them in that order because he considered the test of abuse to be higher than that for the conduct issues and it would not arise if he was able to succeed on that latter point.

42. I was referred to paragraph 93 of my previous judgment in which I noted:

> "93. Firstly, the breaches were self-evidently significance and serious. The disclosure process, as observed by Mr McGrath, is of crucial, fundamental importance to litigation and the manner in which Mr Nathanmanna has approached it has been little short of a disaster. It has impacted seriously on the course of this litigation to the point where the trial window in January 2015 was lost even though it should have been possible for a trial to have taken place under the Original Order. A disproportionate amount of judicial time has also now been allocated to this case which could, and should, have been avoided if Mr Nathanmanna and his Solicitors had dealt with his disclosure obligations properly and in time."

43. Mr McGrath noted that this set out the seriousness of Mr Nathanmanna's default and submitted that this was an accurate summary which was quite clearly now within CPR 44.15(c).

44. In addition, and if necessary, Mr McGrath asserted that UK Insurance could also enforce these costs if the Court gave permission pursuant to CPR 44.16(2)(a) on the basis that Euronex had financially benefited from the proceedings and that the Court considered it just to make such an order. That the proceedings had been for the financial benefit of Euronex was an argument which Mr McGrath developed when addressing the issues of why they should bear the costs of the action.

45. In the meantime by way of reply Mr Meikle, counsel for Mr Nathanmanna, complained that Mr McGrath's argument relied upon a rather broad reading of CPR 44.15(b) and (c). There was a clear distinction, he submitted, between conduct which obstructed the just disposal of the proceedings and conduct which meant that there had been a failure to comply with rules, orders and practice directions.

46. The reason, Mr Meikle submitted, was because if one applied the broad meaning contended for by Mr McGrath there would, in fact, been no distinction between grounds (b) and (c): any

failure to comply with a rule, order or Practice Direction which was serious must then obstruct the just disposal of the proceedings.

47. The conduct here had led to a failure to produce relevant documents The claim was struck out due to the failure to comply with the order of District Judge Goodchild and therefore fell under the circumstances envisaged in CPR 3.4(2)(c) which provides that:

> "(2) The court may strike out a statement of case if it appears to the court....
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

48. Self-evidently, having regard to the wording of the Rule this was not, in Mr Meikle's view, the kind of strike out envisaged by CPR 44.15(c). Accordingly, the strike out in this particular case did not fall under a QOCS exception.

49. In order to demonstrate and amplify his point Mr Meikle took me to the notes in the White Book 2016 volume 1 at page 71 where, at paragraph 3.4.1, in discussing CPR3.4(2) and the various grounds upon which a claim might be struck out, it states:

> "Grounds (a) and (b) cover statements case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill founded and other cases which do not amount to a legally recognisable claim or defence.....
>
> Ground (c) covers cases where the abuse lies not in the statement of case itself but in the way the claim or defence (as the case may be) has been conducted. The strike out can be made even where there was nothing in the rule, practice direction or court order breach which specified this might happen as a consequence of breach....."

50. Accordingly, in Mr Meikle's submission, ground (c) relates to how the claim is conducted. He also referred to a note a little further on in the White Book at paragraph 3.4.3.5 and regarding delay which states that:

> "The court recognised that the guiding principle was that delay alone, even if it was inordinate and inexcusable, could not be an abuse of process. However, abuse of process might arise when delay was combined with some other relevant factor (*Grovit v Doctor [1997] 1 WLR 640*)"

51. Referring then to paragraphs 93 to 100 of my earlier judgment, Mr Meikle noted that these catalogued the failures of Mr Nathanmanna and his solicitors. His emphasis then fell upon paragraph 103 which read:

> "Overall, I struggled to find any redeeming features. I regret that it seems, in very large part, that the conduct of his case has been beleaguered by ineptitude and inefficiency coupled with inactivity and stagnation. That is no way to litigate and is precisely the sort of poor litigation conduct at which the Jackson Reforms were aimed. It would be contrary to the Overriding Objective if this application were to succeed."

52. But, Mr Meikle submitted this was a failure as envisaged under CPR 3.4(2)(c), as discussed at paragraph 3.4.1 of the White Book: in other words, it was conduct in relation to the defence of the claim.

53. He noted that there had been no reference, finding or implication in my judgment that the nature of Mr Nathanmanna's case *per se* was vexatious, scurrilous or ill founded. It was simply that Mr Nathanmanna's defence been conducted terribly which meant that it was destined to be struck out under CPR 3.4(2)(c).

54. Overall, Mr Meikle submitted that the wording of CPR 44.15 did not technically allow the exception to QOCS to be exercised but, substantively as well, as the claim was struck out for breach of a rule, Court order or Practice Direction and the ground expressed in CPR 3.4(2)(c) is expressly absent from CPR 44.15, it plainly demonstrates that protection of QOCS remains in this case.

55. Turning to the CPR 44.16 application against Mr Nathanmanna, Mr Meikle accepted that such an order was permissible if the Court considered it just to allow such enforcement. However, Mr Meikle submitted that there were three reasons why this should not be the case:

a. UK insurance's own case was that Mr Nathanmanna was a man of straw and that the claim had been conducted for the financial benefit of Euronex;

b. as Miss Khatun had alluded to in her witness statement, Mr Nathanmanna's lack of language skills meant that he may not have understood the agreements that he signed; and,

c. it would not be just to allow recovery of costs against Mr Nathanmanna on this ground if it was found that Euronex was the real beneficiary of the proceedings, in which case that company ought to be responsible for the costs. In other words, that it was the Court's conclusion on the 'financial benefit' issue which ought to inform the outcome.

The Costs Claim against Euronex

56. The dilemma for UK Insurance, as I have noted, is that enforcement of a costs order against Mr Nathanmanna will only be effective in real terms if he has sufficient funds to meet the liability. If not, then Mr McGrath contends that UK Insurance suffers a real injustice.

57. The power to make an order against a non-party exists under section 51(3) of the Act. Mr McGrath recognised that such an order might be said to be exceptional but as Lord Browne giving the judgment in the Privy Council decision in *Dymocks Franchise Systems (NSW) Pty v Todd [2004] UKPC 39* at paragraph 25(1) observed:

> "..... exceptional in this context means no more than outside the ordinary run cases where the parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order."

58. In Mr McGrath's view the credit hire model was such that:

a. it meant that claimants often incurred "eye watering" credit hire charges the recovery of which was then sought from a defendants insurers;

b. the claimant was a nominal party to litigation whether or not the credit hire company had any input or control over it;

c. although not a champertous arrangement it could not be said that the recovery of credit hire charges was not for the financial benefit of another; and,

d. credit hire was extremely prevalent.

59. Mr McGrath noted that CPR 44 PD 12.2 specifically envisaged and provided that claims for credit hire would fall within the ambit of CPR 44.16(2), the only condition relating to financial benefit. There was no qualification or prerequisite, before the Rule took effect, to

show that the non-party had controlled or meddled with the litigation. Mr McGrath suggested that this provision is simply a formal acknowledgement that the true beneficiary behind a litigated credit hire claim is the credit hire company itself and cited the opening remarks of Aldous LJ in *Burdis v Livsey [2003] QB 36* at page 55 E when he said:

> "This is the third round of a contest between the motor insurance market and credit hire companies which provide the innocent victims of motor accidents with car repair and hire services at little or no cost to them. The commercial success of such schemes has substantially increased the cost of motor claims borne by insurers. This has no doubt motivated their sustained legal attack on the schemes....."

60. Mr McGrath also referred to *Dickinson v Tesco [2013] EWCA Civ 226* where Accident Exchange Ltd had successfully applied joined the purposes of costs, so that it might have on order made directly in its favour.

61. Applying these considerations in the instant case Mr McGrath submitted that:

a. Euronex had positioned itself as the 'prime mover' in relation to the hire claim which was for its own financial benefit. The witness statement of Miss Khatun, at paragraphs 14-16 and 20-30 highlighted that the clauses which had been inserted into the Hire Agreement and proved the point that there was an actual or potential financial benefit to Euronex;

b. these clauses meant that Euronex could bring proceedings in Mr Nathanmanna's name, that he had to cooperate and lend his name to proceedings and that there was an express authorisation to hand over his damages to Euronex;

c. Euronex had been in a position to control the claim, or liability, for their own charges whereas UK Insurance had had no option but to defend the claim as it was pursued. Euronex had the ability to bring the claim for credit hire to an end but UK Insurance could not;

d. Euronex's letter to UK Insurance, copied to the claimants solicitors, of 25th March 2014 seeking payment of their hire charges in 30 days had referred to "our client"; and,

e. the Mitigation Statement signed by Mr Nathanmanna was not required for any other hire company but gave Euronex some comfort that the claim for credit hire would not just be thrown out.

62. To support his contentions Mr McGrath referred to two cases, the first being a passage from Lord Brown's judgment at paragraphs 23 to 26 of *Dymocks* and particularly what was said at paragraph 25(1) and (3):

> "25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows:
>
> 1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.
>
> 2) Generally speaking the discretion will not be exercised against "pure funders", described in paragraph 40 of Hamilton v Al Fayed as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.
>
> 3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence - see, for example, the judgments of the High Court of Australia in Knight and Millett LJ's judgment in Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd [1997] 1 WLR 1613. Consistently with this

> approach, Phillips LJ described the non-party underwriters in TGA Chapman Ltd v Christopher [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in Knight, provided that he is "a real party in ... very important and critical respects" - see Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation (2001) 179 ALR 406, referred to in Kebaro at pp 32-3, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13 (1) (f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

63. The second authority was that of *Farrell & Another v Direct Accident Management Services Limited ("DAMS") [2009] EWCA Civ 769*, notwithstanding that this was a pre - QOCS case. There, an award of 80% of costs made against DAMS on the basis that the claim was, in reality, pursued for their benefit and notwithstanding that they were entirely innocent of the fraudulent aspects of the claim.

64. Mr McGrath submitted that CPR 44.16(2) now provides a specific mechanism for an order for costs against Euronex. Given the very large credit hire claim brought for its benefit UK Insurance were entitled to an order against Euronex for its costs or, alternatively, a percentage of such costs which Mr McGrath put at 80%; roughly equivalent to Euronex's share of the overall financial loss claimed.

65. Mr Hogan for Euronex made a forthright and robust rebuttal of the application: in his submission it was entirely misconceived.

66. He poured a degree of cold water on some of the authorities referred to by Mr McGrath on the basis that in the credit hire world there had been any number of test cases where credit hire companies and/or insurance companies had intervened for various reasons and had then been made liable for costs. These cases were not representative of what occurred in the majority of cases.

67. The basic factual background to his submissions were, in Mr Hogan's view, quite simple: there was no evidence whatsoever that Euronex had exercised any actual control over this litigation, had provided any funding for it or had actively interfered in any way in the litigation process.

68. Mr Hogan starting point was to examine the nature of a credit hire claim.

69. Prior to credit hire, when a driver's vehicle was damaged in an accident he would have a claim for loss of use which was considered to be a claim for general damages. Post credit hire that claim is still one for loss of use but categorised as special damages, being the amount of the credit hire charges. However, the important point was that the credit hire company had no interest in those special damages.

70. To anchor this point Mr Hogan referred me to the House of Lords decision in the conjoined appeal of *Giles v Thompson* and *Devlin v Baslington [1994] 1 AC 142* in which cases both the claimant suffered whiplash injuries and also made a claim for credit hire charges.

71. In order to highlight certain similarities between the hire documentation in those cases and this case, and also to fully appreciate Mr Hogan's argument it is necessary to set out the elements of hire in those cases in perhaps a little more detail than usual.

72. In the case of Mrs Devlin her vehicle was off the road for about three weeks during which time a hire vehicle was made available to her on credit which was on standard terms. At page 157 B-F of his judgement Lord Mustill noted these terms (so far as relevant to this case) as follows:

> "5 (ii) The Lessor shall have the right to pursue an action in the Hirer's name against the third party.
>
> (iii) The Lessor shall have the right to pursue such action through the County Court and/or High Court and the Hirer must co-operate in the conduct of the action and, if required by the Lessor, attend any hearing that the Court appoints."

73. Lord Mustill continued at page 157G:

> "In addition there was a duplicated Form of Authority, in two parts. The first made provision for the company to appoint a solicitor to act on the motorist's behalf in connection with the accident, and went on to state: "I understand I am at liberty to appoint any solicitor to act on my behalf. I have no particular solicitor I wish to instruct." This part of the form was crossed through. The second part read:

"I hereby authorise you, the Third Party Insurers in this matter, to release to my Solicitors a separate cheque to be made payable to 1st AutoMotive Car Rental in respect of hire charges".

This part of the form was signed by the motorist."

74. In *Giles* the hire agreements provided, again so far as is relevant, at page 158/9H:

"2. The company shall have the right to appoint its own solicitor to pursue an action in the hirer's name against the third party.

3. The company's solicitor shall have the right to pursue such action through the County Court and the hirer must co-operate in the conduct of the action and, if required by the Company's Solicitor, attend any hearing that the Court appoints."

75. There was no form of authority in *Giles* but Mr Hogan observed that there were striking similarities between those provisions and this case, namely, that there was a right given by Mr Giles and Mrs Devlin to the credit hire companies to pursue an action in their names and control the litigation, and there was a contractual obligation (in *Devlin* at least) to pay the fruits of the action over to the credit hire company. However, it was what Lord Mustill had to say about the effect of these hire clause provisions which is relevant in this case. In relation to *Devlin* he noted at page 160 C-D that:

".....What rights does the [credit hire] company possess in the sums recovered by the motorist from the defendant? The answer is plainly : None. Neither the contract nor the Form of Authority purported to create a charge over the proceeds of the claim, either as regards the hiring charges, or the damages for personal injuries, or any other item. Clause 5(iv) merely required the motorist to press ahead with the recovery of sufficient funds to discharge her indebtedness to the companies. Equally, there was no assignment of the proceeds of the action or of the cause of action itself. As for the second part of the Form of Authority, even if this was irrevocable (which I doubt) it was no more than a mechanism designed to ensure that, once the motorist was put in funds by the successful actions, the appropriate part of them reached the company."

76. In relation to the case of *Giles* Lord Mustill noted at page 161H:

"As in the case of Devlin an essential preliminary is to ascertain the rights and obligations created by the hiring agreement. First, one must see whether the

> companies obtain any direct rights over the fruits of the claim for the element of damages representing the hire charges. Here, the answer is just as clear as it was before. The companies have no interest, whether by charge or assignment, which give them any claim to the proceeds which they can enforce against the defendant. Nor is any part of the recovery shared with the motorist, in the sense (for example) that they have a preferential claim to it against the other creditors of the motorist. The position is simply that the success of this part of the claim will equip the motorist with extra money, from which the hire charges can be satisfied."

77. The consequence of this, a decision binding on this Court as Mr Hogan submitted, is that a claim brought by a motorist which includes an element of credit hire charges is the motorist's claim; the damages recovered belong to the motorist, the credit hire charges represent the measure of quantified claim for loss of use and the credit hire company has no interest in the proceedings in the absence of an assignment or the creation of charge, neither of which apply in this case.

78. If any support for this proposition was needed Mr Hogan referred to what Aikens LJ had said at paragraph 30 in the case of *Pattni* which was consistent with this, namely that:

> "I think that the relevant principles established by these decisions are as follows: (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."

79. Next, Mr Hogan turned his attention to the provisions CPR 44.16(2) and the phrase "proceedings include a claim financial benefit" which falls be construed. Hope, expectation or a contractual right to direct the destination of damages was not enough, in Mr Hogan submission, to confer a "financial benefit" because that phrase necessarily required a legal interest in such damages.

80. This was clear, in Mr Hogan's view, from the qualifying words of the sub rule:

> ".....other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses)....."

81. Translating that wording into everyday language, it was directed at those parts of a claim - for example, a claim for care, loss of earnings or physiotherapy expenses - where a claimant had been given assistance. In such instances the law impresses upon the claimant a trust or a subrogated claim so that: the damages recovered for the carers are held in trust for them; likewise wages or earnings recovered are held on trust for the employer; and, BUPA, who provided the physiotherapy, would have a subrogated claim.

82. Accordingly, whilst the claimant might be the legal owner of the damages, the equitable ownership lies elsewhere and this was the sensible reason why such items were excepted from the 'financial benefit' provision.

83. In the absence of a charge or assignment in its favour a credit hire company could have no interest in the damages. Conversely, if a charge or assignment had been created then it might give rise to a financial benefits being conferred but that would be fact specific and that was certainly not the case here.

84. In Mr Hogan submission, it was not possible for Mr McGrath to draw any comfort from the Practice Direction because it had no statutory force and could not override the House of Lords decision in *Giles* declaring what the common law was, and what it remains.

85. Mr Hogan also questioned how the reference to credit hire in the Practice Direction might have come to be there? He suggested that the drafter was ignorant of the decision in *Giles* and had assumed that financial benefit existed in all cases. Such benefits did not exist here and therefore, in Mr Hogan's view, UK Insurance could not seek their costs from Euronex.

86. Given that the application also relies upon section 51 of the Act Mr Hogan considered it appropriate to consider the Court's discretion under that section.

87. In the case of *Dymocks* the defendants were unable to pay or meet some of the costs of the litigation which they had been ordered to pay. Dymocks sought to obtain an order that they be paid by a third-party company which had a close association with some of the defendants and which became involved in and had had a degree of control over some of the litigation. In

considering the issue of discretion Mr Hogan relied upon the same passage from Lord Brown's in the Privy Counsel at paragraph 25 (see paragraph 62 above) as had Mr McGrath.

88. Although persuasive only, the decision was nevertheless approved of by the Court of Appeal in *Goodwood Recovery Limited v Breen [2005] EWCA Civ 414* which referred to the fact that there must be a causal link between the costs incurred and the non-party's conduct.

89. The recent authority which brought together a number of like cases was that of *Deutsche Bank v Sebastian Holdings & Alexander Vik [2016] EWCA Civ 23*. The defendant, Sebastian Holdings, had failed to make any payment of the judgment or costs ordered in favour of the bank. Mr Vik was joined to the proceedings in order to seek an order for costs against him on the basis that he owned and controlled Sebastian Holdings, that the litigation had been conducted for his personal benefit and that therefore he had been the 'real party' to the litigation. The Court of Appeal found against Mr Vik and having summarised the various authorities Moore-Bick LJ at paragraph 21 continued:

> "These principles have been applied in a number of subsequent cases, but it is unnecessary to consider them in detail because they all turn to a greater or lesser degree on their own facts. When an order for costs is sought against a third party, the critical factor in each case is the nature and degree of his connection with the proceedings, since that will ultimately determine whether it is appropriate to adopt a summary procedure of the kind envisaged in the authorities, leading to what Neuberger L.J. in Gray v Going Places Leisure Travel Ltd [2005] EWCA Civ 189 described as "the overall order made by the court at the conclusion of the trial.""

90. It is perhaps also worth noting his observations in the opening sentences at paragraph 22 which stated:

> "As the judge noted in paragraph 9 of his judgment, an application under section 51 does not involve the assertion of a cause of action; it is a request for the court to exercise a statutory discretion in relation to the costs of proceedings before it. Section 51 is now the source of the court's discretion to determine who shall bear the costs of proceedings, whether they are parties to the proceedings or third parties. In principle, therefore, one would expect the procedure in each case to be substantially the same and the order to reflect broadly similar matters, such as the conduct of the proceedings and the nature of the party's or third party's involvement....."

91. As Mr Hogan observed, the judgment of Moore-Bick LJ was a reiteration of paragraph 25(3) of ***Dymocks*** but, he argued, that even if control, funding and/or benefit was made out against Euronex in this case, the court still had to consider the principled exercise of discretion. In this regard there were two matters which he submitted would militate against such an order being made.

92. The first was the absence of any warning to Euronex that UK Insurance would seek its costs and, secondly, on the basis that as there was no suggestion or evidence that Euronex had had anything to do with the substantive litigation, it would be unfair to bind a non-party with the costs of its consequences.

93. Mr Hogan conceded that in the case of ***Farrell*** a costs order had been made against the credit hire company but that this decision very much turned on its own facts because the credit hire company had not only funded litigation through a collective CFA but had been appointed to manage the claim as well (see: the judgement of Sir Andrew Moritt at paragraph 4). In particular Mr Hogan went on to note that at paragraph 40 judgment the judge had found that:

> ".....First, the documents signed by Mr Farrell and Mr Short on 21 January 2005, in particular clause 5 of the hire agreement, demonstrate that the initiation and prosecution of the claim were the direct consequences of the hire of the Nissan Primera by DAMS to Mr Farrell. The judge concluded, at paragraph 53 of his judgment, that DAMS was in a real sense the instigator of the litigation. That conclusion was amply justified. Second, the claim was prosecuted by the solicitors in the names of Mr Farrell and Mr Short at the behest of DAMS, because that is what clause 5 of the hiring agreement provided. If and insofar as DAMS left it to the solicitors to get on with the claim, that is not inconsistent with the control of the litigation by DAMS, for which the hiring agreement provided. Although the collective conditional fee agreements came later.....They provided in terms that DAMS had been appointed to manage and pursue the claims on behalf of Mr Farrell and Mr Short. In the absence of any evidence to the contrary from DAMS, a natural inference is that the proceedings were pursued, and later discontinued, with the knowledge and approval of DAMS.....DAMS was in control of the litigation, and that was a conclusion fully justified on the evidence before him."

94. As to Mr McGrath's suggestion that Euronex should have to pay 80% of the costs if an order was to be made, Mr Hogan bristled somewhat at this on the grounds that this division was

based on the value of the claim whereas, in his submission, it ought to be assessed on the issues. In any event, Mr Hogan submitted, that Euronex should not be saddled with the costs of proving liability or the application for relief and the long periods of delay which had been caused wholly by Mr Nathanmanna and his solicitors.

95. In conclusion Mr Hogan finally submitted that:

a. Euronex had not funded the action. On the contrary there was a Notice of Funding in favour of Mr Nathanmanna;
b. The ratio in *Giles* applied to CPR 44.16 because Euronex had no interest (and could not have an interest) in the damages;
c. the witness statement of Mr Ahmed clearly showed Euronex had no, and did not exercise any, control over the proceedings;
d. the bulk of costs would have been incurred in relation to liability and the application for relief in any event; and
e. it would be unfair if the Court were to exercise its discretion to make an order against Euronex.

96. By way of brief reply Mr McGrath sought to distinguish *Giles* in several ways. Firstly, he submitted that the specific hire clauses in *Giles* were not as far reaching as those in this case where Mr Nathanmanna is obliged to hand over all of his damages to Euronex.

97. Secondly, *Giles* was a case concerned with champerty and was not binding in relation to third-party costs orders.

98. Thirdly, Mr McGrath raised the possibility that the credit charges were in reality a subrogated claims and referred to Lord Mustill's judgement in Giles at page 163 C-D:

> "There remains one further aspect of the relationship, namely the responsibility for the cost of the litigation. Again the agreement is silent. In the simplest case, where only the hiring charge is the subject of claim, there is no problem. Since the action is brought at the company's request there is clearly an implied obligation not only to finance it, but also to cover the motorist's liability to the defendant in the event of failure. The position will be, at least in theory, less straightforward where there is a mixed claim, for personal injury as well as hiring charges, and where the action wholly or partially fails. It may be that in practice the company will bear all the costs involved, but the agreement does not

> say so, and in the event of dispute some difficult questions may arise. These may perhaps be solved by recourse to the analogy with subrogation, and if so the authorities collected in The Law of Insurance Contracts, Dr. M.A. Clarke, 31-6B3 may be germane. The point was not, however, explored in argument, and I do not think it profitable to do more than suggest that under this particular form of contract the motorist cannot be confident of a complete cover in respect of costs. Against this background I turn to the defendant's submission that the agreement is unlawful."

99. Mr McGrath also submitted that the fact that the damages might belong to Mr Nathanmanna was not relevant: it was whether there was a financial benefit to Euronex that was the key. It was the withdrawal of the use of Mr Nathanmanna's vehicle as a result the collision that gave rise to the loss of use which was a matter of general damages. However, once he had hired a vehicle on credit and he had a consequential liability for hire charges these were special damages. This could be demonstrated by virtue of the fact that if the hire agreement were to be held invalid then the whole hire claim would fail as it would if the agreement were to fall foul, for example, of the various Consumer Credit Regulations.

100. Rather than concentrating on the origin of the right to seek damages, Mr McGrath submitted that the test under section 51(3) of the Act and CPR 44.16 was a wide one which looked at the justice of the situation.

Credit Hire

101. I consider it appropriate, albeit briefly, to mention credit hire.

102. Credit hire is a construct. It has created and given rise to very large amounts of litigation indeed over many years as insurance companies and the credit hire companies seek to restrict or enlarge its ambit and effect. This Court deals with a great number of personal injury claims virtually on a daily basis where there is, in addition, a claim credit hire. In quite a few of those cases the credit hire element is, as Mr McGrath put it, "eye wateringly" high. In virtually all of these claims the period of hire is significantly longer than would be the case if a driver was paying for hire out of his or her own pocket. The success of the credit hire industry can no doubt be gauged by virtue of its proliferation.

103. The business model in general is slick and well rehearsed: a road traffic accident occurs; in the vast majority of cases the driver and any passengers will have suffered minor whiplash

injuries; the driver, or someone on his or her behalf, alerts a Recovery company which then recovers the vehicle from the scene to storage; the driver is then put in contact with a Claims Management Company ("CMC"). It may even be that the CMC is alerted first of the accident and then arranges for recovery and storage of the vehicle on the drivers behalf.

104. The CMC will invariably put the driver in contact with a credit hire company and also solicitors. This can all take place extremely quickly so that it is not uncommon to see cars being hired within 24 hours of an accident or Claims Notification Forms being lodged in respect of the injuries suffered by the potential claimant's within that time. There would appear to be obvious business links and relationships between these entities.

105. As regards the credit hire company they hire a vehicle on credit in the expectation that it will be profitable. The hire here, at approximately £48,000, represents a considerable return over a six-month period or so in respect of a depreciating capital asset although not all of that return will represent profit and doubtless an element of that will need to be offset against those occasions when the credit hire cannot be recovered. However, whatever profit is derived must be considered, in my view, as a financial benefit for the credit hire company concerned.

106. Those hire charges, and that profit element, is therefore recovered through the litigation taken by driver and is claimed as special damage. On the face of it, because the drivers sues for his personal injury he has the protection of QOCS which protects him from adverse cost orders and therefore indirectly protects the credit hire company as well. A cynic might observe that this is somewhat advantageous to the credit hire company which is able to obtain a recovery without any risk (assuming the claimant wins of course) and whether by design or otherwise it is very uncommon in this Court to have to deal with a credit hire claim which is also not allied to a personal injury claim.

Analysis & Conclusions

Preamble

107. When Lord Justice Jackson published his 'Review of Civil Litigation Costs Final Report' in December 2009 he concluded at paragraph 4.1 of Chapter 19 that:

> "In my view, the regime of recoverable ATE insurance premiums is indefensible.....On the other hand, most claimants in personal injury cases have for many years enjoyed qualified protection against liability for

adverse costs and there are sound policy reasons to continue such protection. The only practicable way that I can see to achieve this result is by qualified one way costs shifting."

108. He then set out, at paragraph 4.3 and 4.4, what protection was afforded by the 'Legal Aid shield' and how it worked in practice before proposing in paragraph 4.7 that:

> ".....that all claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs. In order to achieve this result I propose that a provision along the following lines be added to the CPR:
>
> "Costs ordered against the claimant in any claim for personal injuries or clinical negligence shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:
>
> (a) the financial resources of all the parties to the proceedings, and
> (b) their conduct in connection with the dispute to which the proceedings relate."
>
> If this proposal is adopted, there will have to be consequential provisions of the kind that currently exist to enable section 11(1) of the 1999 Act to be operated. The details of these consequential provisions will be a matter for the Civil Procedure Rule Committee."

109. Whilst Jackson LJ touched upon the need to deter claimant's from making frivolous or fraudulent claims and applications he suggested that the best way forward was to adopt the formula at s.11(1) of the Access to Justice Act 1999 (now s.26 LASPO) so that:

> ".....the court [can] make a costs order in three specific situations where such an order would be appropriate: (a) where the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim); (b) where the defendant is neither insured nor a large organisation which is self-insured; or (c) where the claimant is conspicuously wealthy."

110. I would observe that, firstly, it was abundantly clear from this proposal that QOCS would apply, and was intended to apply, to all personal injury claims. Whilst it may have represented a somewhat stark new regime it eradicated the need for ATE insurance and it was also applicable across the board. A defendant or their insurers thus knew that even if they were

successful in defending a claim their chances of being able to recover their costs were probably slim, if not non-existent, unless they could fall within an exception.

111. Secondly, Jackson LJ confined his comments to a personal injury action alone and, if he contemplated it, did not express any views as to what the position might be in a mixed claim or, in particular, to the issue of credit hire.

112. Clearly the envisaged rule had undergone a metamorphosis by April 2013 so that under CPR 44.14(1) costs could be enforced without the Court's permission but only to the extent that:

> ".....the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders damages and interest made in favour of the claimant."

113. CPR 44.16(1) then dealt with the fundamentally dishonest claim as envisaged by Jackson LJ.

114. The manner of this metamorphism might be gleaned from a Commissioning Note by the Ministry of Justice dated May 2012 to the Civil Justice Council (*Implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Civil Litigation Funding and Costs - Issues for Further Consideration by the Civil Justice Council*) in which it was stated:

> "As previously announced, a regime of qualified one way costs shifting QOCS) is being introduced in personal injury cases. This was proposed in Lord Justice Jackson's report, and was covered in the MoJ's consultation on implementing the reforms. Further consultation and consideration took place under the auspices of the Civil Justice Council (CJC) and discussions have been ongoing with stakeholders. Following that work, the Government has made the following provisional decisions, with further work requested from the CJC as set out below.
>
> QOCS will operate in all personal injury cases so that claimants are not generally at risk of having to pay the defendant's costs if the claim fails.
>
> QOCS will apply to all claimants, however funded, and whatever their means; there will be no financial test of the claimant's means. The MoJ would welcome the CJC's further advice on whether there should be a requirement for a minimum payment by a losing claimant;

> QOCS will not apply to fraudulent claims (for example involving a fraudulent means or device), or in claims which are struck out. The MoJ would welcome the CJC's further advice on what behaviour should lose the protection of QOCS (including, for example, the making of unreasonable applications in the course of the claim), and how this should be defined and evidenced, particularly where dishonesty is involved (for example, through the use of a fraudulent means or device). The MoJ is particularly keen to discourage dishonest claims, in particular where the claim is exaggerated, either in terms of the injury sustained, or in the circumstances in which the injury was sustained. The MoJ considers that preventing QOCS applying in respect of all of a claim where there is dishonest exaggeration will allow honest claims to be pursued, while discouraging unmeritorious claims."

115. It welcomed the Civil Justice Council's further advice in relation to the last two issues and also upon the following:

> "In mixed claims (combined claims covering personal injury and non-personal injury) QOCS will only apply to the whole claim if the claimant has an interest in the non-personal injury element of the claim, which is either integral or directly consequential to the personal injury claim. However, the MoJ is concerned to avoid a situation where the costs protection offered by QOCS is used for aspects of a claim in which, for example, insurers pursue a subrogated claim to recover insured losses. The MoJ would welcome the CJC's further advice on what is integral or directly consequential to a claim, and whether a workable distinction would be between claims for insured and uninsured losses."

116. The response by the Civil Justice Council in June 2012 (*Response to Ministry of Justice Commissioning Note entitled "Implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Enters Act 2012 etc*), in relation to mixed claims, at paragraph 49 *et seq* noted:

> "49. Essentially, the starting point is that a personal injury claimant should benefit from QOCS protection. What is the position as regards organisations or companies which provide him or her with goods, services or money as a consequence of the accident and which go to meeting his or her losses and needs arising from the accident and which may therefore be recoverable from the defendant and its insurer?.....

> 53. In essence, the C[ommissioning] N[ote] appears to take the view that as a matter of policy organisations which provide services and goods to claimants which go to meeting the claimant's losses should not benefit from QOCS. The following passage, to which emphasis has been added, is instructive:
>
> > 15. "However, the **MoJ is concerned to avoid a situation where** the costs protection offered by **QOCS is used for** aspects of a claim in which, for example, insurers pursue **a subrogated claim** to recover insured losses."
>
> 54. It would therefore appear that the MoJ's policy, correctly interpreted, is that QOCS should not apply to subrogated losses or similar items which give rise in the hands of the provider to a right of recovery as part and parcel of the claimant's own claim for personal injuries. The obvious examples, in road traffic injury claims at least, are subrogated insurance claims - whether for vehicle damage, property damage, private medical treatment or rehabilitation – and services provided by a credit hire organisation."

117. Whatever discussions then followed in the Civil Procedure Rules Committee ("CPRC"), this exchange would appear to be the genesis of the reference to credit hire in CPR 44 PD 12.2.

Interpretation and Application

118. The two issues to be determined are:

a. As against Mr Nathanmanna, whether:

i. the nature of the striking out of his claim is such that it brings it within CPR 44.15 (b) or (c)?; and,
ii. in any event, it is appropriate to make an order under CPR 44.16(2)(a)?

b. As against Euronex, whether, an order should be made against them pursuant to CPR 44.16(3)?

Enforcement against Mr Nathanmanna

119. UK insurance is clearly entitled to an order for costs against Mr Nathanmanna. They were the successful party whilst Mr Nathanmanna was unsuccessful and there is no reason that I can

see to disapply the usual rule under CPR 44.2(2)(a). The real issue is whether that costs order can and should be enforced against Mr Nathanmanna?

120. Since Mr Nathanmanna's claim was struck out I am not convinced that the way in which CPR 44.15 is structured requires a defendant seeking to enforce an award of costs to apply to the Court to do so; the Rule expressly provides that orders for costs can be enforced *without* the permission of the Court in such circumstances.

121. I understand why the application has been issued by UK insurance in this specific instance but it seems to me that generally it would be a matter for a claimant to seek a declaration, upon enforcement proceedings being issued, that the circumstances of the striking out was such that the defendant was not entitled to enforce in that particular case.

122. Be that as it may, when does a claimant lose QOCS protection upon a claim being struck out?

123. The grounds in CPR 44.15(a) and (b) are quite clear and categorical: that protection is lost if the claimant has disclosed no reasonable grounds for bringing the claim or the proceedings are an abuse of the Court's process. In this instance I am satisfied that Mr Nathanmanna did not fall into either category.

124. Firstly, he obviously had a cause of action in negligence and, secondly, the proceedings could not be said to be an abuse of the Court's process. Indeed, the arguments advanced by Mr McGrath, in opposition to granting Mr Nathanmanna any relief from sanctions to which my previous judgment relates, did not rely upon any relating to an abuse of process. It would be wrong therefore to change the basis of my earlier decision now simply because costs are under discussion.

125. Mr Meikle is thus correct in his submission that Mr Nathanmanna's claim was struck out, pursuant to CPR 3.4(2)(c), because he failed to comply with a rule, practice direction and/or Court order. Specifically, he failed to comply with District Judge Goodchild's 'Unless' order of 6th March 2015.

126. So far, so good. However, it seems to me that this is where the difficulties begin. To understand my reasoning it is helpful to reiterate the relevant provisions.

127. CPR 3.4(2) is headed: "Power to Strike Out and Statement of Case". It is the only power in the CPR which exists to enable the Court to strike out a case. It reads:

"(2) The court may strike out a statement of case if it appears to the court:

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

128. CPR 44.15 is headed: "Exceptions to Qualified One-Way Costs Shifting where Permission Not Required". CPR 44.15(a) - (c) reads as follows:

"(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court's process; or

(c) the conduct of –

(i) the claimant; or

(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,

is likely to obstruct the just disposal of the proceedings."

129. It is apparent when juxtaposed that the provisions of CPR 44.15 borrow extremely heavily from CPR 3.4(2). There can be no argument, for example, that sub paragraphs (a) in each case deals with there being no reasonable grounds for bringing a claim.

130. What then appears to have happened is that CPR 44.15(b) and (c) has taken the component parts of CPR 3.4(2)(b) but with a slight variation which have then been split between:

(a) an abuse of the Court's process but this time in relation to the proceedings as a whole as opposed to just the 'statement of case' being an abuse; and,

(b) conduct (as opposed to just the statement of case) being likely to obstruct the just disposal of the proceedings with the addition that it is the conduct not only of the claimant but others as well acting on his behalf which may be relevant.

131. It is material in my judgment, for reasons to which I will come, that there is no provision in CPR 44.15 which reflects a case being struck out under CPR 3.4(2)(c).

132. It would perhaps have been simpler and easier to have just taken the wording of CPR 3.4(2)(c) and inserted them into CPR 44.15(c). But for whatever reason, the CPRC did not do so. Instead they decided to introduce a test relating to conduct which was likely to obstruct the just disposal of the proceedings.

133. Upon reflection this might be considered sensible if it is accepted that the starting point for a defendant in personal injury litigation is that QOCS is the default position. There are any number of circumstances in which a claim might be struck out where there has been no overt or bad conduct by a claimant, a good example possibly being where a claim has been struck out for the failure to pay a fee which is due.

134. Why should a claimant in those circumstances forfeit his QOCS protection simply because payment of a fee might have been overlooked? Put another way, why should a defendant who has become the fortuitous beneficiary of a striking out suddenly be in a better position in being able to enforce costs when he would not have been able to do so had the case gone to trial and the defence been successful?

135. That said, putting aside what I might term technical strike outs, for example the non-payment of a fee, in my experience if a claim is struck out under CPR 3.4(2)(c) it means that the non-compliance is, in itself, serious and significant or, if it is not, that there is a history of poor litigation conduct with the non compliance then being the straw that has broken the camel's back.

136. Nonetheless, it appears that the CPRC considered that a little more than a breach of a rule, practice direction and/or court order alone would be required and therefore felt that an appropriate test would be to assess a claimant's conduct as now dictated by the provisions of CPR 44.15(c). I understand why there might be a reference to conduct in this rule since 'conduct' is not an uncommon feature generally in relation to costs under the CPR, for example, in CPR 44.2(4)(a) and/or CPR 44.4(3)

137. However, I am being asked by UK Insurance to make a finding under CPR 44.15(c).

138. That rule is twofold: firstly, there has to be conduct by the claimant or someone on his behalf and, secondly, that conduct has to have been likely to obstruct the just disposal of the proceedings. The first criteria is met in this case so I turn to the second.

139. A "just disposal" has to be considered in the context of a claim having been struck out and against the yardstick of the Overriding Objective in CPR 1.1. Obviously, a "just disposal" will not have been by way of a trial so, self-evidently, that will have been obstructed. It seems to me therefore that it is the manner of that obstruction by way of conduct which is relevant which, in turn, must mean that this determination is (a) fact specific and (b) a matter of degree in each case. Therefore, on a simplistic level Mr Meikle's submission that there is a clear distinction between conduct which obstructs a just disposal and a failure to comply with a rule, order or practice direction has some resonance although I am not persuaded that a failure in the latter regard can never amount to an obstruction under the former.

140. In this instance, it is the case that Mr Nathanmanna did not comply with a Court order. He failed to serve his List of Documents when he should. His transgression might have stopped there but it did not. He singularly failed to address the matter of disclosure as he should have done over a significant period of time in various ways and his approach, and that his solicitors, was indeed "little short of a disaster". His application for relief simply compounded and prolonged the agony.

141. The question which then arises is whether that conduct satisfies the requirements of CPR 44.15(c)? The test is that it only has to be "likely" to obstruct the just disposal of the proceedings. I have no doubt that, in fact, it did obstruct that aim and so the test in my judgment would be satisfied.

142. However, despite all the pointers towards, and justifications there might be for, making an order the overwhelming difficulty which I have is that the beginning of CPR 44.15 makes clear that orders for costs:

> ".....may be enforced to the full extent of such orders without the permission of the court where the proceedings *have been* [my emphasis] struck out on the grounds that....."

and then proceeds to list grounds (a), (b) and (c).

143. I need to be clear that I am not concerned with the *making* of a costs order at this stage; I have already made that order. What I am concerned with here is whether to permit the *enforcement* of that costs order against Mr Nathanmanna by disapplying QOCS. To reach this point in any case the sequence which has to occur is as follows:

(a) the claim has to be struck out, which can only be under one of the grounds in CPR 3.4(2);
(b) a costs order has to be made; and,
(c) that order (subject to QOCS) then has to be enforced.

144. By the time that I heard Mr Nathanmanna's application for relief, the proceedings had, in fact, already been struck out by virtue of his failure to comply with the Unless order dated 6th March 2015 and he was seeking to reinstate them by way of that relief. Nothing that I did or did not do in relation to that application changed that fact, and when I refused it the proceedings simply remained struck out.

145. The original 'Unless' order might well have been an exercise of the Court's case management powers to seek to enforce compliance but it was, nevertheless, based on the power to strike out the claim (i.e. the statement of case) which can only originate from CPR 3.4(2). The commentary in the White Book 2016 Volume 1 at 3.4.4 on page 84 makes this clear when it states:

> "Rule 3.4(2)(c) gives the Court an unqualified discretion to strike out a claim or defence where a party has failed to comply with a time limit fixed by a rule, practice direction or court order."

146. At the expense of repetition, as noted, there are only three grounds in CPR 3.4(2) upon which to base a striking out and in my judgment once that is done the proceedings will "have been" struck out for the purpose of CPR 44.15.

147. If the statement of case has been struck out on the grounds in CPR 3.4(2)(a) and/or (b) I do not consider that will present an intractable problem because these are mirrored in CPR 44.15(a) - (c). But, where a claim has been struck out under CPR 3.4(2)(c) those specific provisions can never encompass the ground advanced by CPR 44.15(c) simply because it is not included as a ground for striking out in CPR 3.4(2).

148. Accordingly, it follows that Mr Meikle was quite correct in his submission when he said that CPR 3.4(2)(c) was not the kind of strike out envisaged by CPR 44.15(c). That is so because a case cannot be struck out on that ground. To put it a slightly different way, once a claim is struck out that is the end of the claim. But a claim cannot be struck out on any other ground than those contained within CPR 3.4(2). Once a claim is struck out I do not see that it is then possible to revisit that decision or ground and substitute an entirely different ground, particularly when the Court might be being invited to do so a considerable time after the striking out.

149. When I dealt with Mr Nathanmanna's application relief from sanctions and heard full argument, the provisions of CPR 44.15(c) were never mentioned or raised at all. His conduct, and/or that of his solicitors, as I have already noted, did obstruct the just disposal of the proceedings. But the proceedings were not struck out on that ground.

150. In the light of that analysis, in my judgment UK Insurance will be unable to enforce its costs order against Mr Nathanmanna under CPR 44.15. Indeed, where a claim is struck out pursuant to CPR 3.4(2)(c) that will, in my view, be a problem which will arise in every instance. In this case, UK Insurance will therefore be limited to enforcement, without permission, to the extent permitted by CPR 44.14 only.

151. The second limb of the application against Mr Nathanmanna is that permission is sought to enforce its costs order pursuant to CPR 44.16(2)(a). Again, in my view, that raises some interesting issues but it is also directly related to UK Insurance's application for costs against Euronex under CPR 44.16(3) which is a little more complicated. Accordingly, I now turn to that aspect although it will need to address the position regarding Mr Nathanmanna at some point as well.

Costs and Enforcement against Euronex

152. In this regard an application for permission can be to enforce a costs order against a claimant or seek one against a non-party. One is not dependent upon the other, but they are both dependent upon the construction of what is a 'financial benefit'. In addition, there is strong guidance in the Practice Direction, at paragraph 12.6, that where there is a mixed claim it would be usual to make a costs order against the person for whose financial benefit the claim had been made whilst it would be exceptional to permit enforcement against a claimant.

153. Accordingly, under CPR 14.16(2)(a), it is a two stage test:

a. whether a claim is made for the financial benefit of;
b. a person other than the claimant.

154. The point as to whether a credit hire company can be "a person" for the purpose of the rule was not taken or argued before me. However, it strikes me to be so fundamental to the application of the rule that I need to address it because the corollary is that if there is no "person" then the application must fail at that point.

155. The word "person", so far as I can ascertain, is not defined in the CPR. It is not defined under the heading of 'Interpretation' in CPR 2.3 nor in the Glossary at Section E in the White Book 2016 Volume 1 at page 2523. I have not considered whether it might have been defined under the old Rules of the Supreme Court.

156. However, the use of the word "person" in the CPR is not infrequent. I take but two examples. The first is CPR 19.2(2) which provides that:

> "(2) The court may order a person to be added as a new party if
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party....."

157. The second example, which is more apposite because it concerns CPR 46.2 (see: paragraph 35 above) provides that where the Court is considering making a:

> ".....costs order in favour of or against a person who is not a party to proceedings, that person must –
>
> (a) be added as a party to the proceedings....."

158. The word "person" is certainly qualified by the words "new party" in the first instance but in both cases the rules admit and clearly include companies although they are obviously not a "person". Given that there ought to be consistency of definition across the CPR as far as possible, it seems to me that ought to extend to the phrase "a person" in CPR 44.16(2)(a) as well and I conclude that a credit hire company can therefore be "a person" for that purpose.

159. I now turn to the words "financial benefit". This is used in two ways: firstly, in CPR 44.15(2)(a) if the Court is considering the *enforcement* of a costs order against the claimant (if it is just to do so) and, secondly, in CPR 44.16(3) if considering the *making* of a costs order against a non-party. In the first instance the Court is not weighed down or fettered by the jurisprudence attached to Section 51 of the Act (because it is concerned with a party i.e. the claimant) whilst in the second it is because it concerns a non-party. I am of the view that in both cases the meaning of 'financial benefit' will have to be the same. In addition, in both cases CPR 44 PD 12.2 makes clear that an example of a claim made for the 'financial benefit' of another would be a claim for credit hire thus giving some purchase upon the intentions of the Civil Justice Council's recommendations.

160. It will be recalled that this was the Practice Direction of which Mr Hogan was so critical and I have some sympathy with his submissions in this regard. The fact that a claim may involve credit hire of itself cannot import, create or confer a financial benefit for the credit hire company concerned simply by virtue of the fact that the Practice Direction says that it should; the company concerned has to be shown to have a tangible financial benefit as a matter of fact.

161. That brings us to the case of *Giles* and Mr Hogan's apt demonstration that the damages relating to the credit hire charges belong to Mr Nathanmanna as the motorist. It may have been a case concerning champerty but the *dicta* of Lord Mustill in this regard did not suffer because of that and it is binding on me. That being the case, and subject to what I say below, the only way around that in my view is to show that, in some way, the credit hire company has a legal, equitable or other interest in those damages whether vested or contingent.

162. I agree that the wording of the Hire Agreement in this case is similar to that in *Giles* and, if anything, perhaps slightly more onerous in light of Mr Nathanmanna's irrevocable authority for his Solicitors to pay over all his damages to Euronex before he received any monies himself. But there is nothing in that documentation which imposes or creates a legal or equitable interest in the damages; there is certainly no charge over or assignment of the damages created.

163. However, the wording of the rule appears to be aiming at a broader interpretation. It specifically does not say 'financial interest' but a 'financial benefit'. On that basis and approach I am not persuaded that it is necessary for the credit hire company to have any legal or equitable interest in the damages *per se* as long as it can be shown that it will eventually benefit financially from the litigation. A person may be able to obtain a financial benefit from

something quite independently from, and despite, the fact that they may have no financial interest in it.

164. Other than already advanced by Mr Hogan it seems to me that this might conceivably arise in one of three ways.

165. Firstly, the contract of hire between a claimant and the credit hire company gives rise to a debt and an obligation upon the hirer to repay monies equivalent to the hire charges. In this case the mechanism was for Mr Nathanmanna to authorise his solicitors to use any damages he recovered to pay Euronex first and then any balance to himself. Whatever the specific wording of the agreement it would seem that at the point that damages were awarded, at the latest, the debt would chrystallise and become due and payable. The debt constitutes a chose in action; it has a value which can be assigned and enforced by action and, it seems to me, at least arguable that the credit hire company have a contingent interest in those damages because they represent the fund from which the credit hire debt will be paid and without which Mr Nathanmanna would be unable to repay his indebtedness.

166. Secondly, Mr McGrath raised the possibility that the credit charges were in reality a subrogated claim and referred to Lord Mustill's dicta in *Giles* (see; paragraph 98 above). The concept of subrogation, in the insurance field at least, is set out at paragraph 31-1 of *The Law of Insurance Contracts (Clarke) 6th Edition 2009* in these terms:

> "When A (the insurer) has conferred a benefit (insurance money or reinstatement) on B (the insured), B may be obliged by law to transfer to A some asset, including rights to salvage in the remains of insured property, or to make available some right against a third party, including rights of action. This is to enable A to recoup, as far as possible, the loss or expense suffered or incurred by A in conferring the benefit on B...."

167. Although under the guise of credit hire, for which the hirer will obviously have a liability to pay, it is not difficult to see that he will be obtaining a benefit. He will be getting the benefit of a vehicle and he will be able to use that vehicle for which, generally, he does not have to pay until he is reimbursed by way of damages. It is the benefit of credit.

168. In the area of insurance, paragraph 31-2A of Clarke sets out the rule of equity upon which subrogation can be based:

> "To avoid over compensation of the insured is not to deny him good fortune but to avoid unjust enrichment of the insured, unjust because he would be enriched at the insurer's expense...."

169. This was explained in greater detail (paragraph 31-2A) by Lord Hoffman in ***Banque Financiere de la Cite v Parc [1999 1 AC 221 at 231-232*** that:

> ".....there is no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract.....But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived.....One is part of the law of contract and the other part of the law of restitution."

170. Having regard to the concepts of unjust enrichment and restitution therefore, the parallels between insurance and credit hire do not appear poles apart.

171. Thirdly, Mr McGrath's point to some extent was that even if the damages belonged to Mr Nathanmanna the real test was whether there was any financial benefit to Euronex as a matter of fact at any level. There would be no reason for the word "benefit" in this context to be given anything other than its normal meaning i.e. advantage or profit. It might easily be appreciated therefore that a credit hire company, as I observed earlier, will derive a profit, possibly a substantial one, from the hire of a vehicle and in that sense one could conclude that it has a 'financial benefit'.

172. This is not without its potential problems. The mere fact that hire charges are due does not, in itself, confer or give rise to a financial benefit; a vehicle hired at cost or at a loss, for example, could not, I think, be said to do so. In addition, it might be said that although certain individual vehicles in a fleet made a profit, if the credit hire company, in a particular trading period, suffered an overall loss, again, it is arguable that there would be no 'financial benefit'. It might be that this could be surmounted by a deemed notional profit for each hire vehicle which, in turn, might also overcome the difficulty that, self evidently, if a claim has been struck out there will, as a matter of fact, be no "financial benefit of a person other than the claimant". Nonetheless, if the rule is given a broad meaning, then if a profit was made upon a credit hire transaction that is likely to be, in my view, a 'financial benefit'.

173. The overriding difficulty however with each of these three possibilities (if they even rank as possibilities) is that none of them were raised and/or fully argued before me, so it is simply not possible for me to arrive at a determination with any degree of certainty as to whether the proceedings included a claim which was made for the 'financial benefit' of Euronex. If I cannot be satisfied in that regard then clearly UK Insurance have not made out their case that Euronex did, in fact have a financial benefit.

174. On that basis the application for enforcement against Mr Nathanmanna under CPR 44.15(2)(a) must fail. That being so I do not have to consider whether such an order would be just or in keeping with the Practice Direction.

175. However, assuming for a moment that Euronex did have a financial benefit, whilst that might allow for enforcement, if considered just, against Mr Nathanmanna (CPR 44.16(2)(a)) it would still not, in my judgment, enable me to make a costs order against Euronex under CPR 44.16(3). My reasoning is as follows.

176. There is nothing within CPR 44.14-16(2) which fetters the power of the Court to make non-party cost orders as the restrictions are only in respect of enforcement against the claimant. Precisely because these provisions deal with enforcement I do not consider that Section 51 of the Act can be engaged which, in turn, is precisely why the term 'financial benefit' could be attributed a broad meaning.

177. That begs the question as to why CPR 44.16(3) was included? The answer must be that the CPRC considered that this was something different and added to the existing provisions. That might also be gathered from the wording of CPR 44 PD 12.5(a) which suggests that the usual order would be against the person who has financially benefitted other than the claimant when exercising the power under Section 51 and, indeed, CPR 46.2.

178. However, by expressly recognising that the power derives from the Act and that CPR 46.2 applies (which itself refers to the Act) the Practice Direction cannot then trump the jurisprudence under the Act and that rule.

179. Accordingly, whilst it is perfectly possible to make an order for costs against a non-party, such an order can only be made if the case law developed under section 51 is followed (see also paragraph 90 above). I need not rehearse again here the authorities I was taken to by Counsel, particularly Mr Hogan, but would simply observe that it is not as simple as suggesting that a case such as this would be "exceptional". The speech of Lord Brown at

paragraph 25 of *Dymocks* did, of course, refer to such an order as being "exceptional" but those sub paragraphs were not disjunctive. It is clear therefore that before such an order can be made it is necessary to consider the "nature and degree of his connection with the proceedings" and show that the non-party has not only, in whole or part, funded the proceedings but, additionally and/or alternatively, has also substantially controlled them; in other words that they have become "the real party" or the "prime mover".

180. UK Insurance have singularly failed to demonstrate that Euronex funded this litigation in whole or part and/or managed it and/or controlled it in any way. Indeed, on the contrary, there is no evidence at all that Euronex have done any of these things.

181. At the last this is again problematic because the way in which I perceive the credit hire industry and credit hire agreements to be structured is such that credit hire companies, unless they expressly take on the funding and/or management of cases (such as occurred in *Farrell*), will never participate or engage in litigation in the way that section 51 envisages or requires before a non-party costs order can be made. Therefore, the application against Euronex would be bound to fail in my judgment even if it could be shown that they had a 'financial benefit' in the claim in any event.

182. In the circumstances it is not necessary to go on to consider whether to exercise my discretion to make an order under section 51 although I would observe:

a. If an application of this nature is to be made then the non-party should be put on notice of the same within a reasonable time of the issues which might lead to such an order becoming clear. This would then allow the non-party to take the possibility of an adverse costs order into account as the litigation progresses and to act accordingly. There was to my mind some force in Mr Hogan's submission that for this case to have progressed to the stage where the claim had been struck out and a relief from sanctions application dismissed before Euronex was put on notice was unreasonable;

b. The establishing of liability and the application for relief from sanctions were part and parcel of pursuing and preserving the claim for credit hire which formed the vast majority of the claim. If those aspects had succeeded then Mr Nathanmanna would have received some damages (the quantum of which cannot be certain) but it would in turn have enabled Euronex to be paid at least in part. The fact that the claim was not successful cannot now be used to say that Euronex should be absolved from paying any part of those costs. They clearly stood to benefit if the claim succeeded (even if that was not a

'financial benefit' within CPR 44.15(2)(a)) and CPR 44.2(6)(a) makes clear that there is nothing wrong in principle in ordering a party to pay a proportion of another party's costs. An order here in respect of 80% the costs, as contended for by Mr McGrath, would not have been unreasonable.

183. In summary therefore:

a. The application pursuant to CPR 44.15(c) fails because the proceedings were not struck out on that ground. If that was the intention of the CPRC then that is the result at which I have arrived. UK insurance can therefore only enforce a cost order against Mr Nathanmanna to the extent permitted by CPR 44.14. In practice therefore they will recover none of their costs although this is no worse than that which the QOCS regime would have imposed if they had gone to trial and won;

b. In the absence of what I regard as full argument I regret that I have been unable to reach any definitive conclusion to the question posed at the beginning of this judgment upon the construction and/or interpretation of the words "financial benefit" in CPR 44.16(2)(a). In light of the arguments that were advanced however UK Insurance have been unable to persuade me that Euronex had such an interest and, accordingly, have not been successful in their application. Thus, the Court does not give permission for the costs order against Mr Nathanmanna to be enforced against him over and above that permitted by CPR 44.14; and,

c. Even if it had been established that the proceedings included a claim which had been made for the 'financial benefit' of Euronex there was no evidence that the company had involved itself in the litigation in a way which satisfied the jurisprudence under section 51 of the Act sufficient to make an order pursuant to CPR 44.16(3). This may not have been the outcome that the Civil Justice Council had in mind or, indeed, which the CPRC intended but, nevertheless, that is the conclusion which I have reached.

General

184. I shall fix a date to hand down this judgment at which I shall order, subject to any observations by Counsel, and on the basis that costs follow the event, the following:

a. Save as provided for in this order the Claimant shall pay the Defendant's costs of the entire action to be subject to a Detailed Assessment unless agreed.

b. Paragraphs 2-5 inclusive of the Defendant's application are dismissed.

c. The Court declares that the Defendant shall not be entitled to enforce the costs order against the Claimant other than provided for in CPR 44.14

d. The Defendant shall pay the Claimant's and the Respondent's costs of the application save that the Respondent shall not be entitled to any costs in respect of the witness statements of Mr Kamal Ahmed.

185. It is of course open to the parties to seek to agree any outstanding matters and, if they do, and unless there are any further application(s) that any party wishes to make, I shall not require any attendance at the hearing as long as the parties notify the Court in writing of their agreement at least 24 hours beforehand. However, that would not preclude any party attending if they wished.

186. Finally, I would like to thank each of Mr McGrath, Mr Meikle and Mr Hogan for the time and effort that they clearly spent in formulating their respective cases. I have found both the written and oral submissions of all Counsel involved in this case to have been extremely helpful and of assistance to me in reaching my conclusions.

.....

District Judge Avent

14th June 2016