Neutral Citation Number: [2017] EWHC 1434 (QB)

Appeal No: 129/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY
ON APPEAL FROM THE COUNTY COURT SITTING AT LIVERPOOL

Liverpool Civil & Family Court
35 Vernon Street
Liverpool
L2 2BX

Date: 19/06/2017

Before :

MR JUSTICE TURNER

- -

Between :

Select Car Rentals (North West) Limited	**Appellant**
- and -	
Esure Services Limited	**Respondent**

- -
- -

Matthew Stockwell (instructed by **Lampkin & Co Solicitors**) for the **Appellant**
Brian McCluggage (instructed by **Horwich Farrelly Solicitors**) for the **Respondent**

Hearing dates: 17th May 2017

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Approved Judgment

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

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MR JUSTICE TURNER

Mr Justice Turner :

INTRODUCTION

1. For a quarter of a century, insurance companies and credit hire organisations have been fighting a forensic war of attrition over an ever broadening front. This appeal marks the most recent skirmish. It is not likely to be the last.

2. The particular points at issue concern the extent to which credit hire companies are potentially vulnerable to adverse costs orders in litigation to which they are not a party.

BACKGROUND

3. Rachel Mee and three others brought a claim in respect of injuries and losses alleged to have been sustained in a road traffic accident on 27 April 2013. They contended that the accident was the fault of one Warren Jones who had driven his car into the rear of the vehicle in which they had all been traveling. Mr Jones, as first defendant, played no part in the litigation which followed. However, his insurers, Esure Services Limited ("Esure"), were joined as second defendants and strenuously fought the case alleging that the claims were tainted by fraud.

4. The trial came before Mr Recorder Grundy on 30 October 2015. Having heard all the evidence over a period of three days he was very sceptical of these claims. He concluded that the claimants had not proved even that they had been involved in the alleged accident at all. He declined, however, to go further and find that the claims were fraudulent and limited himself to the observation that they were "very suspicious". His findings, although perhaps unusual, were ones he was entitled to reach. As Baroness Hale observed in Re B [2009] 1 A.C. 11 at paragraph 32:

> "32 In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

5. One of the more striking features of the case was that one of the heads of claim was in the sum of £23,456.85 in respect of payments alleged to be due under a credit hire agreement with Select Car Rentals (North West) Limited ("Select") for replacement vehicles in the aftermath of the accident. This is to be contrasted with the pre-accident value of the first claimant's vehicle net of salvage in the sum of £1,710.

6. Doubtless, the Learned Recorder's suspicions as to the bona fides of the claims as a whole were fuelled, at least in part, by the fact that Miss Mee admitted that, in fact, she had bought a replacement vehicle about nine weeks after the accident and so had no need whatsoever to continue accumulating any further debt under the agreement. It

appears that she simply allowed her boyfriend to use the hire cars provided under the agreement which he continued to do until he, in turn, was involved in an accident which thus brought the whole unsatisfactory affair to light.

7. The learned recorder went on to find that even if he had been satisfied that any injuries had been sustained they would have been very minor and limited in duration.

8. The claims were thus dismissed, but Esure had won a Pyrrhic victory. Who was going to pay their costs of meeting these dubious claims?

9. The claimants were, subject to the operation of any exceptions provided for under CPR 44, immune from the enforcement of any adverse costs order by the operation of the Qualified One-way Costs Shifting ("QOCS") regime which applies to personal injury claims and, indeed, they may well have been impecunious in any event.

10. Thus it was that Esure turned their guns on Select contending that their involvement in the ill-fated claims was sufficiently close to justify the making of a non-party costs order against them. Select resisted this claim but were unsuccessful before Recorder Garside QC who awarded Esure 60% of their costs of defending the main claims against Select. It is against this order that Select now appeals before this court.

THE RULES

11. Sub-sections 51(2) and (3) of the Senior Courts Act 1981 provide the statutory basis for the making of orders relating to costs. These are sufficiently broadly defined as to encompass the making of costs orders against non-parties:

> "(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings…
>
> (3)The court shall have full power to determine by whom and to what extent the costs are to be paid."

12. CPR 46.2 sets out the relevant procedure:

> "46.2 – (1) Where the court is considering whether to exercise its discretion 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 the proceedings –
>
> a) That person must be added as a party to the proceedings for the purposes of costs only; and
>
> b) He must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

13. It is to be noted that CPR 46.2 says nothing about the nature and content of the discretion which the court is exercising within such proceedings.

14. CPR Part 44.16 provides for exemptions to QOCS protection and in so far as is material, provides:

> "**Exceptions to qualified one-way costs shifting where permission required**
>
> 44.16 …(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)…
>
> (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."

15. I note in passing that, strictly speaking, paragraph (3) does not in itself provide a distinct exception to the QOCS regime because the limits set upon enforcement of costs thereunder is confined to claimants as defined under CPR 44.13 and does not include non-parties.

16. The accompanying Practice Direction CPR 44 PD12 provides:

> "**Section 2—Qualified One-Way Costs Shifting**
>
> 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…
>
> 12.5 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.
>
> 12.7 Assessments of costs may be on a standard or indemnity basis and may be subject to a summary or detailed assessment."

THE CASE LAW

17. The House of Lords first recognised the existence of a discretion to make an order for costs against a non-party in the case of Aiden Shipping v Interbulk [1986] A.C. 965. Further and detailed guidance on the correct approach to the exercise of such discretion was thereafter set out in the decision of the Court of Appeal in Symphony Group v Hodgson [1994] Q.B. 179.

18. Over recent years, however, the courts have developed a less prescriptive approach to the exercise of this discretion deploying a more open textured way of dealing with the various relevant factors to be taken into account. Most recently, in Deutsche Bank v Sebastian Holdings [2016] 4 W.L.R. 17 the Court of Appeal distilled from Symphony Group the following broad principles:

> "17 A number of points emerge from that case. First, we think it is clear that all three members of the court assumed that the procedure to be adopted for deciding whether a third party should bear all or part of the costs of the litigation should be summary in nature, in the sense that the judge would make an order based on the evidence given and the facts found at trial, together with his assessment of the behaviour of those involved in the proceedings. Second, in order to justify the adoption of a summary procedure the third party must have had a close connection of some kind with the proceedings. Staughton and Balcombe LJJ both emphasised that the court should not make an order for costs against a third party unless it is just and fair that he should be bound by the evidence given at trial and the judge's findings of fact. Whether that is so in any given case will depend on the nature and degree of his connection with the proceedings.
>
> 18 Third, we do not think that the court was seeking to do more than provide an indication of the kind of factors that judges

> should take into account, as appropriate in the particular cases before them, when asked to make an order of this kind. Factors such as failing to join the person concerned as a party to the proceedings or failing to warn him that an application for costs may be made against him may in some cases weigh heavily against adopting a summary procedure, but each case has to be considered on its own merits in order to ascertain whether the third party will suffer an injustice if he is held bound by the evidence and findings at the trial. Decisions made on applications of this kind since Symphony, to many of which we were referred, only serve to illustrate the wide range of circumstances in which orders for costs have been sought and made against third parties."

19. The court in Deutsche Bank was at pains to stress at paragraph 21 that:

> "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…"

20. Approving the decision of the Privy Council in Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 W.L.R. 2807, the court in Deutsche Bank went on to observe at paragraph 62:

> "…the exercise of the discretion is in danger of becoming over-complicated by authority. The decision of the Privy Council in Dymocks, which contains an authoritative statement of the modern law, explains and interprets the Symphony guidelines in a way which reflects the variety of circumstances in which the court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that an order of this kind is "exceptional" only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense...We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind."

THE DECISION OF THE RECORDER

21. In his judgment, the Learned Recorder made specific reference to CPR rule 44.16(2)(a) observing:

> "Essentially, the case put on behalf of Esure Services Limited was that Select Car Rentals were a person other than the claimant, that the claim which they had fought includes a claim made for the financial benefit of Select Car Rentals and that, therefore, rule 44.16(2)(a) entitled them to an order for costs to

> the extent that the court considered it just to make one and that, in the circumstances of this case, it would be just."

22. He went on to state:

> "(1) in order to come to a conclusion about whether I ought to grant the application, I must first decide whether Select Car Rentals (North-West) Limited were a person for whose financial benefit a claim was included in the proceedings; and
>
> (2) if they were, whether it will be just in all the circumstances of this case to make a costs order against them and, if I so conclude, a third question is how much or how it should be quantified."

23. He concluded:

> "I have come to the conclusion that I can answer the first question clearly enough without reference to particular authorities and that, although there are statements of principle in the authorities to which I have been referred, the results in those cases appear to me to turn very largely on their facts."

24. During the course of his judgment, the Learned Recorder identified the aspects of Select's role in the litigation which led to the exercise of his discretion in favour of Esure. They included the following:

    i) Select had actually retained solicitors, Samuels Law, to act on their behalf in the claim. It was no coincidence that these solicitors were also instructed by the claimants. Select's retainer eventually was terminated by letter dated 9 July 2015, nearly two years after the accident;

    ii) Select was in direct email contact with Esure concerning the progress of the claim saying that Samuels Law was acting on their behalf and expressly inviting Esure to comment to them on the issue of liability;

    iii) There was a close association between Select and a company by the name of Roy Lloyd Limited. They shared a common director, Mr Justin Lloyd, who was the author of the witness statement relied upon by Select in resisting Esure's claim for costs. In a written agreement between Miss Mee and Roy Lloyd Limited in respect of credit storage, recovery and repair Miss Mee was contractually obliged to cooperate in the appointment of a solicitor nominated by the company in pressing a claim for damages. In the event that Miss were to choose another solicitor her credit would automatically be terminated;

    iv) Under her rental agreement with Select, Miss Mee gave Select the power to deduct directly from any monies she may recover in respect of her personal injury claim to pay for any shortfall in damages relating to Selects own claims against her;

v) Miss Mee gave an irrevocable authority to her solicitors to provide any engineering report in respect of her vehicle and further updates relating to that vehicle to Select;

vi) Miss Mee further granted Select the right to pursue an action in her name; and

vii) Select were not merely providing Miss Mee with a hire car on credit, they were operating as de facto claims managers as is evidenced by their pro forma letter heading which states: "*Revolutionising the way your claims are managed*".

25. Having concluded that Miss Mee and Select were "absolutely locked together", the Learned Recorder went on to consider whether it would be just to make an order for costs against Select. In finding that it was, he noted that the preponderance of the claim was for the benefit of Select being in the sum of £23,456.85 in the context of a total claim worth less than £30,000.

ONE DISCRETION OR TWO?

26. Select criticise the decision of the Learned Recorder on the ground that he had failed to resolve an issue which had arisen between the parties concerning the relationship between CPR 44.16 (the QOCS financial benefit exception provision) and the general discretion flowing from the operation of CPR 46.2. Select contend that CPR 44.16 does no more than to preserve the court's pre-existing jurisdiction. They argue that by confining his analysis of the case to what was just the Recorder was wrongly broadening the circumstances in which it should be considered appropriate to award costs against a non-party.

27. I note that the authors of "Costs Funding following the Civil Justice Reforms: Questions and Answers" 3rd Edition conclude:

> "Whether the working of CPR 44.16(3) (and CPR 44 PD 12.5) is intended to and does in any way relax the established common law as to the circumstances in which a third party costs order is available is a moot point and will no doubt be argued in due course."

Having thus raised the question, however, the authors, perhaps counter-intuitively given the name of their publication, declined thereafter to venture an answer.

28. This issue came before District Judge Avent in Nathanmanna v UK Insurance Company Limited (Unrep. Central London County Court 5 May 2016) and a copy of his judgment can be found at http://costsbarrister.co.uk/wp-content/uploads/2016/09/Nathanmana-v-UK-Insurance-Judgment.pdf). The District Judge decided that the new rules and Practice Direction did not operate so as to change the nature of the discretion to award costs against non-parties where the QOCS regime applies to the claim.

29. I agree with the conclusion reached by District Judge Avent on this issue and I reject Esure's submission that CPR 44.16 operates in a way which is distinct from older case law. The suggestion that it has effectively created a new category of discretion to

be exercised in a conceptually different way is unattractive. Esure argue that there should be a different and broader discretion to award costs in the context of credit hirers operating behind the protecting veil of the QOCS regime. It may well be that, as is often the case, where a credit hire company promotes litigation for its own financial benefit, knowing that the party in whose name the claim is brought will enjoy some level of protection under the QOCS regime or will probably not be able to satisfy any adverse costs order in any event, then this is a factor which the court may take into account when considering whether it is just for the credit hire company to pay costs. It will be noted, however, that even claimants otherwise protected under QOCS are not entirely immune from the enforcement of an order against them under CPR 44.16 even though it will usually be the case that it is the relevant non-party who has sought a financial benefit who will be first in line. Thus the CPR 44.16 does not change the nature of the discretion but merely operates in circumstances in which factors in favour of the exercise of that discretion may well come into play. Indeed, since the essence of the common law discretion as explained in Deutsche Bank is to achieve what is just on the facts of each case then this approach is sufficiently flexible to bring Occam's razor into play and obviate the need to create a parallel discretion of a different type in cases falling within the ambit of the QOCS regime.

30. Although not referred to by either party in submissions, I also find myself in agreement with the analysis to be found in Cook on Costs (2017) at 40.22:

> "The question that inevitably arises is whether the jurisdiction under CPR 44.16(3) adds anything to the existing provisions for costs against non-parties. The fact that the rule makers have chosen to include this separate provision, suggests that the answer is yes, otherwise why include anything at all? However, the express references to CPR 46.2 in CPR 44.16(3) itself and to s 51(3) and CPR 46.2 in the PD, the overarching statutory jurisdiction in respect of costs in s 51(3) and the absence of any other defined criteria by which the court may determine applications under CPR 44.16(3), suggest that the rule is superfluous, other than a) by way of identifying specific categories of non-party in the firing line and b) as a reminder to parties and the court of the availability of a non-party costs order. As attention seems to be turning to the QOCS provisions, it may be that authority on this provision will emerge."

31. I am further satisfied that there in nothing in the wording of CPR 44.16 which is inconsistent with the case law as it has evolved over the last thirty years. The test of what is just under the Rule is entirely consistent with the central observation of the Court of Appeal in Deutsche Bank that "the only immutable principle is that the discretion must be exercised justly."

32. I would also note that although I agree with the conclusion of District Judge Avent in Nathanmanna that the new rules and Practice Direction produce no broader or different discretion than that which has developed under the common law, I do not agree with his interpretation of what is or is not a claim made for the financial benefit of a non-party. In a conventional credit hire case, the claim for the hire charges will be made for the financial benefit of the credit hire organisation. In this regard the Practice Direction, in my view, amounts to little more than a statement of the obvious.

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

33. I would also note that the court in Nathanmanna appeared to take a more formalistic view of the content of the common law discretion than I would have done on the same facts. In particular, I note that although the Learned District Judge referred to Deutsche Bank he did not allude to the passage containing the proposition that the only immutable rule is that the discretion as to third party costs has to be exercised justly.

34. It follows that it was unnecessary for the Learned Recorder in this case to resolve the dispute between the parties as to the impact, if any, which CPR 44.16 may have had on the nature of the discretion to be exercised because, in my view, it would have made no difference whatsoever to the outcome. The analysis which he undertook in his judgment was, although uncluttered with reference to authority, entirely consistent with the guidance given in the authorities to which I have referred.

THE PRACTICE DIRECTION

35. Select express concern that the Practice Direction at paragraph 12.2, unless purposively interpreted, is ultras vires to the extent that it provides that: "Examples of claims made for the financial benefit of a person other than the claimant…are subrogated claims and claims for credit hire…"

36. I am invited to read into the wording the words "which may be" so as to provide: "Examples of claims *which may be* made for the financial benefit of a person other than the claimant…are subrogated claims and claims for credit hire…".

37. I decline this invitation.

38. A finding that proceedings include a claim which is made for the financial benefit of a person other than a claimant does not automatically expose that person to costs liability. The party making the application must still persuade the court that such a finding satisfies the "immutable principle" that the discretion must be exercised justly. CPR 44.16 (3) provides that the court may make an order against a person for whose financial benefit the whole of part of the claim was made. The making of an order thus remains a matter firmly within the discretion of the court. The finding of financial benefit is thus a necessary but not sufficient condition of exposure to liability to an adverse costs order in this context.

39. Against this background, the fact that the Practice Direction expressly and, as I have already found, uncontroversially categorises a claim for credit hire as an example of a claim made for the financial benefit of another person does not, in my view, give birth to a discretion to award costs against a non-party the content of which is any different from that which applies to claims to which the QOCS regime does not apply.

WAS THE RECORDER RIGHT?

40. It follows from my findings above that I am satisfied that the Learned Recorder applied the right test when exercising his jurisdiction to award costs against Select.

41. Select, however, go on to complain that the Recorder should have taken into account the fact that the terms of the agreement with Miss Mee were in a form commonly found in credit hire agreements and that direct communications between credit hirer and insurers are standard practice under the ABI general terms of agreement between subscribing insurers and credit hire organisations. However, even if these terms and this practice are to be taken as standard in the industry, this does not provide Select, or for that matter any other credit hire company, immunity from a non-party costs order. To find otherwise would be to re-introduce the concept of the narrow requirement for exceptional circumstances which was firmly rejected by Lord Brown who observed in Dymocks at paragraph 25:

> "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."

42. Select go on to contend that there is no evidence that the contractual rights which they enjoyed under the agreement were actually exercised in practice and that the fact that Select approached Esure rather than the claimant's own solicitors to enquire about the progress of the case would end to suggest they were no exercising control over the litigation.

43. In my view, these objections lack sufficient force to undermine the Learned Recorder's conclusions. What modest weight they may have is decisively counterbalanced by the other features in the case. He performed a careful balancing exercise and, in my view, reached a result which not only fell within the broad bounds of his discretion but one which I would probably have reached myself if, hypothetically, I had found some flaw in his approach which would have required me to exercise it afresh.

CONCLUSIONS

44. In summary, I find as follows:

    i) CPR Part 44.16 does not introduce a bespoke and distinct type of discretion to be exercised in cases falling within the QOCS regime as it applies to non-parties.

    ii) The wording of CPR Part 44.16 is entirely consistent with the way in which the proper approach to the discretion to order costs against a non-party has developed in recent case law.

iii) PD para 12.2 in so far as it provides that claims for credit hire are made for the financial benefit of a person other than the claimant is uncontroversial and requires no artificial interpretation to save it from the fate of being found to be ultra vires.

iv) The fact that any given credit hire organisation's connection with a claim is no greater than is commonly the case does not, without more, provide it with an automatic immunity from a non-party costs order. There is no room for the argument that it is a prerequisite to the making of such an order that such involvement be exceptional.

45. It follows that this appeal is dismissed.