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| IN THE NEWCASTLE-UPON-TYNECOUNTY COURT | No. F76YX243Appeal Ref. AP64/21 |

Newcastle Civil & Family Courts and Tribunals Centre

Barras Bridge

Newcastle upon Tyne

NE1 8QF

20 May 2022

 Before:

 HIS HONOUR JUDGE FREEDMAN

BETWEEN :

 ON-HIRE LIMITED Appellant

 - and -

 JAMES SMITHSON Respondent

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MR B. WILLIAMS QC (instructed by On-Hire Limited) appeared on behalf of the Appellant.

MR S. BROWNE QC (instructed by Keoghs LLP) appeared on behalf of the Respondent.

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 **JUDGMENT**

JUDGE FREEDMAN:

**INTRODUCTION**

1. This is an appeal by On-Hire Limited, the appellant, against the decision of District Judge Searl (“the District Judge”) on 30 September 2021 whereby she made a non-party costs order that the appellant pay 50 per cent of the respondent’s costs of the action. The costs were assessed in the sum of £15,000 so that the appellant was ordered to pay the respondent the sum of £7,500. The appellant was also ordered to pay the respondent’s costs of the hearing before the District Judge in the sum of £5,100. The District Judge refused permission to appeal her Order.
2. The matter was listed for a “rolled up” hearing for the court to consider the application for permission to appeal and, if granted, the appeal itself. In the event, at the outset of the hearing, and after reading all of the papers in the case, including the transcript of the judgment of the District Judge, as well as skeleton arguments filed, respectively, on behalf of the appellant and the respondent, for reasons which will become apparent, I gave permission to appeal in relation to Ground 1 on the basis that it stood a real prospect of success.
3. The appeal was heard by way of Microsoft Teams.

**THE CLAIM**

1. The claim arose from a road traffic accident which occurred on 4 February 2019. The claimant and the defendant (in the original claim) each alleged that the other was at fault in veering on to the wrong side of the road. As such, liability remained in dispute.
2. On the same day as the accident, the claimant instructed solicitors Winns to pursue a claim on his behalf. Winns arranged for the claimant’s vehicle to be inspected. It was assessed as being unroadworthy.
3. On 6th February 2019 the Claimant entered into a Credit Hire Agreement with the Appellant (“Credit Hire Agreement”) for the hire of an alternative vehicle. The period of hire was 31 days, between 6 February and 8 March 2019. The overall cost of the hire was £12,864.
4. In addition, the claimant claimed the sum of just over £12,000 for the cost of repairs. There were also incidental claims for recovery and storage, as well as collection and delivery. The personal injury claim was put at £3,200. The overall value of the claim was just over £28,500, the bulk of the claim obviously relating to the costs of repairs and credit hire.
5. Following service of a defence and counterclaim, the case was allocated to the Fast Track. It fell under the fixed recoverable costs regime. Liability and quantum remained in dispute. The trial was due to take place on 18 March 2021.
6. In the event, and following allegations of “fundamental dishonesty” contained in an email from the defendant’s solicitor dated 17 March 2021, the claim was discontinued. The defendant alleged, in particular, that:
7. The claimant had produced an apparently independent witness to the accident but analysis of the parties’ disclosure showed that he, in fact, knew the alleged witness;
8. The claimant failed to disclose his career as a semi-professional boxer to his medical expert;
9. The claimant also failed to disclose an extensive history of prior accidents to his medical expert.
10. On the same day, the respondent’s solicitors also wrote to the appellant copying in the letter which had been sent to Winns and indicating an intention to join the appellant to the proceedings for costs purposes.
11. The hearing proceeded on 18 March 2021. Judgment was entered for the defendant on the counterclaim with fixed costs. Deputy District Judge Willis adjourned Winns’ application to come off the record. He made an order pursuant CPR 46.2 that the appellant should be added as a party to the proceedings for the purposes of costs. He then made provision for the issue of whether the appellant should pay or contribute to the costs of the main action to be determined at a later date as well as the question as to whether QOCS should be set aside in accordance with CPR 44.16 so that the claimant would, in any event, be liable to the defendant for the costs of the main action.

**THE HEARING BEFORE THE DISTRICT JUDGE**

1. The application was that the appellant should pay 90 per cent of the respondent’s costs of the action to be summarily assessed. There was before the District Judge two witness statements in support of the application from Rachel Emma Czaga, a solicitor at Keoghs dated respectively 15 April and 14 July 2021. The appellant had filed two witness statements from Ms Cheryl Charlton who is employed as the manager of On-Hire Limited, dated respectively 30 April and 27 September 2021.
2. On 28 September 2021, one working day before the hearing on 30 September, the respondent served a third witness statement from Mr Gary Herring, a partner at Keoghs. Despite firm opposition by Mr Williams QC, the District Judge admitted this *late* statement into evidence. This affords the second ground of appeal.

**THE JUDGMENT OF THE DISTRICT JUDGE**

1. With no disrespect to the District Judge, the judgment does not require close analysis for the purposes of this appeal. The reason for that is that it is plain that the District Judge conflated the two separate and distinct issues which fall to be determined when a court is considering a non-party costs order. It is agreed that the applying party needs to demonstrate, first, that the non-party is a ‘real party’ to the litigation and, secondly, that the non-party has caused the other party to incur substantial costs which would not otherwise have been incurred, but for the involvement of the non-party. Whilst the District Judge appeared to appreciate that both matters fell to be considered separately, in fact, in her judgment she confused, on the one hand, having a controlling interest in the litigation and, on the other, a causal link. For example, at paragraph14 of the transcript, the District Judge postulated that the causative link was made out by virtue of the terms of the Agreement. This is manifestly incorrect: the fact that the terms of the agreement gave the appellant a commercial interest in the outcome of the litigation and therefore, potentially, rendered it a ‘real party’, has no bearing upon whether the involvement of the appellant in the litigation caused additional costs. Equally, at paragraph 18 of the transcript, the District Judge concluded that being satisfied that the appellant had effectively gained control of the litigation:

“…both the causal link and the real party’s test stand to be made out...”

1. Given that both Mr Williams QC and Mr Browne QC agreed that both the ‘real party’ test and the causal link in relation to costs had to be made out before a non-party costs order could be made, I am satisfied that the District Judge erred in her application of the law in deciding this matter. Accordingly, and as I indicated to counsel in the course of argument, it seems to me that the correct approach is for this Court to determine the matter afresh rather than undertaking a close textual analysis of the District Judge’s judgment. Mr Williams QC agreed with this approach and I did not understand Mr Browne QC to dissent.
2. In these circumstances, subject to one discrete issue in relation to the introduction of the witness statement from Mr Gary Herring (the second ground of Appeal), the issues which fall for determination in this appeal are twofold:
3. Was the appellant a ‘real party’ to the litigation?
4. Did the appellant cause the costs for which it is sought to be made liable?

**LEGAL FRAMEWORK**

1. Although I have now identified the issues which arise in this appeal, it is instructive to look at the rules which permit the making of costs orders against non-parties (and, as appears below, it is also necessary to look briefly at the authorities).
2. Sub-sections 51(2) and (3) of the Senior Courts Act 1981 provide the statutory basis for the making of orders relating to costs. It is clear that 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 including...

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

1. CPR 46.2 is concerned specifically with “costs orders in favour of or against non-parties”, as follows:

“(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...”

1. The Rules also deal with the position where a claimant enjoys QOCS protection. In this case, no decision has been made as to whether or not QOCS should be disapplied but even if the Claimant were to have QOCS protection, it is clear that the court still has jurisdiction to make non-party costs (see CPR 44.16(2)(a) and, in particular, Practice Direction 44, 12.5).

**CASE LAW**

1. I am grateful to HH Judge Roberts for his helpful summary of the case law in the case of *Kevin Gass v (1) Mbata Bobi (2) First Central Management Limited (3) On-Hire Limited* (unreported; date of judgment 21.06.2021). Mr Browne QC in his skeleton argument expressly approves the summary of the case law provided by HHJ Roberts and it is clear that Mr Williams QC is in full agreement.
2. The starting point is the case of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 which was a decision of the Privy Council. Lord Brown said:

“The ultimate question in any such ‘exceptional’ case is whether in all the circumstances it is just to make the order.”

1. At [25], he said:

“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...”

1. In *Deutsche Bank A.G. v Sebastian Holdings Inc & Anor* [2016] EWCA Civ 23 (Comm) Moore-Bick LJ said at [62]:

“...We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly.”

1. So much for general observations. In relation to what needs to be specifically established, considerable assistance is to be derived from the judgment of the Supreme Court in the case of *Travelers Insurance Company Ltd v XYZ* [2019] 1 WLR 6075. As Mr Browne QC observed in his skeleton argument, that case can only be relied upon for guidance given that it was concerned not with the provisions of credit hire but, rather, orders made against liability insurers. Nevertheless, I agree with Mr Williams QC that many of the points made in that case are of general application and they were, of course, adopted by HHJ Roberts in the case of *Gass*. At all events, and as accepted by both parties, the relevant principles are that the usual grounds for making a non-party costs order will either be that a non-party has wrongly intermeddled in the proceedings or constituted itself the ‘real party’ to them and, secondly, that that has also resulted in costs being caused which would not otherwise have been incurred.

*REAL PARTY*

1. The court endorsed Lord Brown’s statement of principle at [25]:

“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... Nor, indeed, is it necessary that the non-party be ‘the only real party’ to the litigation…, provided that he is ‘a real party in ... very important and critical respects’...”

1. Clear it is, therefore, that the non-party need not be the only real party to the litigation but the non-party must be ‘substantially’ the party in charge of the litigation. In this regard, Mr Williams QC’s analysis of the judgment of Lord Reed DP in *Travelers* is helpful. He refers to the parallel drawn by Lord Reed with the civilian concept of a party who, although not joined to the proceedings, acting as the *verus dominus litis* (‘the real master of the litigation’). Lord Reed went on to approve the definition of a *dominus litis* provided by Lord Rutherford in the 19th century Scottish case *Mathieson v Thomson* (1853) 16 D 19, 23:

“...he is a party who has an interest in the subject-matter of the suit, and, through that interest, a proper control over the proceedings in the action. Now it will not make a person liable in the expenses of an action that he instigated the suit, or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit that, while he does both of these things, he shall have some ultimate consequent benefit in the issue of that suit. But when you go a step further, and find a party with a direct interest in the subject-matter of the litigation, and, through that interest, master of the litigation itself, having the control and direction of the suit, with power to retard it, or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*; and, though another name may be substituted, the party behind is answerable for the expenses.”

1. At [98], Lord Reed approved a further statement from a Scottish case stating that in order to be *dominus litis*, the non-party must have the “whole interest for practical purposes”. It is of note that Lord Briggs who gave the leading judgment in *Travelers* expressly adopted Lord Reed’s citation of the Scottish cases in connection with the ‘real party’ test.
2. The decision of the Supreme Court in *Travelers* is not without interest. *Travelers* concerned a defence conducted by a liability insurer. It controlled and funded the proceedings and made all the important decisions, including the strategy on settlement. Of course, it also had a direct commercial interest in the outcome of the proceedings given that it would have to meet any judgment. Notwithstanding this, the Supreme Court overturned the non-party costs order that had been made against the insurer (reversing the Court of Appeal as well as the trial judge) because the insurer’s participation had at all time furthered the interests of its insured as well as itself: see [32] - [42] *per* Lord Briggs; [114] - [115] *per* Lord Sumption.
3. In summary, the position is that more than a shared commercial interest in the outcome of litigation is required for a non-party to be categorised as the ‘real party’ to the litigation for the purposes of costs. The non-party must control and direct the litigation and its participation in the litigation will only render it liable to costs if, when running the litigation it is not furthering the interests of the named party. The way in which Mr Williams QC puts it is that the conduct of the non-party:

“...must render the named party a ‘nominal party’ in both senses of that term.”

*CAUSATION*

1. It is sufficient to refer to the dicta of Lord Briggs in *Travelers* at [65]:

“I have noted ... how firmly the Court of Appeal ... endorsed the requirement ... to demonstrate a causative link between the incurring of the costs sought to be recovered from the non-party and some part of the conduct of the non-party alleged to attract the ... jurisdiction. That requirement is in my view rightly imposed... If the costs would still have been incurred if the non-party had not conducted itself in the relevant manner, why should it be just to visit the non-party with liability for them?”

1. At [80], Lord Briggs repeated the same point:

“...causation remains an important element in what an applicant ... has to prove, namely a causative link between the particular conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered... If all those costs would have been incurred in any event, it is unlikely that a[n] ... order ought to be made.”

1. Lord Reed expressed himself in a similar fashion. He put it in this way:

“...[the non-party] must, of course, have caused the expense for which he is sought to be made liable.”

**WITNESS STATEMENT OF GARY HERRING**

1. Mr Williams’s second ground of appeal reads as follows:

“Further, in determining the non-party costs application, the District Judge was wrong to take the witness statement of Mr Gary Herring into account, which made assertions as to causation. That statement:

1. Was served only one clear day before the application hearing, despite the appellant having raised issues of causation immediately in response to the application;
2. Did not, in any event, adequately state the respondent’s case on causation; and
3. Was not supported by any relevant disclosure.”
4. In the course of argument before the District Judge, Mr Williams QC made similar points when inviting the court to disregard the witness statement in its entirety. In short, he submitted that because causation was central to the issues which the District Judge had to determine, it was unfair and unjust for the appellant to be faced with evidence on this point but one working day prior to the hearing. He also pointed out that the witness statement was deficient in many material respects.
5. The District Judge did not give a specific ruling on the admissibility of Mr Herring’s witness statement. She merely observed that she had all the witness statements before her and that she would attribute what weight she deemed appropriate to the evidence which, in any event, had not been subject to cross-examination.
6. In her judgment, whilst observing that “in dealing with summary applications ... the strict rules as to timing for statements do not apply...”, it is clear that she did have regard to the contents of Mr Herring’s statement. At paragraph 21, she noted that Mr Herring said that the:

“...costs would have been significantly less but for the credit hire, because the costs would have, but for that, been on a fixed basis.”

1. She cited paragraph 30 of Mr Herring’s witness statement to the effect that but for the credit hire, this claim would have been dealt with on a fixed costs basis.
2. A court has a very wide discretion as to what evidence may be adduced and that is particularly so at a Costs Hearing where no ‘live’ evidence is received. The District Judge clearly had in mind that the witness statement had been served very late and that Mr Williams QC strongly objected to the introduction of the statement. Nevertheless, she noted that Mr Williams QC was in a position to make submissions on the witness statement.
3. It seems to me that it cannot be said that the District Judge acted unfairly or unjustly in admitting the statement. To put it another way, to admit the evidence was a decision which was well within the ambit of the wide discretion conferred upon her. She did not err either in Law or in principle in having regard to the contents of this statement.
4. Accordingly, I do not grant permission to appeal in relation to Ground 2. In all the circumstances, it seems to me that the District Judge was entitled to have regard to the contents of Mr Herring’s statement and that therefore, the appeal on this point stands no real prospect of success.
5. However, I should make it plain at this stage that, in my view, for the reasons explained by Mr Williams QC, the statement has limited value. It contains no more than bare assertion, not supported by any documentary evidence. Furthermore, there are a number of matters which require further clarification and elaboration before it can be accepted as demonstrating a compelling case on causation.

**TERMS OF THE ON-HIRE AGREEMENT**

1. The respondent places heavy reliance on the terms of the hire agreement which, it is submitted, serve to demonstrate that the appellant was in a position to exert a very substantial degree of control over the conduct of the claim. Accordingly, it is necessary to set out in a little detail the terms relied upon:

“i) Clause 5 of the ‘Explanation’ section of the agreement states that:

‘To participate in Our credit hire scheme, Your claim must be handled by Us or by solicitors approved by You/Us (‘the Solicitors’) unless We agree otherwise.’

ii) Part 1, ss.1.1, states:

‘Unless You opt not to defer payment for vehicles/hire charges, We will provide interest free credit on the following terms:-

We will undertake the handling of Your accident claim against the Third Party.’

iii) Part 1, ss.1.7, states:

‘Subject to cl.1.10, You will bring a claim against the Third Party and, if We request You to do so, You will appoint Solicitors approved by You/Us to conduct Your claim unless We agree otherwise.’

iv) Part 1, ss.1.8, states:

‘If You fail to act reasonably in the type of vehicle You hire in a period for which it is hired in accordance with cl.1.3 above, resulting in a partial recovery of the hire costs You are responsible for the remainder of the costs. In the circumstances stated in cl.2 of this part of the Agreement, the Agreement may be terminated and You will then be liable to pay hire charges in full and immediately in any event.’

v) Part 1, ss.1.10, states:

‘If We (not the Solicitors) are conducting the claim against the Third Party, You authorise Us to negotiate and settle the claim on Your behalf as We reasonably think fit.

vi) Part 1, ss.1.11, states:

‘You will provide Us/the Solicitors with conduct of Your claim with all such assistance in the conduct of Your claim (including, if necessary, attending at court to give evidence) as We/They may reasonably require or otherwise co-operating fully in recovery of the hire charges by You/Us, e.g. refunding to us any hire monies paid directly to You in error. If You fail to cooperate with the terms and conditions of the Agreement, Your Solicitor is required to notify us of this and You agree to provide your Solicitor with irrevocable authority to do so.’

vii) Part 1, ss.1.12, states:

‘You agree that the Solicitors conducting Your claim may tell us how Your claim is progressing.’

viii) Part 1, ss.1.4 and 1.5, states:

‘You may be asked to provide disclosure of financial documents (including those held in joint names), for a period of three months pre-accident covering the period of hire, including, but not limited to: wage slips; copy bank statements; copy savings books; and copy credit card statements if these are required to provide that You could not have afforded hire other than on a credit basis. By entering into this Agreement, You give Us and the Solicitors conducting Your claim authority to release these documents to your opponent’s representatives and to the Court.’

‘You must agree to provide Us or the Solicitors conducting Your claim with your financial documents if requested. Should You fail to provide these documents when requested, You agree for any outstanding hire or repair charges to be deducted from Your award for damages for personal injury and You also give the Solicitors conducting your claim irrevocable authority to pay this directly to You/Us to discharge any outstanding liability.’

ix) Part 2 states:

‘You must repay all of the hire charges to Us immediately on our request in one single payment if:

You breach this agreement in any way; (2.1)

You instruct other Solicitors to act for You in connection with the accident (even if not related to the hire costs) unless We agree otherwise; (2.3)

You tell Us or the Solicitors that You do not wish Us/them to continue to act for You unless We agree otherwise; (2.4)

You fail to disclose within a timely manner any documents or information requested but, in particular, documents and information referred to in cl.1.14; (2.11)’.”

**RESPONDENT’S CASE RE ‘REAL PARTY’**

1. It is convenient to set out the respondent’s case briefly, at this stage, because, inevitably, very heavy reliance is placed upon the standard terms and conditions of the On-Hire agreement. In her first witness statement dated 15 April 2021, Rachael Czaga asserts that these terms and conditions demonstrate that On-Hire was able not only to determine whether proceedings were to be commenced but, thereafter, to control the conduct of the proceedings. She also sought to argue that the agreement contained an implied term to the effect that the claimant’s costs liability to the respondent, in the event of failure of the claim for hire, would be covered by the appellant (the true position is that the appellant arranges for insurance cover for a claimant’s costs in the event of a claim for hire not succeeding).
2. In his written and oral argument, Mr Simon Browne QC expanded upon the points made by Ms Czaga. He submits that not only is it plain that the appellant has a very substantial financial interest in the claim but also it is permitted to manage the claim and to appoint a solicitor chosen or approved by it (in fact, in this case, the claimant had already appointed Winns before being referred to the appellant). It is his submission that because of the degree of control vested in the appellant, for the purposes of these proceedings, they can properly be described as the ‘real party’.
3. Mr Browne QC also points out that the non-party need not be the only’ real party’ to the litigation. In this regard, he relies upon the judgment of Dyson LJ in *Myatt & Ors v National Coal Board (No. 2)* [2007] EWCA Civ 307 where a non-party costs order was made against the claimant’s solicitors:

“10. Let us now suppose that the solicitors have the major financial interest in the outcome of the appeal but that the claimants have a modest financial interest in it as well. It would be very surprising if the existence of the claimants’ modest financial interest meant that the solicitor’s financial interest counted for nothing when deciding what order for costs it was just to make. Why should the existence of the claimants’ modest financial interest deprive the court of the jurisdiction to make an order against the solicitors, which absent that interest it would undoubtedly have? Sir Geoffrey submitted that if a client has a financial interest in the success of the appeal, the solicitors are acting for him in the usual way, and it is nothing to the point that the solicitors may have a far greater financial interest of their own in the success of the appeal. In my view, this does not provide a satisfactory answer to the question that I have posed.

11. Rose LJ did not have in mind the kind of hybrid situation that has arisen in the present cases. He did not have to consider the position of an appeal in whose success the solicitor has the principal interest but in which the client has his own lesser interest, too. It is at this point salutary to recall that Lord Brown said that the non-party need not be the only real party to the litigation, provided that he is ‘a real party’ ... in very important and critical respects’. I can think of no good reason why those observations should not apply with equal force to solicitors and non-solicitors. I have no doubt that there is jurisdiction to make an order under section 51(3) against a solicitor where litigation is pursued by the client for the benefit, or to a substantial degree, for the benefit of the solicitor.”

1. Mr Browne QC submits, therefore, that it is not necessary for On-Hire Limited either to be the dominant party or the only party to be a ‘real party’. The reality here, he says, is that the appellant took control of the claim and, to a considerable extent, financed the litigation. Moreover, the appellant was involved pre-action as well as during the currency of the claim. The two elements of control and financial interest render the appellant a real party.

**APPELLANT’S CASE RE ‘REAL PARTY’**

1. Unsurprisingly, Mr Williams QC places heavy reliance on the contents of the first witness statement from Ms Cheryl Charlton dated 30 April 2021. Ms Charlton summarises the position at paragraph 19 of her witness statement:

“...[OHL] did not instigate the proceedings, nor fund or control them. The claimant chose to hire a car from OHL after his accident under an agreement which made it clear that he had been supplied with a hire car. The claim brought was not OHL’s claim. The claim was the claimant’s pursued so that he could obtain funds to meet his obligations under the hire agreements which he chose to enter into, as well as his own personal claims. The claim was therefore pursued for the claimant’s benefit throughout. That, no doubt, is why he signed the proceedings (both the claim form and the particulars of claim himself) ...”

1. Based on that evidence, Mr Williams QC makes two essential points. First, and in reliance upon the passages in *Travelers*, it is clearly not enough for the appellant to have a commercial interest in the outcome of the litigation. Mr Williams QC puts it this way:

“It must essentially run the show, and do so in its own interests, rather than the named parties’ interests.”

He says that the evidence does not demonstrate that the appellant conducted itself in this way.

1. Secondly, he argues that even if the appellant had been more actively involved in the litigation, it still would not have been the ‘real party’ because there was no subordination of the claimant’s own interest. Throughout, the claimant was pursuing a claim for damages for personal injuries which, manifestly, was his own interest. Moreover, even in respect of the claim for hire charges, the primary interest was that of the claimant himself because it is the very essence of a credit hire claim that it can only succeed if there is a personal liability for the hire care for the claimant to defray: see *Dimond v Lovell* [2002] 1 AC 384.

**RESPONDENT’S CASE RE CAUSATION**

1. There are essentially two strands to the respondent’s case on causation. Mr Browne QC’s starting point is that of the total claim of £28,502, the costs of credit hire, credit repairs, recovery, and collection amount to approximately 88 per cent of the overall value of the claim. Whilst that, of itself, does not establish that the appellant caused the respondent to incur significantly greater costs than would have been the case, it is the backcloth against which causation should be analysed.
2. To demonstrate the fact that substantially increased costs were incurred as a result of the appellant’s involvement in the litigation, Mr Browne QC does rely upon the witness statement from Mr Herring. In summary, Mr Herring states that but for the credit hire claim, this would have been a simple, ‘fast track’ dispute about liability. He asserts (without giving any reasons) that the credit hire aspect was the most contentious item of the claim. Moreover, he says that whereas his firm, Keoghs, deals with claims up to £25,000 under a fixed fee, once the pleaded claim exceeds £25,000 the claim is dealt with on a non-delegated basis within the complex credit hire team. When the case is categorised in that way, the work is charged at an hourly rate. Whilst not explaining, in financial terms, what difference that would make to his insurers, he says that inevitably the fees charged by Keoghs were substantially more because of the credit hire element.
3. The other matter relied upon in support of the respondent’s case on causation emerges from the second witness statement of Ms Czaga dated 12 July 2022. To summarise the position, she says that during the course of the litigation, it became increasingly clear that the claimant was being less than frank in his account of matters. In particular, in relation to the accident itself, the allegedly independent witness Steven Robinson was, in fact, an associate of the claimant. Further, the claimant had failed to disclose to the medico- legal expert that he was a semi-professional boxer. Coupled with these matters, he had failed to provide a proper history of his previous road traffic accidents and the injuries which he had suffered as a result.
4. It is submitted that these matters should have come to the attention of the appellant by no later than July 2020 when disclosure took place. Given the appellant’s entitlement to manage and conduct the claim on behalf of the claimant, it is argued that the appellant should have taken appropriate steps to investigate issues of honesty at this point in the litigation. Had they done so, then it would have been apparent that the claim could not properly be pursued. Thus, the argument runs that costs incurred after July 2020 were costs attributable to the default of the appellant’s in failing properly to review the litigation and identify the inconsistencies.

**APPELLANT’S CASE ON CAUSATION**

1. As I have foreshadowed earlier, Mr Williams QC is dismissive of the value of the witness statement of Mr Herring, given its lack of particularity. He says that it is no more than a bald assertion that Keoghs charged more for this case because its potential value was in excess of £25,000. Absent any further particularity or documentation to support such a proposition, he argues that a Court is not entitled to attach much weight to this bare assertion. Moreover, and even if, as a generality, it was accepted that Keoghs would charge more by way of costs if the potential value of the claim exceeded £25,000, there was no evidence before the court as to the extent of such increased costs. It could easily have been a very modest increase in costs because of the claim being pitched at in excess of £25,000. Further there was no explanation before the court as to whether the outcome of the litigation had any impact upon the fees charged by Keoghs, or whether the fact that there was a claim for personal injuries influenced the charging rates. Generally, there was a paucity of information as to the extent to which it could be said that the inclusion of a claim for credit hire materially increased the costs incurred.
2. As to the assertion that the appellant should have been aware of the lack of good faith on the part of the claimant, Mr Williams QC refers to the second statement from Cheryl Charlton dated 30 April 2021 in which two points are made, namely:
3. The appellant was not aware that the claimant was acting in a dishonest fashion until it received a letter from Keoghs on 17 March 2021. This was so because the appellant had not, in fact, played any role in the proceedings; nor was it provided with documents given on disclosure or with witness statements; and
4. Even if the appellant had been aware of the allegations of dishonesty, it is said that the appellant had no contractual power to stop the claim since the claimant was entitled to pursue his personal injury claim in any event.
5. More generally, Mr Williams QC emphasises that this was a case where liability was in dispute and the defendant had brought a counterclaim. That was necessarily the primary issue in the litigation. Additionally, a significant component of the litigation was the injuries allegedly suffered by the claimant and whether, in fact, they were genuine. In such circumstances, it could not be said that the majority of the costs were incurred as a result of the claim for credit hire. Indeed, to the contrary, Mr Williams QC argues that the vast majority of the costs of the proceedings would have been incurred in any event and did not result from the appellant’s involvement in the claim.

**DISCUSSION**

1. If I allow this appeal, I am very conscious that, on the face of it, I am disagreeing with HHJ Richard Roberts who, in the case of *Gass*, upheld the decision of the district judge who made a costs order against On-Hire Limited to the extent of 60 per cent. It should also be noted that it is clear that the District Judge in this case placed heavy reliance on the decision of HHJ Roberts. However, and whilst perhaps a trite observation, it must be remembered that there is a very significant difference between deciding a case at first instance and determining an appeal: in the former, judges reach their own decision based upon an analysis of the evidence and the law whereas, in the latter, the questions to be determined are whether the judge has erred in law and/or whether the decision can be said to be plainly wrong. In *Gass*, HHJ Roberts was, of course, faithful to his obligations as an appellate judge: he was not required to, nor did he say whether he agreed or disagreed with the conclusion of the district judge. At [104], he stated:

“I conclude that it was well within the district judge’s discretion to infer that the respondent had proved that the appellant’s particular conduct as a real party had caused the incurring of costs and to assess those costs at 60 per cent.”

1. In any event, as it seems to me, there were material distinctions between the case of *Gass* and the instant claim. First and foremost, there was no dispute as to liability. Accordingly, no costs were incurred in investigating the circumstances of the accident and there was no question of a counterclaim. As a corollary of this and, again, a very significant difference, the district judge in *Gass* was able to postulate that but for the hire claim, it is likely that the case would have settled. The same self-evidently cannot be said in the instant case: to the contrary, even if the credit hire claim had not been in dispute, a trial would still have been necessary to determine the question of liability and, probably, causation and quantum of general damages. Thus, as it seems to me, whereas in *Gass* the credit hire claim probably caused the litigation to continue to run, in this case the litigation was only going to resolve if the claimant discontinued or at the conclusion of a trial.
2. In my judgment, these are reasons which would permit me to depart from the decision of HHJ Roberts albeit that, in any event, I am not bound by either his reasoning or his decision.
3. As to the issue of ‘real party’, it seems to me that if the court were to focus solely on the terms and conditions of the contract made between the claimant and the appellant, it would certainly be arguable that the appellant had sufficient control of the litigation to be described as the real party. I am unpersuaded, however, that the correct approach is simply to look at what, in theory, the appellant was entitled to do as opposed to what, in practice, its involvement was in the litigation. It seems to me that the latter is what is important in determining whether, in reality, the appellant played a substantial, controlling role in the litigation. As to this, the evidence of Ms Charlton is highly persuasive and not in dispute. Her summary at paragraph 5 of her first statement sets out the lack of the appellant’s involvement in the claim. In particular:
4. The claimant chose to contract with the appellant because he required a replacement vehicle;
5. The claimant had the option to pay up front for the cost of hire or to enter into a credit hire agreement;
6. The claim brought by the claimant was his claim in the sense that he was seeking to recover his personal losses which included, of course, the appellant’s hire charges but also, in particular, his claim for General Damages for personal injuries;
7. The appellant neither controlled nor interfered with the conduct of the litigation. The appellant made no decisions whatsoever in relation to the conduct of the litigation;
8. The appellant was not provided with witness statements or with disclosure documents;
9. The appellant had no dealings with the claimant other than to supply him with a replacement vehicle;
10. The entirety of the litigation was conducted by Winns solicitors, an entity separate and distinct from the appellant; and
11. In so far as the appellant had a contractual liability to indemnify the claimant against its costs, it discharged its obligation by arranging for the claimant to be insured against any adverse costs liability.
12. Applying then the test laid out in *Travelers*, it seems to me that it cannot sensibly be said that the appellant had control of the litigation, far less that it was conducting the litigation in its own interests. Plainly, too, it was not acting in such a way so as to subordinate the interests of the claimant. In my view, in so far as the appellant did participate in the litigation, it was doing no more than serving the interests of the claimant. In this regard, it is to be recalled that in *Travelers*, the Supreme Court overturned the non- party costs order that had been made against the insurer because the insurer’s participation had at all times furthered the interests of its insured as well as itself.
13. I am satisfied that on the facts of this case, at all times the claimant was substantially the main party to the litigation, properly described as the’ real party’. It was the claimant who was arguing that he was not at fault for the accident and it was the claimant who was pursuing his claim for general damages for pain, suffering, and loss of amenity. Further, the claim for hire charges remained the claimant’s claim albeit that it was effectively a subrogated claim. In short, this claimant was far removed from being a *nominal* claimant. Further, and in so far as the appellant had a shared commercial interest in the outcome of the litigation, its *de facto* lack of control of the litigation precluded it from being a ‘real party’.
14. Even if my analysis of the ‘real party’ issue is incorrect, I am satisfied that the respondent fails to make good its arguments about causation. Dealing with the evidence from Mr Herring, I think the points advanced by Mr Williams QC are entirely justified. In short, his statement goes nowhere close to demonstrating that as a result of a claim for credit hire being included, the costs of the litigation were significantly increased. Much more detail was required and it needed to be supported by documentary evidence. The statement frankly leaves many questions unanswered.
15. The points made in relation to the appellant’s failure to pick up on the claimant’s alleged dishonesty can be disposed of in similar, summary fashion. All the criticisms contained in the second witness statement of Rachael Czaga should properly be directed against Winns and not the appellant. As Ms Charlton made clear, beyond supplying the vehicle to the claimant, the appellant played no further role in the litigation. It simply was not in a position to assess the honesty or otherwise of the claimant or to conclude that the claim should not be pursued any further. Those were matters to be investigated by the claimant’s solicitors and for a decision to be made by the claimant and/or his solicitors as to whether the claim could properly be pursued. Accordingly, it seems to me to be quite impossible to say that the appellant caused further, unnecessary costs to be incurred because it failed to identify the apparent dishonesty on the part of the claimant.
16. Generally, whilst it is conceivable that the credit hire element of the claim added a little to the overall costs of the litigation, I am satisfied that the bulk of the costs would have been incurred in any event. I repeat that this is particularly so because liability was contested and, also, because there was a claim for General Damages for PSLA. Both these aspects of the claim necessitated extensive investigation. There is simply no evidence to support the proposition that the costs would have been significantly less if there had been no claim for credit hire.

**CONCLUSION**

1. For these reasons, I have come to the clear view that this appeal should be allowed. Neither limb of the test for a non-party costs order is satisfied. It follows that to adopt the words of Lord Brown in the case of *Dymocks Franchise Systems (NSW) Pty v Todd* (*ibid*.), in all the circumstances, it would not be just to make a costs order against the appellant.
2. Finally, I express my gratitude to both counsel for their very clear and helpful written and oral arguments.

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