Neutral Citation Number: [2024] EWHC 471 (KB)

Appeal Ref: KA-2023-000052
Claim no: F17YM188

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT CHELMSFORD
MR RECORDER GALLAGHER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2024

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

Kindertons Limited	**Appellant**
- and -	
(1) Georgina Murtagh	
(2) Esure Services Limited	**Respondents**

- -
- -

Robert Marven KC and **Henry King** (instructed by **Canford Law**) for the **Appellant**
Stephen Bailey (instructed by **Horwich Farrelly Sols**) for the **Respondents**

Hearing date: 8 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE TURNER

The Hon Mr Justice Turner :

"For those who believe that most civil litigation does not end up being about the costs that were incurred in pursuing that same litigation in the first place, look away now."

Coulson LJ ***Goknur v Aytacli*** [2021] 4 W.L.R. 101

INTRODUCTION

1. This is an appeal against a decision of Mr Recorder Gallagher of 6 March 2023. The issues raised relate to an order for costs which he made against a non-party. In short, Kindertons Limited ("Kindertons"), against whom the order was made in favour of Esure Services Limited ("Esure"), challenges the Recorder's decision and contend that no such order ought ever to have been made.
2. Esure is a company which provides motor insurance. Kindertons describes itself as "a specialist in accident aftercare and mobility solutions to the insurance industry and related sectors".
3. So opens yet another chapter in the continuing war of forensic attrition between motor insurers and credit hire companies.

BACKGROUND

4. On 20 February 2019, a minor collision occurred on the A13 in London when one Georgina Murtagh carelessly drove her Volkswagen Polo into gentle contact with the rear of Serhat Ibrahim's Audi A5.
5. His claim for the cost of repairs of the damage caused was in the sum of £2,543.80.
6. The combined legal costs claimed by the parties to this appeal stand at nearly £100,000.
7. I will now deal with the history of this litigation in order to explain how what should have been a straightforward claim came to such spectacular grief.

FIRST CONTACT WITH KINDERTONS

8. Within two days of the accident, a representative of Kindertons telephoned Mr Ibrahim to discuss providing him with a replacement vehicle. He returned the call on the afternoon of 22 February and spoke to a representative by the name of Rachel. The call was recorded. He described the damage to his vehicle, somewhat cryptically, as:

> *"… not a lot of damage. It's just basically the back bumper. It looks a bit out of line…and when I open the boot they don't close and where with the key you could open the boot where it pops automatically open…it won't do that time to time."*

9. Upon this slender basis, Mr Ibrahim was readily persuaded that he should not be driving the car and that he ought straightaway to hire an alternative vehicle from Kindertons. It is to be noted that in a report later provided by

JP Morris assessors on behalf Kindertons the author concluded that Mr Ibrahim's Audi had suffered no damage in the accident which would have rendered it unroadworthy. The repairs would take four to five days to complete.

10. Rachel told Mr Ibrahim:

> *"Just so you are aware…we are gonna be providing you with the replacement vehicle. Now the vehicle that we do give to you, it is a hire car, not a courtesy car, which we provide for you on a credit hire basis, now all this means is that the charges are recovered from the negligent driver's insurance company, and the agreement between you and us is there's no cost to you. So you do not have to pay for any hire or repair aspect of things"*

11. She went on to pre-empt any attempt by Esure to offer to provide Mr Ibrahim with a less expensive alternative hire car:

> *"If the other person's insurance company should happen to call you, I would just ask you to please ignore their call or any advice that they provide, just 'cause they will try and reduce what you're entitled to in respect of your vehicle value and your legal entitlement to a hire car, err, the other company is called Esure, so if you hear erm, of or get a phone call from Esure just tell them that Kindertons are dealing with the claim and end the call from there, OK?"*

THE AGREEMENTS BETWEEN MR IBRAHIM AND KINDERTONS

12. On 23 February 2019, Mr Ibrahim duly entered into a credit hire agreement with Kindertons for the hire of a Jaguar XF at the rate of £345.08 per day (later replaced with a Mercedes Benz C250 on the same terms). The total period of hire was 33 days.
13. The terms and conditions of hire included the following:
    i. Deferment of the obligation to pay the hire charges until the conclusion of the claim for damages against the third party (Clause 7(a));
    ii. The right on Kindertons' part to appoint an 'external contractor' to assist with that claim (Clause 7(a));
    iii. The right on Kindertons' part to pursue an action in the hirer's name against the third party (Clause 7(b));
    iv. The right on Kindertons' part to pursue an action through the County Court and/or High Court coupled with an obligation on the hirer's part to co-operate in the conduct of the action (clause (7(c));
    v. A provision that any default of condition 7 would result in termination of the agreement forthwith and repayment of the hire charges being immediately due in full (Clause 8).

14. Also on 23 February, Mr Ibrahim entered into a credit agreement with Kindertons in respect of repair, recovery and storage facilities. The terms and conditions provided:
    i. The obligation to pay the repair, recovery and storage charges would be deferred pending conclusion of any claim against the third party (clauses 1.2, 1.4);
    ii. A right on Kindertons' part to instruct repairers on Mr Ibrahim's behalf (Clause 1.7);
    iii. A right on Kindertons' part to instruct an engineer and agree repair costs on Mr Ibrahim's behalf (Clause 1.8);
    iv. A right on Kindertons' part to pursue a claim in Mr Ibrahim's name against the Third Party (Clause 2.3);
    v. An obligation on Mr Ibrahim's part to pursue a claim against the Third Party (Clause 2.3);
    vi. A right on Kindertons' part to appoint an Authorised Representative to pursue the claim in Mr Ibrahim's name (Clause 2.4);
    vii. An obligation on Mr Ibrahim's part to provide all reasonably necessary co-operation and assistance for the pursuit of the claim (Clause 2.5);
    viii. An obligation on Mr Ibrahim's part not to agree any settlement proposals without Kindertons' agreement (Clause 2.6);
    ix. An obligation on Mr Ibrahim's part to pay any settlement cheque to Kindertons' from which Kindertons' would be entitled to deduct sums due to it (Clauses 2.7 and 2.8);
    x. An immediate liability on Mr Ibrahim's part to pay all sums due if he were to breach the terms of the agreement in any significant respect (clauses 2.9 and 2.10);
    xi. A retaining lien on Kindertons' part to retain the Claimant's vehicle if the agreement were terminated until all sums due to it under the agreement are paid (Clause 2.10).
15. During the course of the hearing, I raised with the parties an issue as to the potential impact which the provisions of the Consumer Rights Act 2015 may have upon the enforceability of the terms of these agreements. The point had been neither pleaded nor raised below or before me but under section 71(2) of the Act:

> *"…the court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it."*

16. In the event, I pressed the issue no further and, with the encouragement and agreement of the parties, was prepared to proceed on the assumption that the terms were enforceable against Mr and Mrs Ibrahim. Fortunately, in the particular circumstances of this case, I am satisfied that the outcome of this appeal will be the same regardless of the operation of the 2015 Act and it

would be inappropriate for me to speculate as to what impact (if any) it may have upon future credit hire claims.

ESURE'S APPROACH TO MR IBRAHIM

17. On 25 February (two days into the initial hire period and before Mr Ibrahim entered into the second credit hire agreement) Esure sent him a letter offering an equivalent replacement vehicle at no cost at all to him but at a cost to Esure of £63.45 per day (the cost to Esure was identified so as to enable Esure to argue that if Mr Ibrahim did not take advantage of the offer and incurred higher costs then this amounted to a failure on his part to mitigate his loss).
18. In the light of the warning he had earlier been given by Rachel to have no truck with Esure, her reassurance that he would not be paying any hire costs anyway and the terms of the hire agreement he had already entered into, it is not surprising that Mr Ibrahim did not take up the offer.

THE CLAIM

19. Proceedings were brought by Mr Ibrahim and his wife, Silvia, against Miss Murtagh on 19 September 2019 limited in value to £20,000. Mrs Ibrahim was alleged to have been a passenger in the car at the time of the accident. Mr Ibrahim's claims for credit hire, repairs, recovery charges and additional charges came to a total of £16,757.75. All but £50 (airily attributed to "undocumented miscellaneous expenses") arose under the credit agreements. Mrs Ibrahim also claimed in respect of such undocumented expenses in an identical sum.
20. In addition, Mr and Mrs Ibrahim both claimed general damages in respect of personal injury but the combined alleged value of these claims, even if they had been made out, could not have exceeded £3,192.25 without exceeding the £20,000 limit of the value of the claims as a whole.
21. Miss Murtagh denied liability and the matter proceeded to trial.

THE TRIAL

22. The matter came before Mr Recorder Berkley QC (as he then was) in the form of a fast track trial on 13 August 2020.
23. It all went very wrong for Mr and Mrs Ibrahim.
24. The Recorder found that, although he was satisfied that a collision had occurred, the damages claimed in respect of the repairs and hire charges had not been caused in the accident. In the case of Mrs Ibrahim, he found that she had not even been in the vehicle at the time and that both she and her husband had been fundamentally dishonest in saying that she had been.
25. Mr and Mrs Ibrahim were ordered to pay Miss Murtagh's costs in the sum of £12,000 but promptly disappeared from forensic view leaving the costs bill unpaid.

THE NON-PARTY COSTS CLAIM

26. Esure then applied for a non-party costs order ("NPCO") against Kindertons.
27. The application ought to have been heard by His Honour Judge Berkley QC (as he had by then become) but, instead, found its way into the list of Mr Recorder Galagher.
28. In ***Deutsche Bank AG v Sebastian Holdings Inc*** [2016] 4 W.L.R. 17 the Court of Appeal held:

> *"56. The suggestion that the judge ought not to have determined the Bank's application for costs against Mr Vik because he had made adverse findings against him in the main action is, again, one that we cannot accept. Although in Symphony Balcombe LJ said, that an application for payment of costs by a third party should "normally" be determined by the trial judge, we find it difficult to imagine a case in which that would not be appropriate. It is necessary for these purposes to assume that the judge has conducted the trial impartially and that, if he has made findings critical of the third party, those findings were justified. Making findings of fact is part of the judicial function and to have made findings critical of one party or another does not disable the judge from dealing with consequential matters impartially, even when they turn on facts in respect of which he has already made findings. That is a commonplace in cases in which the court has to exercise its discretion in relation to costs as between the parties to the proceedings. There is no reason, therefore, why the same should not hold good in relation to an application for costs against a third party, provided, of course, that it is not unjust to hold him bound by the findings in the main action. Accordingly, although we would not wish to exclude altogether the possibility that there may be cases in which an application of that kind should be decided by someone other than the trial judge, such cases are likely to be rare."*

29. It is regrettable that the trial judge did not hear the costs application and that neither side took the issue below. Particular care should be taken not to list NPCO applications to be heard before a judge who did not sit on the trial without a compelling reason. None was identified in this case. Nevertheless, this court is now presented with a fait accompli and no purpose consistent with the overriding objective would be served by doing anything other than re-emphasising that this should not have happened before moving on to determine the appeal.

THE DECISION BELOW

30. The parties agreed that the Recorder had the power to make a NPCO. The issue was as to whether he should have exercised his discretion to exercise that power in the circumstances of this case.
31. The statutory foundation of this power is to be found in section 51(3) of the Senior Courts Act 1981 where it is expressed in the broadest possible terms:

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

32. The Recorder correctly referred to CPR 44.16(2) as identifying circumstances in which an NPCO may be made in the context of a Qualified One-way Costs Shifting [QOCS] case. It provides, in so far as is material:

> **"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*
>
> *(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. In addition, CPR 44 PD 12 provides:

> *"12.2*
>
> *Examples of claims made for the financial benefit of a person other than the claimant…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."*

34. In this context, however, it is to be noted that in ***Select Car Rentals (North West) Ltd v Esure Services Ltd*** [2017] 1 W.L.R. 4426 I observed:

> *"44. In summary, I find as follows:*
>
> *(i) CPR r 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 r 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) Paragraph 12.2 of Practice Direction 44 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."*

35. It is important to remember that this is not a case in which it was the finding of fundamental dishonesty which precluded Mr and Mrs Ibrahim from sustaining otherwise viable residual claims. They lost because they were found to have no claims at all.
36. In the circumstances of this case, the Recorder found that the claim included a claim which was made for the financial benefit of Kindertons. He awarded Esure 80% of their costs against Kindertons.
37. It is against this decision that this appeal is brought. I will deal with each ground of appeal in turn.

GROUND ONE

The judge was wrong to conclude that the appellant had a financial benefit in the litigation such as to found a non-party costs order

38. This is a brave contention; not least because it was not fully articulated below.

39. In common with credit hire companies generally, the whole purpose of Kindertons providing credit hire facilities is to make a commercial profit out of the client's legal claim. In cases of accidents involving impecunious parties, the provision of such facilities is capable of providing a fair and useful mitigation of the difficulties which would be faced by claimants unable to afford to pay the lower Basic Hire Rate [BHR] up front.
40. As Ritchie J observed in ***Amjad v UK Insurance Limited*** [2023] EWHC 2832 (KB):

> *"58. In CHC [Credit Hire Company] charges claims the claimant can only recover damages if he has a lawful and sufficiently drafted contract so that he has a contractual debt to the CHC which is recoverable from the defendant in the proceedings, albeit deferred. Therefore, by definition the claimant has some interest in succeeding to alleviate that potential debt. However, the CHC has a far stronger interest in the success of the CHC charges claim because all the money awarded will end up with the CHC. The whole of the financial benefit in money terms goes to the CHC. All the claimant will achieve, should the head of claim be awarded, is to be relieved of any residual liability to the CHC. I bear in mind that the claimant's liability is partly illusory, because in most or many of such arrangements there is a tacit agreement that the CHC will not enforce against the (generally impecunious) claimant if the legal claim is lost. Often CHCs insure against losing the subrogated claims so suffer no loss themselves and do not charge the claimant.*
>
> *59. In my judgment the words "for the benefit of the claimant" are to be construed in accordance with their normal and usual meaning in the context of the rule in which they were used and the funding background. The rules are designed to give access to justice to claimants by QOCS protection, due to the absence of Legal Aid and the qualified OCS protection that provided. The QOCS protection is qualified by a cap upon enforcement which protects the claimant's money and property and permits enforcement only against damages and interest awarded in the PI claim (and in later cases costs as well). The lifting of the cap in r.44.16(2) is constrained by the "who benefits?" test in relation to the claims. Sub-paragraph (a) relates to all heads of claim and sub-paragraph (b) only relates to non PI heads of claim. The "who benefits" test is used to trigger gateway (a) "or" (b). The rule does not say (a) "and/or" (b). The test of "who gains the benefit?" is common to both options: (a) and (b). These sub-sections open gateways to determine against whom the Courts are permitted to enforce costs. If a non-party is gaining the benefit then gateway (a) is open against the non-party. If the claimant is benefitting then gateway (b) is open and the claimant*

> *is the target of the above cap enforcement, but only in relation to the costs of the non PI heads of claim."*

41. He went on to explain:

> *"61. ...So, retuning to CHC charges, at one end of the scale is the claimant who has paid the CHC charges (unlikely though that may be), then the whole benefit of the award for CHC charges is going to the claimant and (b) applies. At the other end is the claimant who has not paid the CHC charges and although stated as liable under the CHC contract that liability is or may be illusory or technical, because the reason for choosing a CHC vehicle was the claimant could not afford to hire one at the BHR. In my judgment the correct interpretation of who benefits at this end of the scale is that this is an (a) case not a (b) case. The award will go to the CHC. If the claimant has paid nothing to the CHC and, despite the passage of years since the vehicle was returned, the CHC has not enforced the charges, or if the CHC has tacitly agreed not to enforce the charges unless and until the claimant wins damages, then there is no real benefit to the claimant in the claim for CHC charges."*

42. In this case, Kindertons stood to gain substantially from the claim brought in Mr Ibrahim's name. The price of the services which they provided under the contracts with Mr Ibrahim very significantly exceeded the value of the personal injury and "undocumented miscellaneous expenses' claims" brought by him and his wife, even if they had been fully made out. The transcript of the telephone conversation with Rachel makes it clear that Mr Ibrahim was led to believe that he would not be expected to pay a penny under the contract. The bill would be footed entirely by Esure.
43. It follows that Kindertons had a very strong financial stake in the litigation and that any benefit to Mr Ibrahim in pursuing the claim for hire charges was all but illusory.

GROUND TWO

There was no proper basis for the judge's finding that the appellant controlled the litigation.

44. There is a danger that the concept of "control" is wrongly treated as if it were a traffic light, governing access to the exercise of court's discretion to make a non-party costs order, which is showing either red or green. Control is almost invariably a matter of degree. As a concept, it is relevant to the extent that, in any given case, the greater the level of control exercised by the non-party the more likely it will be that the court will exercise its discretion in favour of making a NPCO.
45. As the Court of Appeal held in ***Deutsche Bank AG v Sebastian Holdings*** [2016] 4 W.L.R. 17 at para 62:

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

46. On the facts of this case, there was a high degree of control. The contractual terms identified above tied Mr Ibrahim into bringing a claim and continuing it at the risk of incurring serious financial consequences in the event that he were to fail to comply. It matters little, if anything, that such consequences were not, in the event, visited upon Mr Ibrahim. It is the threat and not the execution of repercussions which forms the usual basis for control.
47. Furthermore, within only two days of the accident, Rachel was encouraging Mr Ibrahim to hire a vehicle from Kindertons on credit hire rates at no cost to him and, importantly, directing him not to engage with Esure. This was presented to Mr Ibrahim on the basis that any such engagement might prejudice his interests but, in reality, I am satisfied that any engagement with Esure risked compromising the interests of Kindertons who thus wished to choreograph the progress of the litigation to preclude this.

GROUND THREE

The judge wrongly failed to consider causation

48. Kindertons contends that in the circumstances of this case, Esure cannot establish by the application of a "but for" test that Kindertons' involvement resulted in Esure incurring more costs in the litigation than they would have done in any event.
49. In ***Total Spares v Antares*** [2006] EWHC 1537 (Ch) Richards J held:

> *"54. ...it cannot in my judgment any longer be said that causation is a necessary pre-condition to an order for costs against non-party. Causation will often be a vital factor but there may be cases where, in accordance with principle, it is just to make an order for costs against a non-party who cannot be said to have caused the costs in question."*

50. In ***Turvill v Bird*** [2016] EWCA Civ 703 Hamblen LJ endorsed this approach:

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

51. Kindertons relies upon the more recent authority of ***XYZ v Travelers Insurance Co Ltd*** [2019] 1 W.L.R. 6075 in which the Supreme Court considered the relevance of causation in a claim for a NPCO against liability insurers. Particular reliance is placed upon the observations of Lord Briggs on the role played by the element of causation in NPCO cases. However, Lord Briggs was careful to circumscribe the scope of his observations in the following terms:

> *"30. It is not the purpose of this judgment comprehensively to reassess those generally applicable principles. It may be (and I am reluctantly prepared to assume but without deciding) that they really are limited, as the Court of Appeal thought in the present case, to the twin considerations of exceptionality and justice. The same general conclusion is to be found in the Deutsche Bank case. That said, I share all Lord Reed DPSC's concerns as to the lack of content, principle or precision in the concept of exceptionality as a useful test. Rather, this is an occasion to consider, in more granular detail, the principles which ought to apply to that distinct part of the broad spectrum of non-parties occupied by liability insurers. While doing so it will be appropriate to make some brief observations about the impact of those general principles in the liability insurance context, and in particular about the role played by the presence or absence of a causative link between the conduct of the non-party relied upon and the costs which the applicants incurred which they seek to recover against the non-party under section 51 ."*

52. From this passage alone, it is clear that Lord Briggs was not intending to lay down any general guidance on causation applicable to all NPCO applications.
53. He went on to observe:

> *"31. Liability insurance serves an obvious public interest. It protects those incurring liability from financial ruin. More importantly, it serves to minimise the risk that persons injured by the insured will go uncompensated as a result of the insured's lack of means. Unlike ATE insurance it is not primarily aimed at making a profit by assisting in the funding of litigation but, where liability becomes the subject of litigation, the insurance typically contains provision under which the insurer is obliged to fund the insured's defence and, as an inevitable concomitant, entitled to exercise substantial (although not always complete) control over the conduct of its insured's defence. The liability insurer is therefore typically an involuntary rather than voluntary funder of litigation, and the control which the insurer habitually exercises over the conduct of its insured's defence arises from a pre-existing contractual entitlement, rather than from a freely-made decision to intermeddle."*

54. The position of Kindertons is different. It involved itself voluntarily and enthusiastically in the claims after the accident giving rise to it. This not to say that the services provided could not, in appropriate cases, serve a public interest but, unlike liability insurers, its involvement was a matter of choice in the expectation of profit specifically related to the legal proceedings to follow.
55. Lord Briggs went on to say:

> *"66. The causation requirement was not the subject of challenge on this appeal. It does not appear to have featured in the other Chapman cases, but their facts suggest that the relevant costs ordered to be paid would not have been incurred, but for the exceptional conduct relied upon. In cases such as the present, where it is the intermeddling test rather than the real defendant test which falls to be applied, the formulation of that test by Phillips LJ in the passage in the Chapman case [1998] 1 WLR 12 quoted above clearly incorporates a need to demonstrate causation, since it is the costs attributable to the intermeddling that the meddler is ordered to pay."*

56. In this case, the issue of whether or not Kindertons was a real party to the litigation with respect to the recovery of credit hire charges was and remains a central one and so falls to be distinguished from the category of intermeddler cases to which Lord Briggs was directing his attention in this passage on the need to demonstrate causation. It could not be said that it was none of Kindertons' business to involve itself in the progress of the litigation. On the contrary, it was very much its business both in a literal and metaphorical sense.
57. In my view, on the circumstances of this case and without seeking to lay down any general rule relating to the appropriateness of NPCOs against credit hire companies, I am satisfied that the Recorder was right to conclude that it was just to make the order and he was not obliged to make any specific finding in respect of "but for" causation before so doing. In particular, Kindertons was exercising a degree of control over the most valuable of Mr Ibrahim's claims on the basis of instructions from Rachel the specific intention of which was to neuter any attempts by Esure to limit its exposure to the hire claim which had the potential to reduce Kindertons' profits. In my view it was neither fair nor just that it should be permitted to do this without exposing itself to the potential consequences of a NPCO.
58. By ordering Kindertons to pay 80% of the costs, the Recorder was exercising his discretion appropriately to reflect the proportionate benefit which it stood to obtain if the claim for hire charges had succeeded. An attempt mathematically to calculate on a "but for" basis of causation would simply not have reflected the unfairness of allowing Kindertons a free ride on the coat tails of Mr Ibrahim's claim.

GROUND FOUR

The judge failed to take into account that Esure had not given the appellant any notice that they would or might pursue a non-party costs application against the appellant

59. Kindertons wisely opted not to develop this ground below. Less wisely, it sought to raise it for the first time on this appeal.
60. As Lewison LJ pointed out in ***Fage UK Ltd v Chobani UK Ltd*** [2014] EWCA Civ 5 at paragraph 114 the trial is "not a dress rehearsal" but rather "the first and last night of the show". In this case, the curtain came down on 17 January 2023 when the Recorder heard the arguments then relied upon by the parties. By the time he had handed down his reserved judgment on 6 March 2023, the audience had long since departed the theatre.
61. In any event, the point is without merit. Kindertons would or should have known only too well that the nature of its business put it at risk of a NPCO application. The wording of CPR 44 PD 12.2, insofar as it relates to claims for credit hire, provided express warning of this; if any such were needed. I can discern no prejudice to Kindertons in the timing of Esure's application.

GROUND FIVE

The judge failed to address the overarching question whether it was just in all the circumstances to make a costs order against the appellant. In circumstances where the dismissal of the claimants' claim and the costs order against the claimants resulted from the claimants' dishonesty in respect of the injury claims, it was not just to order the appellant to pay the respondents' costs. The appellant was just as much a victim of that dishonesty as the respondents.

62. The fact that Mr and Mrs Ibrahim were found to have been dishonest did not make it unjust to make the NPCO against Kindertons.
63. On the contrary, Kindertons voluntarily assumed the risk that Mr and Mrs Ibrahim would turn out to be dishonest. As Miss Murtagh's road traffic insurers, Esure had no say in the matter. The level of scrutiny which would be applied to any aspect of the claim which it was seeking to adopt was a matter for Kindertons. Little in the way of scrutiny is discernible from the transcript of the conversation between Mr Ibrahim and Rachel. Of course, it may well be that the cost of exercising higher levels of scrutiny would be disproportionate to the money thereby saved but this is a commercial decision the consequences of which must be borne by Kindertons.

GROUND SIX

The judge wrongly regarded CPR PD 44 para 12.5 as a self-standing basis for the making of a non-party costs order. This PD as a practice direction is not a source of law or jurisdiction. Nothing in the PD diluted the requirement upon the respondents to establish a proper basis for a

non-party costs order in accordance with the substantive general law, which for the reasons aforesaid, they failed to do.

64. I have found that a proper basis for the making of a NPCO was made out. It follows that the failure of grounds one to five inclusive means that ground six must also fail.

DISCRETION

65. On the facts of this case, I too would have made a NPCO against Kindertons had the matter come before me at first instance for the reasons I have given. But even if I had not been minded to make such an order, I would still have concluded on appeal that the approach taken by the Recorder to the exercise of his discretion fell comfortably within the generous parameters afforded to him. Appellate courts will not lightly interfere with such decisions.

CONCLUSION

66. In all the circumstances, this appeal must be dismissed. I invite the parties to attempt to agree the appropriate costs order.