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Non Party Costs Orders and Fundamental Dishonesty Update

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Non Party Costs orders

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Background – inter-partes costs

Basic rule – costs are inter-partes

Section 51 of the Senior Courts Act 1981

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

(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

(7) In subsection (6), *"wasted costs"* means any costs incurred by a party— (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative;

CPR 46.2 - Always been a power of the court to order persons not a party to pay costs

CPR 46.8 – Costs against a legal representative.

Non Party costs – CPR 46.2

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

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

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

Dymocks v Todd [2004] 1WLR 2807

(1) Although costs orders against non-parties are “exceptional”, exceptional means only that the case is outside the ordinary run of cases which parties pursue or defend 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. Inevitably this will be fact specific to some extent.

(2) Generally the discretion will not be exercised against pure funders, that is, those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course. The public interest in the funded party getting access to justice will generally outweigh the recovery of costs by the successful unfunded party.

(3) If however the non-party not only funds but controls or benefits from the proceedings, justice will ordinarily require that they will pay the successful party’s costs if the funded party fails. The non-party is not so much facilitating access to justice as themselves gaining access to justice for their own purposes and are themselves a real party to the litigation.

(4) A non-party should not ordinarily be liable for costs which would in any event have been incurred without the non-party’s involvement in the proceedings, although the position may be different where a number of non-parties have acted in concert.

QOWCS CPR 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); 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.

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CPR PD 44

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 a case to which rule 44.16(1) or rule 44.16(2)(a) 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.

Mee v Jones [2017] Turner J

(Also known as Select Car Rentals v Esure)

Upheld NPCO against CHO

a) 44.16 not a new jurisdiction – same as 46.2.

b) PD that credit hire is for the CHO benefit is not Ultra Vires but a statement of the obvious. 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.

c) CHO had actively controlled the litigation

d) Outcome – credit hire company liable for 60% costs of the claim

e) Approved Court of Appeal in Deutsche Bank that "the only immutable principle is that the discretion must be exercised justly."

f) "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. 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."

Sharzad v RSA/Fastrack [2023] HHJ Gosnell

Overturned the NPCO because the District Judge had found the CHC did not control the litigation:

"My analysis of the previous authorities on this issue makes clear that it is only by exercising control over the litigation that a non-party can be treated as the "real party" in the litigation." The court must enquire whether the non-party has controlled the proceedings for their own benefit to the extent that they are the " *real party* " or whether they have funded the litigation which would not have taken place without their support.

A credit hire company would be at risk of paying the successful insurer's costs in any claim where a decision on liability went in the Defendant's favour. This would be the case even where there was no dishonesty on the part of the Claimant and the judge merely preferred the Defendant's version of events. This is neither fair nor consistent with the authorities I have analysed earlier. In my judgment, there must be evidence that the credit hire company has controlled the litigation to such an extent that an objective analysis would suggest that it was the real party and the actual claimant merely a nominal claimant whose interests were distinctly secondary.

On Hire v Smithson

HHJ Freedman 20th May 2022. Relied on *Travelers Insurance Company Ltd v XYZ [2019] 1 WLR 6075*

"30. 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.

31 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?"

32 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."

33 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."

Saores v Wilson/Anexo 20th October 2023

Claim against overarching holding company of CHO and solicitor - Anexo. Arose from post settlement costs dispute.

The court will consider the extent which a non-party benefit from the litigation. Sometimes referred to as the 'real party' or 'effective party' test. The non-party does not have to have the sole or even dominant interest. If they have something to gain that may be sufficient depending on circumstances of the case. It is sufficient if they are, in reality, a party as opposed to the party.

One should consider the extent to which the non-party causes costs to be incurred.

Following on from the above, the court should consider the quantum of costs that were engendered by the actions of the non-party.

Another important aspect is the extent to which the non-party controls or influences the litigation interest. This is sometimes referred to as intermeddling.

It is important to understand that these are pointers to the decision the court must make. They are not hard and fast preconditions to making a non-party costs order. It is not the case that both control and funding of the litigation must be present.

NPCO not made

Kindertons v Murtagh 5th March 2024

Turner J on appeal

First instance Personal injury and credit hire claim – dismissed as no damage caused and claim there was found to be FD. Costs order made against Claimants under 44.16.

Not enforced – non party costs application made against CHO. Not heard by the trial judge which the Court held should usually be the case unless a compelling reason.

80% of Def costs ordered against the CHO at first instance

Kindertons: Grounds of Appeal

Financial benefit – short shrift. It does.

Control - 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.

The contractual terms tied the claimant 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.

Kindertons: Grounds of appeal

Causation – Argument was 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.

Held: Cited with approval ***Total Spares v Antares*** [2006] EWHC 1537 (Ch) Richards J held at 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.”

Kindertons

XYZ v Travelers- not of general application. Applies to Liability insurers where different public policy considerations apply.

There is a different test on causation in “intermeddler cases” and “real party cases”. If an intermeddler then causation may be required. Credit hire NPCO is a real party issue as the claim is for their benefit.

SO…..

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.

Amjad v UK Insurance [2023] EWHC 2832: Ritchie J

GET BASIS RIGHT

Claimant brought a PI and credit hire claim. Failed to beat a Defendant Part 36 offer. Court made an enforceable costs order against Claimant of £5,000 more than the damages award.

First Instance Judge concluded 44.16(2)(a) applied – claim for financial benefit of a third party. NOT 2(b) – for the benefit of the Claimant. But then ordered Claimant to pay the costs.

Who benefits test. – if Claimant then 44.16(2)(b) if third party then 2(a).

Usually a Binary test.

By not considering – failed to apply Case law under CPR 46.2 for NPCO

Credit hire - will usually be (a) – for the benefit of the credit hire company.

Pereira and others v DAML 20th June 2024

HHJ Saunders: Leading Counsel on each side. Four cases for NCPO against Direct Accident Management Limited (aka McAms) - 2 had personal injury as well 2 did not.

Considered the business structure of DAML/Anexo and Bond Turner

Business model was to recover Credit hire for impecunious Claimants - no expected recovery from Claimant. BUT no actual involvement in any case.

HELD. DAML was real party to the claim. Control arose as under t/c they could require claim to be brought, solicitors to be retained and decide settlement.

Risk of the business model.

But for Causation not required. Test was whether it was Just. The claim was a direct consequence of hiring the car even if other claims were or would be made.

Exceptional – in that the presentation of the case linked to the hire on credit and the funding of the credit hire claim is the “essential catalyst” for the claim being made. So they are the “real party”

It would be unjust NOT to make an order. The business model is to recover from Defendants and not the Claimant. They should therefore bear the risk

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Fundamental Dishonesty Case Update

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8th October 2024

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A brief look at recent cases of significance regarding fundamental dishonesty, within the context of:

(i) ‘The substantial injustice’ exception to section 57 CJCA

(ii) Indemnity Costs for failed allegations of FD

(iii) Interim Payments where FD alleged.

What is Fundamental Dishonesty?

CPR 44.16

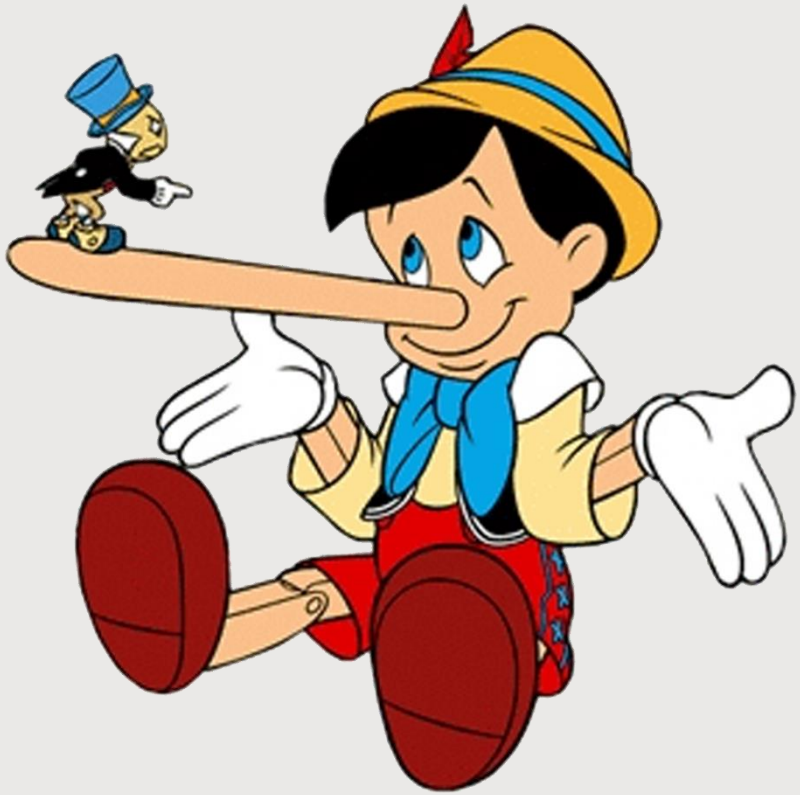
Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

Gosling v Hailo (29 April 2014) [2014] 4 WLUK 770

HHJ Moloney: where *the dishonesty went to the root of either the whole of his claim or a substantial part of his claim*.

Don’t need to plead FD, buuuuuut...

Andrew Jenkinson v Gary Robertson [2022] EWHC 756 (Admin)



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It is in the interests of basic fairness that ***a Claimant should be given adequate warning of, and a proper opportunity to deal with, the possibility of a finding of fundamental dishonesty****. The consequences of such a finding are severe, and rightly so, but the safeguards against an unjust finding are the giving of adequate notice of the allegations and a proper opportunity to respond. What amounts to such notice or opportunity in a given case will depend on the circumstances. Ordinarily, the allegations will be either pleaded or set out in writing, but there may be cases where that is not necessary. The fact that the Claimant is a litigant in person is a factor to be taken into account in assessing adequacy of notice and the opportunity to respond but that fact does not of itself demand that in all cases involving litigants in person, there has to be written prior notice of the allegations*. (at paragraph 32)

The s.57 defence can be raised at a late stage, even as late as in closing submissions. However, where the claimant is a litigant in person, the Court will ordinarily seek to ensure that the allegation is clearly understood (usually by requiring it to be set out in writing) and that adequate time is afforded to the litigant in person to consider the defence. (at paragraph 25)

The other decisions of note are those of Mustard v Flower [2021] EWHC 846 (QB); Cojanu -v- Essex Partnership University NHS Trust [2022] EWHC 197 (QB). There are others, but these are the main ones.

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SUBSTANTIAL INJUSTICE

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§57 Criminal Justice & Courts Act 2015

Where, in a PI claim, *the court finds that the claimant is entitled to damages in respect of the claim, but on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim, the court must dismiss the primary claim,* ***unless it is satisfied that the claimant would suffer substantial injustice*** *if the claim were dismissed*.

Williams-Henry v Associated British Ports Holdings Ltd [2024] EWHC 806 (KB)

8 Factors discussed at paragraph 178 of the judgment.

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Factor 1

The amount claimed when compared with the amount awarded. If the dishonest damages claimed were small or moderate compared to the size of the assessed genuine damages which were substantial or very substantial this will weigh more heavily in favour of a substantial injustice ruling.

Factor 2

The scope and depth of that dishonesty found to have been deployed by the claimant. Widespread and gross dishonesty being more weighty against a finding of substantial injustice than moderate or minor dishonesty.

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Factor 3

The effect of the dishonesty on the construction of the claim by the claimant and the destruction/defence of the claim by the defendant. This would be measured by considering all matters including the costs consequences of the work done in relation to the dishonesty compared with the work done had there been no dishonesty.

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Factor 4

The scope and level of the claimant's assessed genuine disability caused by the defendant. If the claimant is very seriously brain injured or spinally injured, then depriving the claimant of damages would transfer the cost of care to the NHS, social services and the taxpayer generally and that would be more unjust than if the claimant had, for instance, a mild or moderate whiplash injury. The insurer of the defendant (if there is one) has taken a premium for the cover provided. Why should the taxpayer carry the cost?

Factor 5

The nature and culpability of the defendant's tort. Brutal long term sexual abuse, intentional assault or drug fuelled, dangerous driving being more culpable than mere momentary inadvertence.

Factor 6

The Court should consider what the Court would do in relation to costs if the claim is not dismissed. The Judge should ask: will the Court award most of the trial and/or pre-trial costs to the defendant in any event because fundamental dishonesty has been proven? Also, will the claimant have to pay some or all of his/her own lawyers' costs out of damages if the claim is not dismissed? These both aim towards answering the question: "what damages will be left for the claimant after costs awards, costs liabilities and adverse costs insurance premiums are satisfied?" If the genuine damages to be received by the claimant will be substantially reduced or eradicated by the adverse costs awards, then it is less likely that SI will be caused by the dismissal.

Factor 7

Has the defendant made interim payments, how large are these and will the claimant be able to afford to pay them back?

Factor 8

Finally, what effect will dismissing the claim have on the claimant's life? Will she lose her house? Will she have to live on benefits, being unable to work?

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Shaw v Wilde [2024] EWHC 1660 (KB)

I have found that Mr Shaw has a limited earning capacity. If his claim is dismissed, he will not earn as much as he would have done if he had not been injured, and he will not be compensated for those losses. He will, however, have the same state support as the victim who has no solvent tortfeasor to sue.

Fundamental Dishonesty & Indemnity Costs

Hiren Thakkar and Ors v AXA Insurance UK PLC [2024] EWCA Civ 552

Should indemnity costs be payable where allegations of FD/fraud are made and fail?

https://www.dekachambers.com/wp-content/uploads/2024/06/PI-Briefing-June-2024.pdf

The article is titled ‘Something for Everyone OR Sauces For Geese’. With good reason.

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There is no starting point or presumption of indemnity costs.

Defendant's best argument: In order for there to be an award of IC, there must be *conduct or circumstance which takes the case out of the norm* and that paying party *must surmount a high hurdle* (note: 'out of the norm' does not necessarily mean something that happens rarely)

Claimant's best argument - A 'statement of the obvious' – "*because the making of a dishonest claim will very often attract an indemnity costs order against a claimant, a failed allegation of dishonesty will very often lead to the making of an indemnity costs order against the defendant, on the simple basis that "what is sauce for the goose is sauce for the gander*".

Fundamental Dishonesty & Interim Payments

Is it appropriate for a court to make an order for interim payments where FD has been alleged?

Qaisar Mehmood (by his litigation friend Mrs Asma Islam) v Harry Mayor [2024] EWHC 1057 (KB)

The Civil Procedure Rules 25.7(1) and 25.7(4)

CPR 25.7(1) The court may only make an order for an interim payment where any of the following conditions are satisfied –

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;

(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim.

CPR 25.7(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

Master Fontaine's comments

Master Fontaine said that: *the issue as to whether the Claimant is exaggerating the effect of his injuries, and if so, whether he is being fundamentally dishonest in so doing, can only be resolved at trial when the oral evidence of the medical experts and of the witnesses of fact is heard. That is not an issue that can be resolved on a summary basis with only documentary evidence.* (para 25)

And, at para 26: *The range of what the Claimant may expect to recover is from nothing to the full amount he is seeking. There is no "irreducible minimum" as referred to in Chiron Corporation & Ors v Murex Diagnostics Limited (No 13) [1996] FSR 578 and Trebor Bassett Holdings Limited v ADT Fire & Security plc [2012] EWHC 3365 (TCC) per Coulson J. at [13]. Thus, it is not possible for the court to conclude, in accordance with CPR 25.7(4), what would be "a reasonable proportion of the likely amount of the final judgment".*

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Thank you for your attention.

Questions?

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