SAR-V1

IN THE LAMBETH COUNTY COURT **CASE NO: B15YP428**

B E T W E E N :

DELWAR HUSSAIN

Claimant

-and-

DAVID BRADFORD

First Defendant

and

EURONEX RENTALS LIMITED

Second Defendant/ Third Party

JUDGMENT OF DISTRICT JUDGE BURN ON THE HEARING OF AN APPLICATION BY THE FIRST DEFENDANT FOR A COSTS ORDER AGAINST THE THIRD PARTY ON 12TH MAY 2017

The Application

1. This is an application by the first Defendant's insurer (D1) issued on 8th October 2016 that the second Defendant and third party (D2), a credit hire company who hired a replacement vehicle to the Claimant following a road traffic accident on 20th October 2014, shall pay the D1's costs of the Claimant's claim for damages and of this application. The road traffic accident claim was heard by me at Central London County Court on 21st

September 2016 and was dismissed. The credit hire element was £50,834.89 out of a total claim of £73,383.39.

2. D1 says that the qualified one-way costs shifting that applies in personal injury claims so that losing claimants do not pay successful defendants costs (QOCS) should be disapplied, that the costs order against D2 should be enforced in full, and should be assessed on an indemnity basis. The main points made in D1's application were that:-

   (a) The credit hire claim was fundamental to the claim and was made for the financial benefit of D2, the credit hire company.

   (b) The Claimant relied upon a witness statement from a Mr Davison of D2 on spot hire rates "which was misleading and fostered a grossly inflated claim".

   (c) On the balance of probabilities the Claimant's claim was fundamentally dishonest both in respect of the circumstances of the accident and the claim for credit hire.

   (d) The inflated credit hire claim was likely to obstruct the just disposal of the proceedings which would allow the court to disapply QOCS under CPR 44.15(1)(c).

Response

3. D2's response, initially in a witness statement of Mr Uddin, a director, dated 21 December 2016, seemed to be that:-

   (a) D2 did not fund or control the Claimant's claim, a case management company not connected to D2 recommended the Claimant's solicitors, Dunne & Gray, to the Claimant, who then contacted D2 to provide a replacement vehicle. The Claimant was given no indemnity by D2, and D2 did not influence the Claimant during the litigation.

(b) Mr Davison produced a witness statement on comparative hire rates, but the judge did not find that he made up the figures, lied to the court or acted dishonestly: rather his evidence was not accepted and his comparisons were found to be inappropriate.

(c) Clause 6 of the Claimant's agreement with D2 gave D2 the right to pursue an action in his name, clause 11 required the hirer to allow his name to be used to enforce any right, and clause 28 authorised the hirer's solicitors to pay any money received in damages to D2 on account of the hire charges. Those clauses were not used in this case.

The Main Facts of Hussain v Bradford

4. The Claimant alleged he was stationary in a queue of traffic behind the Defendant, and the Defendant reversed back into him, apparently when he was trying to do a U-turn. The Defendant alleged that he was stationary in the queue of traffic, was not attempting a U-turn and the Claimant drove into the back of his stationary vehicle.

5. The Claimant claimed for a whiplash-type personal injury, the value of his car a Ford Focus £1,625, the credit hire £50,834.89, recovery of the vehicle £354, storage £17,670, and for physiotherapy and cognitive therapies £1,380 and £760 x 2. A counterclaim was brought by the Defendant but was dealt with between the parties, and was not before the court at trial.

6. The trial took place before me on 11th August 2016 at Central London County Court and I reserved judgment. This was handed down on 21st September. I dismissed the Claimant's claim because I preferred the evidence on liability of the Defendant rather than the Claimant and said:

> *"The parties gave very differing accounts of the accident. The Claimant that the Defendant reversed into the front of his stationary car, the Defendant that the Claimant drove into his stationary car waiting in a queue".*

Both accounts could not be right or even partly right. I found that the Defendant's version was more probable, gave eight reasons for so finding, and found that the Defendant was the more credible witness.

The Credit Hire Claim

7. The credit hire claim was for hire of a Mercedes A class for 395 days at a daily rate of £96.12, plus CDW and VAT, a total of £128.70 per day.

The Witness Statement of Mr Davison of Euronex dated 11th April 2016

8. He said he had carried out spot hire research in February 2016 on the internet for a Ford Focus in the Barking area for periods of one day, one week, one month or 395 days, and quotes were obtained from three companies which gave daily rates of Avis £125.57, Budget £104.32, Hertz £122.96, compared with Euronex £96.12. These quotes were all from providers at City Airport, not other locations in East London. Mr Davison argued that Euronex offered the Claimant the best value for money and had saved the Claimant £5.37 per day.

9. The Defendant's spot hire evidence was in a witness statement from Mr Adams of WhichRate dated April 2016. There were quotes from Thrifty, Sixt, Enterprise and Avis in different locations in East London on daily, weekly and 88 day hire periods, all for a Ford Focus, with daily rates varying between £36.99 and £74.64.

10. In submissions at trial D1's Counsel commented that the Claimant's witness was not independent as he was employed by the credit hire company D2, and, made false and profoundly misleading comparisons by quoting D2's daily rate, excluding CDW and VAT, not the true rate of £128.70. Also his comparators were all for the expensive City Airport location, while the Defendant's spot hire evidence was independent and used 2014 data, from more reasonable locations, including all the extras.

11. My relevant findings on the credit hire part of the claim were that:-

(a) While the Claimant had established the need for a replacement car, there was no need for a Mercedes A Class, as his was a Ford Focus, and there were serious doubts about his impecuniosity. Therefore if he had succeeded on liability I would have allowed a claim only at a spot rate of £30.22 per day, and only for 110 days, which would have been a total of £3,324.

(b) I also agreed with the D1's Counsel's submissions that Mr Davison's evidence was not independent and that he made false comparisons between the D2 rate without the extras, and the rates for expensive City Airport locations, which included all the extras. But I did not make any findings of dishonesty by Mr Davison, who did not give evidence at trial.

The Subsequent Proceedings Involving Euronex

12. An oral application by D1 for the Claimant to be held to be fundamentally dishonest and for QOCS to be disapplied, was intimated after judgment was handed down on 21st September 2016, but because the Claimant was absent. I ordered that any application must be in writing on notice. D1 duly made this application on notice in October 2016, which included for D2 to be made a party, for a non-party costs order.

13. On 23rd November 2016 I gave further directions on the application listing a hearing on 4th April 2017 and directing D2 to respond by 23rd December (the Claimant had already been directed to respond by 25th November).

14. On 19th December D2's solicitors sent a notice of acting to D1's solicitor and to the court. Around 22nd December they apparently posted their response to the application to D1's solicitor and to the court. The witness statement of Mr Uddin was technically one day late, but anyway, for whatever reason, it did not make its way to the court file or to D1 (it is possible that it was sent to Central London County Court where the claim was originally heard, but I had returned to my base court of

Lambeth in October 2016, and the file remained here to the best of my knowledge).

15. On 30th January 2017, because the Claimant had not responded to the court, and because it appeared that D2 had not responded either, I granted D1's application on the papers and relisted the hearing on 4th April for an assessment of costs only with a reduced time estimate, but on 16th February 2017, the day on which D2 knew of my order, they applied for relief from sanctions and for a variation of the order. That application was listed by the staff to be heard on 4th April. Both parties were represented by Counsel then and since. On 3rd April D2 served a skeleton argument (without any supporting authorities) to resist D1's application.

16. On 4th April I granted D2's relief from sanctions application and set aside the costs order made against them, but because of the late service of D2's skeleton and their even later provision, only at court of copies of the long judgment in an unreported similar case **Nathanmanna v UK Insurance Company Limited v Euronex Rentals Limited (DJ Avent Central London County Court 14th June 2016)**, I adjourned further consideration of the Defendant's application to 12 May with a time estimate of 1 day. The order of 30th January remained in place with regard to the Claimant, leaving only the issues concerning D2 to be determined.

17. The bundle for the hearing on 12 May was not paginated but ran to several hundred pages and included 6 authorities. I heard Counsel's oral submissions in half a day but the careful consideration of the papers and drafting this reserved judgment meant that the time estimate was greatly exceeded.

The Implementation of the QOCS Rules into the Civil Procedure Rules in April 2013

18. At the outset of this hearing I made Counsel aware that in 2012/2013 I was a District Judge member of the Civil Procedure Rule Committee and

indeed of its QOCS sub-committee, and, therefore, was involved in a number of discussions about and the drafting of the new Rules CPR 44.15-16. The interpretation of which are at the heart of this case From the records which I had retained and my recollections I informed Counsel of the following:-

(a) That the Civil Justice Council and the Rule Committee had hoped that the Ministry of Justice would set a clear policy in relation to QOCS for "mixed claims" i.e. where other persons but the claimant had some financial interest in the damages, but that did not happen.

(b) There was a wide range of views expressed about mixed claims in various papers considered, and in discussions including that:-

(i) vehicle damage and credit hire elements of RTA claims should be completely excluded from QOCS;

(ii) QOCS might apply to any non-personal injury element of those claims that was integral to or directly consequential upon the personal injury;

(iii) QOCS protection might only be removed when the personal injury element was de minimis and not the primary purpose of the proceedings; or

(iv) it should be left to the discretion of the court to "apportion appropriate protection in individual cases".

But in the event the final version of the rule and practice direction is probably closest to (iv).

(c) To the best of my recollection the relationship between the disapplication of QOCS and the authorities decided under Section 51 and CPR 46.2 was not specifically discussed by the Committees, and neither was the meaning of the term "financial

benefit", as opposed to "financial interest", which was the term frequently used in the authorities.

The Law

Costs Against Non-Parties: Section 51 of the Senior Courts Act 1981 and CPR 46.2

19. Section 51 says:-

> (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –
>
> ...
>
> (b) any county court;
>
> shall be in the discretion of the court.
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

20. CPR 46.2(1) reads:-

> Where the court is considering whether to exercise its power under Section 51 to make a costs order in favour of or against a person who is not a party to the proceedings that person must:
>
> (a) be added as a party 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.

Authorities under Section 51 and CPR 46.2

21. These are relied on mainly by D2.

Giles v Thompson [1994] 1 AC 142

22. This is a decision of the House of Lords which prima facie is binding upon this court. In **Giles** the accident took place on 22nd August 1991, the claimant sustained a whiplash, her vehicle was damaged and

needed repairs. After a week a replacement was provided by Forward Hire Limited under a written contract which provided for the claimant to have a car on credit hire because hers was unroadworthy as a result of the accident. The contract gave the hire company the right to appoint its own solicitors to pursue an action in the hirer's name against the third party, including in the County Court, that the hirer must co-operate in the conduct of that action, and that if the hirer was in default of that condition the credit allowed by the company would be terminated and the hire charges would become due from the hirer. The claimant also signed a document confirming that the hire company may appoint a solicitor to act on her behalf for the recovery of her losses and they would have her authority to commence proceedings, including for the recovery of the car hire charges.

23. In the conjoined case of **Devlin** the defendant drove into the back of the claimant's car in circumstances which left no doubt as to liability. The claimant sustained typical whiplash injuries, the car was damaged and a replacement vehicle was made available by First Automotive Car Rental. The conditions of that agreement were quite similar to those in **Giles** with the addition of the claimant authorising the third party to release to her solicitors a separate cheque to be made payable to First Automotive Car Rental in respect of the hire charges.

24. Lord Mustill dealt quite succinctly with whether such arrangements gave the credit hire company an interest in the sums recovered by the claimant. He said that they had none. Neither the contract nor the forms of authority purported to create a charge on the proceeds of claim or the damages for personal injuries, and there was no assignment of the proceeds, or of the cause of action itself. The form of authority was merely "a mechanism" designed to ensure that once the claimant was put in funds, the appropriate part of them reached the hire company. He also added that the position was simply that the success of the credit hire part of a claim would equip the claimant with extra money from which the hire charges could be satisfied.

Deutsche Bank v Sebastian Holdings (d1) and Vik (d2) [2016] EWCA Civ 23

25. In this case the claimant bank succeeded in an action against d1 for $250,000,000, and was awarded 85% of its costs on an indemnity basis. d1 did not pay. The claimant applied successfully to join d2 for costs purposes. He was the sole shareholder and director of d1, who the judge found had controlled and funded the litigation, and he ordered d2 to pay the claimant £36m on account. d2 lost his appeal. The Court of Appeal said:-

    (a) Third party cost cases should be summary in nature with the judge making an order based on the evidence given, the facts found at trial together with an assessment of the behaviour of those involved.

    (b) A failure to warn a party that an application for costs might be made against him was no more than a factor to be taken into account.

    (c) The exercise of a discretion to make a costs order against a non-party was in danger of becoming overcomplicated by authority: the only principle is that the discretion must be exercised justly.

    (d) There needs to be a close connection between the claimant and the non-party by funding, control or benefit.

Goodwood Recoveries v Breen and Breen v Slater [2005] EWCA Civ 414

26. In this case Slater and his wife owned the Recoveries company, which operated in debt recovery. The company bought a £17,000 debt owed by the defendant, from the Official Solicitor. At the trial the judge was very critical of Mr Slater, found him dishonest in failing to disclose documents, lied in evidence and attempted improperly to persuade a witness not to give evidence for the defendant. The claim was dismissed

and Mr Slater was ordered to pay all the costs on an indemnity basis. He lost his appeal. The Court of Appeal said:-

(a) Costs could be awarded against a director or shareholder who controlled and supported an action brought by a company in which he had an interest if he was the real party for whose benefit the litigation was brought.

(b) Slater was the real party in the case and the whole of the costs had been caused by his dishonesty.

(c) It was not necessary to rule on the question of whether Mr Slater's conduct was the cause of all the costs incurred or whether only additional costs could be attributed, since all the costs were in fact directly attributable to his conduct but in general there must be a causal link between the costs incurred and the parties' conduct.

Farrell and Another v Direct Accident Management Services Limited [2009] EWCA Civ 769

27. An award of 80% of costs was made against the defendant credit hire company on the basis that the claim was in reality pursued for their benefit. The decision turned very much on its own facts: the credit hire company had not only funded the litigation through a collective CFA, but had been appointed to manage the claim as well. It was held that the initiation and prosecution of the claim was the direct consequence of the hire by the defendant to Mr Farrell, the claim was prosecuted by solicitors in the names of Mr Farrell (and Mr Short) at the behest of the defendant, and it was a natural inference that the proceedings were pursued and later discontinued with the knowledge and approval of the defendant, who was in control of the litigation.

The Status of Practice Directions

28. Civil Procedure Act 1997 Section 5 provides that:-

(1) Practice Directions may be given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.

(2) Practice Directions given otherwise than under SubSection (1) may not be given without the approval of the Lord Chancellor and the Lord Chief Justice.

Part 1 of Schedule 2 provides:-

(I) It is for the Lord Chief Justice or a judicial officeholder he nominates with the agreement of the Lord Chancellor to make or give designated Practice Directions.

29. In **Bovale Limited v Secretary of State for Communities and Local Government [2009] EWCA Civ 171** it was held that a judge is bound to recognise, and has no power to vary or alter, any Practice Direction whether brought under the Section 5(1) or the Section 5(2) procedure. Practice Directions are binding on the court to which they are directed. It cannot be open to another judge to ignore a Practice Direction.

The Relevant Civil Procedure Rules on QOCS introduced in April 2013

30. CPR 44.13 provides that the subsequent rules apply to claims for personal injuries. 44.14 provides that orders for costs against a claimant may be enforced without the permission of the court only when they do not exceed the amount of damages and interest and only after the proceedings have been concluded and the costs assessed.

31. CPR 44.15 and 44.16 set out the exceptions to QOCS. 44.15 allows for costs orders against a claimant to be enforced without the court's permission where the proceedings have been struck out because there were no reasonable grounds to bring the claim, or they were an abuse of process, or where the conduct of the claimant or a person acting on their behalf or with their knowledge, was likely to obstruct the just disposal of the proceedings.

32. CPR 44.16 provides:-

(ii) orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court 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 Accident Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(iii) 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. CPR 44 Practice Direction paragraph 12.2 states:-

"Examples of claims made for the financial benefit of a person other than the claimant are subrogated claims and claims for credit hire".

34. *CPR 44 Practice Direction paragraph 12.5 states:-*

"The court has the 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:-

(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 exceptionally make such an order permitting the enforcement of such an order for costs against the claimant".

Nathanmanna v UK Insurance Company Limited v Euronex Rentals Limited Judgment No 2 of District Judge Avent Central London County Court 14th June 2016 (not reported)

35. This is the only known judgment following the implementation of the QOCS Rules in the CPR in April 2013, on applications by a defendant insurer under CPR 44.15 and 16 to enforce a costs order against a claimant and against a third party credit hire company. It followed a trial on 5th May 2016 in which Euronex were represented by Counsel, Mr Hogan as in this case. Judge Avent's judgment is more than 40 pages long, with 179 paragraphs. It is not binding on me but it is based on a very full summary and analysis of the introduction of QOCS, CPR 44.15 and 16, CPR 46.2, S.51 of the Senior Courts Act and the authorities decided under that Act, and essentially covers the same territory as this case.

36. The factual basis was similar. A road traffic accident on 21st June 2013 in which the claimant allegedly suffered a whiplash, hired a replacement car from Euronex at a cost of £47,850, with a total value of the claim pleaded at £60,000. However, the claim did not proceed to trial as it was struck out on 12th May 2015 for the claimant's and his solicitors' repeated failures to comply with directions for disclosure, for which relief from sanctions was refused on 23rd November 2015. As in this case, the defendant only sought costs against Euronex at that stage.

37. A large part of the judgment concerned the defendant's application to enforce a costs order against the claimant (which I have not had to deal with at this hearing). With regard to the claim for costs against Euronex the main points in DJ Avent's analysis and conclusions were:-

    (a) This largely turned upon the construction of what is:-

        (a) a "financial benefit" particularly in the context of mixed claims, where arguably some of the benefit was for another person other than the claimant.

(b) Although whether a credit hire company is "a person" for the purposes of the Rules was not argued before him, he concluded they were by analogy of other uses of the word "person" in CPR 19 and 46.2.

(c) He noted that PD 44 specifically gave an example of financial benefit to another person of credit hire, that financial benefit is not defined in the CPR, but it must be intended to have a particular meaning, which may be broader than financial interest.

(d) With regard to Section 51 and **Giles** and the related cases, it was held that a credit hire company had to have a legal or equitable interest in the claimant's damages for the defendant to succeed in an application for a third party costs order, but if there was no charge over the damages or an assignment of them to the credit hire company that interest did not exist.

(e) The Judge suggested a financial benefit as opposed to a financial interest could arise in three different ways:-

(i) when a credit hire contract gives rise to a debt and an obligation on the hirer to repay the hire charges and the debt crystallises when the damages are awarded;

(ii) in a subrogated claim because the hirer receives the benefit of a vehicle to use for which he does not pay until he is reimbursed by damages;

(iii) that the ordinary meaning of financial benefit is "profit" which in most cases credit hire companies do make on their hire charges, but that could not be certain in an individual case.

(f) But he noted that none of these situations were raised or fully argued before him so he felt he could not determine with any

certainty whether the proceedings included a claim which is made for the financial benefit of Euronex, so he could not be satisfied the defendant had made out their case, especially as the case law under Section 51 requires that a non-party has funded or controlled the proceedings, which Euronex had not done here.

(g) He also added that:-

(i) in an application of this type the non-party should be put on written notice within a reasonable time of the issues which might lead to a costs order to enable the non-party to take account of the risks during the litigation;

(ii) the fact that the claim was not successful cannot be used to argue that Euronex should be absolved from paying any costs as they stood to benefit if it had succeeded and credit hire was a major part of the claim, even if that was not a financial benefit within the meaning of CPR 44.15(2)(a);

(iii) if the claim had succeeded an order for Euronex to pay 80% of the Defendant's costs would have been reasonable.

38. This case has not been reported and the judgment was not appealed.

Submissions

For D1 on CPR 44.16 and on Euronex's Conduct in the Proceedings

39. D1's Counsel argued:-

(a) by CPR 44.16(2)(a) QOCS can be disapplied for a claim which is made for the financial benefit of a person other than the claimant; and

(b) by CPR 44.16(3) the costs order can be made against the other person for whose financial benefit the claim was made; and

(c) the credit hire aspects of a primary claim are claims made for the financial benefit of a person other than the claimant:-

(i) by the express definition in CPR 44 PD12.2; and/or

(ii) by the natural meaning of the language in that the credit hire claim was brought so that monies would be recovered to be paid to Euronex, which monies would have been self-evidently a financial benefit to Euronex;

(d) and so QOCS can be disapplied in the present circumstances and a costs order made against Euronex.

40. Next, as to whether QOCS *should* be disapplied and whether a costs order *should* be made, D1's Counsel submitted that both should happen because:-

(a) CPR 44 PD 12.5 says that that is what should usually happen for a claim brought for the financial benefit of another; and/or

(b) Mr Davison's witness statement was profoundly misleading or fostered a grossly inflated hire claim of over £50,000 when the Claimant would only have been awarded £3,324 had the claim succeeded. He noted that the D1's submissions in this respect have not been countered by any statement from Euronex or Mr Davison to the effect that Mr Davison's statement was honestly believed by him or was reasonable. Mr Uddin's statement did not assert that. Mr Davison's intermeddling was contrary to the overriding objective and was likely to have obstructed the just disposal of the claim, and so it would be just and appropriate for QOCS to be disapplied. Further, because of Mr Davison's standing as a representative of Euronex, his intermeddling was Euronex's

intermeddling, so it would be just for costs to be ordered against Euronex.

41. He further submitted that Mr Davison's witness statement was fundamentally dishonest (because of the sleight of hand and obfuscation in his calculations, and because no-one involved in the workings of the credit hire market, as Mr Davison was, can have honestly believed that credit hire could ever offer "the best value for money," as he said.). But fundamental dishonesty is not a necessary condition for an enforceable costs order under CPR 44.16(2)(a) and 3. Instead Mr Davison' statement and Euronex's conduct were intermeddling in the Claimant's claim, such as were likely to have obstructed the just disposal of the proceedings and which, therefore, should make it entirely just and appropriate for an enforceable costs order to be made against Euronex.

On Behalf of D2 Euronex

42. The power of the court to make costs orders against non-parties is derived from Section 51 of the Superior Courts Act and CPR 46.2 and covers all types of claims. The concept of financial benefit has its origins in the case law under Section 51. When QOCS was introduced in April 2013 there was a need for the CP Rules to explain how disapplying QOCS would work alongside Section 51 and 46.2.

43. It is clear from Lord Mustill's decision in **Giles v Thompson** that there needs to be unlawful support of an action by a non-party by funding it or intermeddling in it, or through taking a charge on the damages or an assignment, and acquiring a financial interest in and benefit from the litigation, before a costs order might be made against that non-party. That did not apply in the case before him and no costs order was made against the credit hire company, where the terms of the agreement were not very different from the instant case.

44. CPR 44.16(2) provides a "toolbox" for the court to choose from in personal injury cases where other persons have a financial interest in the case. (2)(a) excludes from a disapplication of QOCS specific claims

for gratuitous care, earnings paid by the claimant's employer and medical expenses (which might be paid through an insurer and therefore be a subrogated claim). (3) gives the court a discretion to make costs orders against other persons for whose financial benefit the whole or part of the claim was made, without attempting to define by category to which persons this might apply or when.

45. PD 44.12.2 gives examples only of other subrogated claims or credit hire. But a Practice Direction cannot repeal or rewrite statute or the common law. It does not have statutory force and cannot override a decision of the House of Lords. This must mean that credit hire claims may fall within 44.16 if the credit hire company has a charge over the damages or an assignment but not otherwise.

46. Only if a defendant can persuade the court that CPR 44.16 introduced a new special concept of financial benefit can the court decide it has discretion to make a costs order against a credit hire company other than following the guidance in **Giles v Thompson**.

47. Any application to make a costs order against a non-party is made under Section 51 and CPR 46.2. The **Deutsche Bank v Sebastian Holdings and Vik** case is a recent example in which the previous law was thoroughly reviewed. On the facts Vik was the alter ego of the defendant company and the paymaster of the litigation. He funded and substantially controlled the proceedings and therefore benefited from them, and making a costs order against him was entirely appropriate.

48. In personal injury claims with a credit hire element the claimant owns the damages, not any third party to whom the claimant might owe money. They are not direct claims by the credit hire company. It is also necessary under the Section 51 case law including **Deutsche Bank** and **Goodwood Recoveries**, to establish a causal link between the costs incurred and sought to be recovered by the third party's conduct.

49. In this case Euronex did not fund or control the litigation and has no charge against or a right to take an assignment over the Claimant's

damages. All of this Mr Uddin stated in his witness statement of 21st December 2016. The witness statement of Mr Davison is a red herring – it occupied two paragraphs in the judgment, and there was no finding by the judge that he was dishonest or made up the figures, only that his comparisons were not sound and his submission that the credit hire was the best value for money for the Claimant was not made out. Any costs attributed to this evidence are de minimis. Euronex had no legal or equitable interest in the Claimant's damages and therefore the personal injury claim was not brought for Euronex's financial benefit, even despite paragraph 28 of the agreement, a similar form of authority clause to the one Lord Mustill described in **Giles** as "a mechanism".

50. DJ Avent was correct to dismiss the Defendant's application for a costs order against UK Insurance in a similar case to this. He was correct to say a credit hire arrangement creates a debt or obligation to pay which crystallises when damages are awarded to the Claimant but not to suggest the credit hire company has a contingent interest in the damages unless that can be enforced by a charge or assignment. Credit hire is not a subrogated claim as it is not insurance, it is a contract to hire a vehicle with payment deferred. And while it is true that credit hire companies are in business to make a profit, the court has no jurisdiction in an individual personal injury claim to enquire into the overall financial health of a company, whether it has made a profit in the last year or will in the particular case. Also, UK Insurance did not argue in that case that the claim was brought for their financial benefit.

51. If the court is minded to make a costs order against Euronex in this case it should not be done on the basis that the credit hire claim of £50,000 was the largest element of the potential damages. The approach should be by how much the credit hire part of the claim and/or Mr Davison's evidence increased the work and costs involved, and on the facts this must have been a small percentage of the costs.

52. Also, the court can take into account that the Defendant's application has come very late after the litigation was concluded and with no prior

intimation that it might be made, to enable Euronex to consider whether they should apply to be made a party during the proceedings.

53. Finally, it is not clear what the Government and the Rules Committee were trying to achieve by the mentioning of credit hire as an example of the financial benefit to a person other than the claimant in CPR 44.16. What was or is the mischief being addressed? A Practice Direction cannot make new law, so a cost order can only be made against a credit hire company if the tests set out in the case law under Section 51 are met, and they are not here.

The First Defendant's Reply to Euronex Resistance to the Application

54. Euronex cite various authorities to try to demonstrate that a third party or non-party costs order cannot be made without a close connection between the Claimant and Euronex, or the control or funding of the litigation by them. Were those or similar to be requirements in the present application, a close connection between the Claimant and Euronex would anyway be demonstrated by Mr Davison's involvement in the case and his production of his witness statement, however it is submitted that these are not necessary conditions for the present application.

55. The authorities relied upon by Euronex do not concern QOCS or CPR 44.16(2)(a) or (3). Whatever requirements or restrictions may apply elsewhere for third party or non-party cost orders, the present application is not made under those authorities but is made under CPR 44.16(2)(a) and (3). Any non-QOCS authorities are no longer applicable because the common law and any statutory interpretation expressed within those authorities has insofar as may be relevant, been abrogated by the Civil Procedure (Amendment) Rules 2013 which implement the present Parts 44 and 46 into the CPR. These provide new grounds for third party or non-party costs order. If there was in the previous jurisprudence a restriction precluding a third party or non-party costs order against

someone merely for whose financial benefit the claim was made, such restriction was for present circumstances removed by CPR 44.16(3).

56. It is accepted that CPR 44.16(3) is subject to CPR 46.2 and is ultimately founded on Section 51 of the Senior Courts Act 1981 but:-

    (a) CPR 46.2 imports only procedural requirements that any contemplated non-party must be joined as a party to the proceedings for the purposes of costs, and that they should have a reasonable opportunity to attend the hearing at which the court will consider the matter further. Both of these procedural requirements have been fulfilled here.

    (b) Section 51 of the SCA 1981 provides that the court shall have full power to determine by whom and to what extent the costs are to be paid. This is a very wide power.

57. In summary CPR 44.16(3) provides a new additional basis of "financial benefit" upon which a costs order can be made against a third party/non-party. This is another aspect of the quid pro quo of QOCS otherwise protecting personal injury claimants and denying defendants the costs to which they would otherwise have been entitled.

58. Clearly, the credit hire aspects of the claim were for the financial benefit of Euronex because:-

    (a) Whether or not Euronex has an interest in the claim or any damages or whether or not they controlled any litigation or funded it, the intention of the litigation was that monies would be recovered from the defendant and would then be passed on to Euronex. On any normal and reasonable interpretation of the words that was to be a financial benefit.

    (b) Further, a credit hire claim is explicitly defined as being for the financial benefit of the credit hire company by CPR 44 PD12.2.

59. Euronex's submission that a Practice Direction is simply a statement of the court's practice and does not have statutory force and cannot override decisions of the House of Lords, is incorrect because:-

(a) Practice Directions are made under delegated authority under Section 5 of the Civil Procedure Act 1997.

(b) Anyway, Euronex's cited decisions of the House of Lords determining what the common law is, do not define or restrict the CPR 44.16 definition of financial benefit, which is a new term introduced by 44.16(2)(a). There is nothing in any authority to require or allow this court to go against the natural meaning of those words. Therefore the court is invited to find that this claim was brought for Euronex's financial benefit.

60. The D1 has not claimed that a costs order should be made because Euronex controlled or funded the litigation. D1 seeks a costs order against Euronex on a different basis, namely under CPR 44.16(2)(a) and (3) because this claim was brought for their financial benefit.

61. Further, Euronex's submissions as to "but for causation" and that the claim would have continued to trial anyway, even without the inflated credit hire claim are ill-founded, are made without any evidence and so are made improperly. Settlement of the claim would have been far more likely without the additional £50,000 credit hire claim. That inflated claim and Mr Davison's witness statement at least are Euronex's intermeddling and the obstruction of just disposal of the claim, which is sufficient for a costs order against Euronex.

62. There was not any requirement for D1 to give Euronex any advance warning of the proceedings but they did have it because they:-

(a) provided the Claimant's car on a credit hire basis deferred until the conclusion of the litigation or other recovery.

(b) provided the Claimant with the required documentary evidence to try to prove his liability for the credit hire charge.

(c) through Mr Davison provided a witness statement for the proceedings.

63. As to the requirements for notice of the costs application under CPR 46.2, it is only that they be given a reasonable opportunity to attend a hearing at which the court will consider the costs application. Euronex and/or their solicitors received the Defendant's application on 24th October 2016, filed and served Mr Uddin's statement on or around 22nd December and then attended the hearing on 4th April at which today's hearing was listed. They have had reasonable notice of, and an opportunity to attend the relevant hearings.

64. Further, Euronex had knowledge of the issues in this case because it was a party in the **Nathanmanna** case.

65. DJ Avent's judgment is not binding on this court. This is not an appeal against his judgment. The court should decide the present application anew. Also, the application made against Euronex in that case was much broader because UK Insurance argued that:-

(a) Euronex had directly benefited from the Claimant's claim because of the credit hire agreement.

(b) Euronex had a right to be paid.

(c) Euronex had instructed the Claimant's solicitors (when they had not done so),

(d) Euronex possibly funded the claim (when they had not) and were the real party who drove the litigation (which was also not so).

66. Notwithstanding the foregoing, D1 "respectfully observed and submits" that DJ Avent's judgment is of no definitive guidance in the present application, not least because he said:-

"In the absence of what I regard as full argument I regret that I have been unable to reach any definitive conclusion to the question posed at the beginning of this judgment upon the construction and/or interpretation of the words financial benefit in CPR44.16(2)(a)".

Also it was not argued before him that CPR Regulations 2013 abrogated and surpassed any previous caslaw. Instead, he fell into error when he said by CPR 44.16(3) expressly recognising that the power derives from Section 51 SCA 1981, and that CPR 46.2 applies (which itself refers to Section 51 SCA 1981), the Practice Direction cannot then trump the jurisprudence under Section 51 and CPR 46.2, because it is not the Practice Direction that is trumping the previous jurisprudence, it is Rule 44.16(3) itself. That Rule brings in the term "financial benefit" and that Rule can and does trump the previous jurisprudence because it has been brought in by a statutory instrument. The law changed on 1st April 2013. Anyway, because CPR Practice Directions are made under statutory delegated authority, they can and do trump previous jurisprudence if necessary.

67. In the alternative whilst the precise details of Euronex's involvement in the actual conduct of the **Nathanmanna** case are not known to this Defendant, in the present case Euronex were heavily involved as set out above, including by the intermeddling of Mr Davison. Such conduct was likely to obstruct the just disposal of the proceedings and would therefore warrant a costs order against Euronex in the present case.

Submissions on the Assessment of the Costs

D1

68. Because of the dishonesty, or at least the exaggeration of Mr Davison's witness statement, D1 seeks that his costs be assessed on an indemnity basis. The Defendant seeks an order against Euronex for all of his costs because without the highly inflated credit hire claim, there may have been better prospects of the claim being compromised on a litigation risk

basis, thus avoiding the costs of the litigation. In the alternative it is open to the court to order against Euronex a lesser fraction of the D1's overall costs, perhaps in proportion to the pleaded credit hire claim as compared to the total claim. D1 will still seek that any proportion of costs be assessed on the indemnity basis.

69. D1 highlights also Euronex's conduct of the application and its ambushing of D1 and the court at the hearing on 4th April by only serving its skeleton argument on 3rd April, and by producing copies of the unreported case of **Nathanmanna** at court on the 4th, despite having had notice of the application since October 2016, and having been previously directed by DJ Burn to respond to it by 23rd December. The skeleton and the case of **Nathanmanna** should have been provided by 23rd December 2016. Had Euronex acted more timeously the hearing of 4th April may well have been effective to deal with this application and today's hearing could have been avoided. Such poor conduct by Euronex should also favour an award of costs at least of this application, again on an indemnity basis.

For D2 Euronex

70. The purpose of a costs order is to compensate the receiving party, not to punish the paying party. Indemnity costs should only be awarded in exceptional cases and this is not one of those. Assessing the costs based on the percentage of the damages has no logic. If any costs were awarded against Euronex it should be on the basis of the additional work and costs incurred in the litigation because of the credit hire claim.

Findings and Conclusions

71. There is no dispute that Euronex provided the Claimant with a replacement vehicle on credit hire, and that hire agreement was a disclosed document in the litigation. D1 does not dispute either that there is no evidence at all that Euronex funded or controlled the litigation, as the Claimant appeared to have instructed a solicitor independently of Euronex who was acting on a conditional fee agreement. The Claimant's

claim was for general damages for pain, suffering and loss of amenity, the value of his vehicle, its recovery and storage, and for credit hire. This was not, therefore, a claim for credit hire alone, although that was the largest element of quantum by far.

72. It is not disputed either that Euronex's other involvement in the case was the witness statement of Mr Davison on comparative vehicle hire rates to Euronex's. He was clearly not an independent reporter on hire rates, as is more usually the case in RTA credit hire claims, but an employee of Euronex. He also chose to only obtain *daily* hire rates and not rates for longer periods, and only from the expensive London City Airport location, not cheaper places in East London. He also made inappropriate comparisons between the rates he found and Euronex rates, in that in the former he included collision damage waiver and VAT, but in the latter he did not, which made it appear that the Euronex rates were cheaper than the alternatives, whereas in fact they were more expensive, by about £20 at least a day. He therefore concluded wrongly that Euronex had saved the Claimant money, and that Euronex's hire was "good value".

73. At trial Mr Davison did not give oral evidence, and I was not invited by D1 to make any finding that he was dishonest and I did not do so. Nor was I invited at the trial to conclude that Euronex or Mr Davison had "intermeddled" in the claim or "obstructed its just disposal" and again I did not do so.

74. It is very relevant to my mind that the Claimant lost this case on liability because I preferred the evidence of the Defendant to the Claimant. I found that the Defendant did not reverse into the Claimant, as he claimed, but that the Claimant went into the rear of the Defendant. In fact, I had no need to deal with quantum at all in my judgment, but did so for the sake of completeness, finding that the Claimant had established that he had a need for a replacement vehicle (but not an A class Mercedes), was not impecunious and therefore would not have succeeded in an award on the credit hire rates but only on the lower spot

hire rates, and for a shorter period, suggesting an award of just over £3,300.

75. The majority of the evidence, and the time at trial, was taken in considering liability, whereas consideration of the evidence in relation to quantum, including the credit hire aspect, took much less time.

76. CPR 44.16 allows the court in personal injury claims to make costs orders against a person other than the claimant for whose "financial benefit the whole or part of the claim was made" subject to Rule 46.2. Financial benefit is not defined in the CPR, in either the rules or a practice direction, or in the authorities to which I was referred under Section 51 and Rule 46.2.

77. PD 44 paragraph 12.2 gives subrogated and credit hire claims as examples of claims made for the financial benefit of a person other than the claimant, but goes no further in defining or suggesting in what circumstances credit hire companies may or may not become liable to a costs order under CPR 44.16.

78. The line of authorities under Section 51 and Rule 46.2 clearly point to the need for the third party to have been guilty of some conduct which caused or contributed to the claim being dismissed or struck out. In none of the authorities to which I was referred was a costs order made against a third party who only might have had a financial benefit if the claim succeeded. The authorities, which included **Giles** in the House of Lords, where the credit hire agreement was very similar to this one, also decided:-

    (a) that the credit hire company has to have taken a charge over the claimant's damages or had the right to an assignment before a costs order might lie against them;

    (b) the company or any other third party had to have funded or controlled the litigation;

(c) there needed to be a causal link between the third party's conduct and the costs incurred, and

(d) it was relevant whether the defendant had given prior warning to the third party of their intention to seek a costs order.

79. I can quite understand in this context why my colleague, District Judge Avent felt unable to conclude in the **Nathanmanna** case what the meaning of financial benefit was in the context of credit hire claims, and why he dismissed the application by UK Insurance to make a costs order against Euronex, although I accept that that application was broader than the one I have had to consider, and made unsupported allegations about the role of Euronex in that litigation.

80. My conclusion is that the D1's application in this case should also be dismissed because:-

(a) Euronex clearly did not control or fund this litigation.

(b) The *primary* purpose of the litigation was to obtain compensation *for the Claimant's* alleged injuries suffered in the accident, and to recover *his* financial losses including vehicle damage, recovery and storage of the vehicle, and the hire of a replacement. The claim was not brought only or specifically to recover monies to be paid to D2.

(c) The fact that the credit hire element was the largest part of the claim by value does not mean it was the focus of the claim or the driver of the litigation.

(d) I dismissed the claim because the Claimant failed to prove on the balance of probabilities that the Defendant's negligence caused the accident because I preferred the Defendant's version of events to the Claimant's.

(e) Euronex's role in the litigation was a relatively minor one. Their Mr Davison was a witness as to comparative hire rates. The

Claimant's solicitor must have decided to rely upon him, despite the lack of independence, and the obvious shortcomings in his witness statement. The credit hire claim was not lost because of those shortcomings, but because I dismissed the Claimant's claim in its entirety, and because the Claimant failed to prove he was impecunious, and therefore failed to prove he needed to rely upon credit hire for a replacement vehicle.

(f) I accept that Euronex did have a *financial interest* in the Claimant obtaining damages, not least because of clause 28 of their agreement, and in that sense stood to benefit financially from the claim if it succeeded, but because of the line of authorities under Section 51 including a decision of the house of Lords, I do not find that the claim was *brought for the financial benefit* of Euronex, as they did not have a charge over the damages, or an entitlement to assignment, and the credit hire was not the primary purpose of the claim.

(g) While the Civil Procedure Rules are secondary legislation approved by Parliament, I do not accept the submissions of D1's Counsel that CPR 44.16(2)(a) was *intended* to supersede the findings of the House of Lords in **Giles** (and the several other authorities referred to me under Part 51 of the Senior Courts Act and Rule 46.2) as the CPR rules do not state that, and are not even explicit about when a costs order might or should be made against a credit hire company. Also I as a former member of the Committee and of the QOCS Sub Committee at the relevant time have no record or recollection that was the intention.

(h) Practice Directions do not have the same status as Rules of court. I accept, of course, that provided they are made following the procedure set out in Section 5 of the Civil Procedure Act 1997, a judge is bound to recognise them and not ignore them. However, I do not accept the fact that CPR 44 PD 12.2 gives credit hire as an example of a claim made for the financial benefit of a person other

than the claimant, and that CPR 44 PD 12.5(a) states that 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, was intended to mean such orders would be made after April 2013 fairly automatically against credit hire companies, unless they had either funded or controlled the litigation, or their conduct in that litigation justified such an order.

(i) While the witness statement of Mr Davison in these proceedings could possibly be described as intermeddling, I do not find that it obstructed the just disposal of the claim. It was readily apparent to Counsel for D1 and to myself at trial that his evidence did not prove that the credit hire provided by Euronex was cheaper than the relevant spot hire rate, or provide good value for money. But Mr Davison was not at court and I was not invited then to make any findings about his or Euronex honesty or conduct and did not do so.

(j) While D1 might be correct in general that RTA personal injury claims settled more readily if they do not include relatively large credit hire claims, in *this* case settlement was not perhaps that likely when D1's accoun of the circumstances of the accident's completely contradicted the Claimant's.

(k) D1's application did comply with the requirements of R 46.2, but it is nonetheless relevant that D1 did not give D2 any notice of their intention to seek a costs order against them prior to October 2016, after the conclusion of the proceedings. When a party intends to allege dishonesty or conduct by a witness or non-party, in my view, fairness requires that early notice should be given of this.

81. Even if I had been persuaded that it was appropriate to make a costs order against Euronex, which I have not, it does not follow that it should not have been for the costs of the entire action or on an indemnity basis

when D2 did not control or fund the claim, which was not lost because of their conduct. I also do not accept that making an order on a percentage basis to reflect the percentage that the credit hire claim was of the total damages, is necessarily appropriate because that could greatly overstate the work and time involved for D1 and the court in dealing with the credit hire element. If a costs order had been justified in D1's favour in this case, in my view it would have been for only a small percentage of their costs, probably not exceeding 10%.

82. There is some substance in D1's criticism of D2's handling of the application in that their real grounds for opposing it only became apparent from the skeleton argument served on 3 April, the day before the listed hearing, and they only disclosed the very long and relevant Nathanmanna judgment at the hearing on 4 April. But there was not sufficient time allowed that day to hear submissions from both parties in any event, and the court certainly benefitted from the adjournment and did find some time to begin to get to grips with the extensive material in the hearing bundle before 12 May albeit I then reserved judgment.

83. I therefore dismiss D1's application for a costs order against D2.

84. Finally I will add that I would hope that the Civil Procedure Rule Committee might revisit the QOCS rules in the not too distant future, when a few more cases have been decided under CPR 44.16, when they might consider whether "financial benefit" should be defined and whether the rule might be more specific about the circumstances when a court should consider making a costs order against a subrogated insurer or credit hire company, particularly in the light of **Giles**, and the other authorities under S.51 .

26th May 2017
DISTRICT JUDGE BURN

Lambeth County Court