Neutral Citation Number: [2025] EWCA Civ 733

Case No: CA-2024-002511
CA-2024-002835

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COUNTY AT LEEDS
His Honour Judge Gargan, Case No G02YY259, on appeal from the County Court at Wakefield, Deputy District Judge Carson

AND ON APPEAL FROM THE COUNTY COURT AT CLERKENWELL & SHOREDITCH
District Judge Jeffs, Case No G81YJ019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2025

Before :

LORD JUSTICE COULSON
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE BIRSS

- -

Between :

Yehuda Tescher	**Appellant**
- and –	
Direct Accident Management Limited	**Respondent**
AXA Insurance UK PLC	**Appellant**
-and-	
Spectra Drive Limited	**Respondent**

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Roger Mallalieu KC (instructed by **Horwich Farrelly and Keoghs LLP**) for the **Appellants**
Benjamin Williams KC and Andrew Hogan for Direct Accident Management Ltd (instructed by **Direct Accident Management Limited**)
Benjamin Williams KC and Matthew Waszak for **Spectra Drive Limited** (instructed by **Mansfield Solicitors and Advocates Limited**)

Hearing dates: 7th and 8th May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Birss:

1. If a credit hire case fails, when and in what circumstances should the non-party credit hire company be made liable for the defendant's costs? That is the question in these two appeals. In each case, following a road accident, a claim was issued which included (at least) damages for personal injury and for credit hire costs. In each case, for different reasons, a costs order was made in favour of the defendant and against the claimant. However the effect of the Qualified One-Way Costs Shifting (QOCS) scheme is that such a costs order will not be enforced. The defendants each applied for a non-party costs order against the credit hire company. The two orders under appeal each refuse to make that order. The defendants appeal to this court, submitting that a non-party costs order ought to have been made. In one of the judgments under appeal, given the frequency of credit hire cases, the judge suggested that general guidance on these issues would be welcome.

2. Anecdotally, credit hire RTA cases represent a significant volume of the trial work of district judges, outside the small claims track. The evidence in this case bears that out. It includes a 2023 statement by the corporate group, which includes the credit hire company Direct Accident Management Ltd (DAML) as well as the solicitors Bond Turner, that they have on average around 10 barristers in court each day representing the group's clients. That amounts to well over a thousand cases a year just for that group. Since there were about 1,700 fast trial trials in 2023, this data corroborates the anecdotal impression that handling credit hire claims is a substantial undertaking for the county court, supporting the idea that general guidance on this issue would be worthwhile.

Tescher v Direct Accident Management Limited (DAML)

3. On 19 November 2018 the car being driven by the defendant Yehuda Tescher came into contact with a motorcycle being driven by the claimant Luiz Francisco Povoa Quesada. On 21 and 24 November 2018 the claimant signed successive credit hire agreements with DAML. The claimant brought proceedings. Proceedings were issued by his solicitors Bond Turner. The Particulars of Claim dated 28 October 2020 included a claim for general damages for personal injury, including whiplash, and for special damages of just over £22,000 in total, including £19,633.36 for credit hire charges for a period of 88 days. The credit hire charges represent over 85% of the value of the special damages claim. Liability was denied and, amongst other things, the Defence puts all aspects of the credit hire claim in issue. In the Reply, amongst other things the claimant pleaded a positive case that he was impecunious in the sense of *Lagden v O'Connor* [2004] 1 AC 1067.

4. The matter came for a trial on the Fast Track before District Judge Swan in the County Court in Clerkenwell & Shoreditch on 8 December 2022. The judge dismissed the claim and directed that the claimant pay the defendant's costs, not to be enforced without permission of the court pursuant to QOCS. DJ Swan also directed that DAML be joined as a second defendant for the purposes of costs and gave directions to facilitate resolution of an application for a non-party costs order.

5. The application by the (first) defendant came before District Judge Jeffs on 10 May 2023. By then evidence had been served in the form of a witness statement of Nicole Edwards, a legal executive at the first defendant's solicitors, and a witness statement

by Paula Levens on behalf of DAML. Ms Edwards' evidence exhibited a number of documents from DAML including a 2023 share prospectus for the AIM market for the Anexo group, of which DAML and Bond Turner are members. The prospectus describes the group as an integrated credit hire and legal services group focused on providing replacement vehicles and associated legal services to impecunious customers who have been involved in a non-fault accident. The reference to 10 barristers every day comes from this prospectus.

6. In his judgment DJ Jeffs dismissed the application for a non-party costs order essentially on the basis that he was not satisfied DAML was the "real party" and that the claimant had not established causation, i.e. that DAML had caused costs to be incurred which would not have been incurred as a result of its involvement. Mr Tescher sought permission to appeal. HHJ Saunders gave permission to appeal and transferred the appeal to this court.

AXA Insurance v Spectra

7. On 23 October 2019 a road accident took place in which the car being driven by the claimant Ms Nicola Smith was written off. On the day of the accident the claimant entered into a credit hire agreement with Spectra. The claimant, a district nurse, needed a car. On 28 October 2019 liability for the accident was admitted by AXA, the insurers for the driver responsible. The credit hire lasted for 89 days. On 13 February 2020 Ms Smith received a cheque for the value of the total loss of her vehicle (£2,550). On 24 August 2020 the claimant's solicitors DGM commenced proceedings directly against the insurers AXA under the European Communities (Rights against Insurers) Regulations 2002. The claim included general damages for whiplash and travel anxiety. As HHJ Gargan later held (at [22]) the claim for pain, suffering and loss of amenity (PSLA) was unlikely to exceed £3,800. Special damages of £16,160.94 were also claimed, the bulk of which was credit hire charges. The schedule of special damages includes a plea that the claimant is impecunious "and is therefore entitled to recover from the defendant the full credit hire rate". The Defence admitted liability, did not contend that the claimant had not suffered some loss in the context of PSLA but required the claimant to prove the nature and extent of the loss. As in the DAML case, in relation to the claim for credit hire charges all aspects were put in issue.

8. On 18th November 2020, AXA made a Part 36 offer in respect of the PSLA claim only for £2,750. DGM replied stating that it could not settle the claim on a piece meal basis and asking for an offer to settle the whole of the claim.

9. On 25 May 2021 Keoghs, the firm now instructed by AXA, wrote to DGM pointing out that the claimant had insured another vehicle within 10 days of the accident. Keoghs argued that this proved that the claimant's assertion that she needed a hire car for almost three months was false as she had an alternative vehicle available to her. The letter demanded that the claimant discontinue her claim or face a plea of fundamental dishonesty. The relevance of such a plea is that fundamental dishonestly is one of the exceptions in the QOCS scheme.

10. The claimant discontinued her claim on 28th May 2021. She later explained that she had simply done what her solicitors "told her" to do. The usual costs order under

CPR r38.6(1) followed, i.e. that the claimant pays the defendant's costs, subject to QOCS.

11. On 29 June 2021 AXA brought an application for two orders. One was an order setting aside QOCS protection on the grounds of fundamental dishonesty. The other was a non-party costs order against Spectra.

12. The application came before Deputy District Judge Carson on 18 February 2022. The claimant represented herself and each of Spectra and AXA were represented by counsel. The DDJ heard oral evidence from the claimant and Mr Louis Georgiou. Mr Georgiou is and was a director of Spectra. Mr Georgiou's cousins Michael and Sava Georgiou are or were also directors of Spectra and also directors of the company (Infinity) of which DGM was a trading name. In her oral evidence the claimant explained that she had felt pressured into discontinuing by DGM which had advised her that she risked going to prison at a time when she was experiencing personal difficulties. The DDJ decided that the claimant had not been fundamentally dishonest because the replacement car she had insured 10 days after the accident had not been available to her until she received the benefit of the total loss claim, and she had indeed used the hire car during the claimed period. The DDJ adjourned the non-party costs order. After a further hearing, further written submissions and a substantial delay in producing the reserved judgment, the DDJ circulated judgment on 1 March 2023.

13. An order was made in the defendant's favour requiring Spectra to pay 65% of the defendant's costs (amounting to £3,432). On appeal to HHJ Gargan, despite the sum at stake, the wider significance of the issues meant that the same leading counsel as appeared in this court also appeared below. The judge overturned various findings of fact by the DDJ, remade the decision and refused the defendant's application for a non-party costs order. In his judgment (at [173]) HHJ Gargan noted the early admission of liability and the relative size and importance of the credit hire claim, all the more so after the Part 36 offer in November 2020. He also held (at [173.6]) that there was no apparent need for Spectra to have day to day control over the litigation because it was likely to have been consulted and to have determined whether to accept any offer of payment from AXA for credit hire. Then at [173.7] while HHJ Gargan accepted that as a matter of law the claimant was liable for the credit charges, the commercial reality was that is was unlikely the claimant would be pursued for any shortfall in the sum recovered from AXA. In summary the judge concluded at [174] that Spectra was the principal beneficiary of the proceedings throughout.

14. Turning to causation, at [175] HHJ Gargan decided that Spectra was at least a cause of the costs incurred by AXA up to November 2020 (the Part 36 offer) and that after that, the underlying cause of the proceedings continuing was to establish the quantum of the vehicle claims and so Spectra was the primary cause of AXA's costs after November. In this context the judge then went on to address the DDJs' rejection of the allegation of dishonesty, holding at [175.4] that if the matter had gone to trial the claim would have succeeded in part and so, but for the discontinuance, AXA would have had to bear its own costs (and pay the claimant's).

15. In conclusion at [185] the judge decided that while there were some factors which distinguished this case from a standard credit hire claim and militated in favour of a non-party costs order, (i.e. the early admission of liability, the Part 36 offer on PSLA

and the significance of the vehicle claims), on the other hand what the judge called AXA's "good fortune in escaping a judgment and costs" was a factor which suggested that it would not be just to make a costs order against Spectra.

16. At [188] HHJ Gargan also suggested that it would be helpful to have clear guidelines on this issue for judges dealing with credit hire cases.

These appeals

17. Coulson LJ gave permission to appeal to this court in the Spectra case and directed that the two appeals, Spectra and DAML, be heard together.

18. The appellants contend that in both DAML and Spectra a non-party costs order against the credit hire company ought to have been made. The appellants do not challenge the findings of primary fact in each case, by DJ Jeffs in DAML and by HHJ Gargan on appeal in Spectra. A Respondent's Notice aspect in the Spectra case arises because, given the conclusions that Spectra was the principal beneficiary of the claim and the finding on causation, were it not for the point the judge made about AXA's good fortune, on a fair reading of the judge's judgment a non-party costs order would have followed in all likelihood. The Respondent's Notice challenges those conclusions such that, irrespective of the "good fortune" point, Spectra contends that no non-party costs order was warranted anyway.

The law

19. There are different strands of law to examine. I found the best approach was to work essentially in chronological order.

Credit hire in general: Giles v Thompson and Lagden v O'Connor

20. The House of Lords' decision in *Giles v Thompson* [1994] AC 142 is a convenient place to start. The credit hire agreements in that case were found not to be unlawful on the grounds of champerty nor were they contrary to public policy. The judgment is given in the speech of Lord Mustill. At p154C to p155A Lord Mustill started by identifying a practical gap in the remedies available to the driver of a car involved in an accident which was the other driver's fault, which has damaged the vehicle sufficiently that they cannot use it at least until it is repaired and who do not have the means or the inclination themselves to hire a substitute vehicle, thereby taking a chance of recovering that cost of hire from the defendant's insurers. Most motor insurance policies do not provide for such a replacement vehicle. He explained how credit hire companies fill that gap by offering to drivers with apparently solid claims against the other party the opportunity to hire a replacement vehicle on credit while they need it. At 155B-E Lord Mustill summarised the essential terms of the arrangements in the cases before the court as follows:

> "The terms on which this opportunity is given are said to be, in broad outline, as follows. (1) The company makes a car available to the motorist whilst the damaged car is under repair. (2) The company pursues a claim against the defendant, at its own expense and employing solicitors of its choice, in the name of the motorist for loss of use of the motorist's car. (3)

> The company makes a charge for the loan of the replacement car, which is reimbursed from that part of the damages recovered by the motorist from the defendant or his insurers which reflects the loss of use of the motorist's car. (4) Until this happens the motorist is under no obligation to pay for the use of the replacement car. (5) These arrangements are conditional on the co-operation of the motorist in pursuing the claim and any resulting legal proceedings. (6) The companies aim to confine the scheme to cases where the motorist is very likely to succeed in establishing the defendant's liability, without any contributory negligence on the part of the motorist."

21. The judgment goes on to reject the challenges from the insurers of the defendants in the ensuing road traffic accident (RTA) claims that such agreements were unlawful or that in this scheme the claimant has suffered no loss. As Lord Mustill explained at 166E-G the credit hire company had no direct right of damages. The liability for car hire rests on the motorist throughout although it is suspended as regards enforcement. It is, as he put it, "a real liability, the incurring of which constitutes a real loss to the motorist". Also, as Lord Mustill put it at 165G, the company makes its profits from the hiring not the litigation.

22. The respondents before this court were at pains to take us to *Giles v Thompson* to demonstrate that the idea of a claim for damages for credit hire had been ratified at the highest level in the courts and was in law a claim by the claimant not the credit hire company. I accept those submissions but it bears pointing out that the present case is not concerned with the validity of credit hire claims as such. It is concerned with what to do about the costs, and in particular what to do about costs when a credit hire claim has failed, not when it has succeeded. As the appellants submitted, in fact *Giles v Thompson* does contain a short passage on that topic at p165A, as follows:

> "If the motorists are found to have been tempted by the hire companies into the unnecessary hiring of substitute vehicles, the claims will fail pro tanto, with consequent orders for costs which will impose a healthy discipline upon the companies."

23. This was said at a time when the costs regime for RTA claims involving personal injury was very different from the regime today, and did not include QOCS. The statement is notable all the same. The healthy discipline contemplated by Lord Mustill is a situation in which the credit hire company bears some risk of paying costs when a credit hire claim fails.

24. The next relevant case is *Lagden v O'Connor* [2003] UKHL 64 which established that credit hire charges can be recovered in cases in which the claimant is impecunious, and that those rates may well be higher than the spot hire rate available to a claimant who had the financial means to hire a replacement car themselves. As the share prospectus documents relating to DAML explain in terms, a feature which distinguishes the group's business from the wider RTA credit hire and claims market is that the group is focused on "the impecunious customer (motorist, motorcyclist or cyclist)" which allows the group to recover significantly higher rates than spot hire or GTA rates. (GTA rates are a set of rates agreed between a group of insurers and credit hire companies in "General Terms of Agreement").

Non-party costs orders: Symphony v Hodgson and Dymocks v Todd

25. The next step is the law relating to non-party costs orders. The starting point is s51 of the Senior Courts Act 1981 which provides that, subject to any other enactment or rules of court, costs are in the discretion of the court and also provides that the court has full power to determine by whom and to what extent the costs are paid. In the same year as *Giles v Thompson*, the Court of Appeal in *Symphony v Hodgson* [1994] QB 179 explained the history of this area of law, starting with *Aiden Shipping v Interbulk* [1986] AC 965 which had held that while the jurisdiction to make an order was without limit, the exercise of the jurisdiction should be limited by the requirements of reason and justice (see Balcome LJ in *Symphony* at 190C-H). Balcombe LJ then addressed various examples of circumstances in which a non-party costs order had been made and then formulated a series of principles, starting at p192H with the point that an order for payment of costs by a non-party will always be exceptional (citing Lord Goff in *Aiden Shipping*).

26. The concept of these orders being exceptional was addressed in the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors (Associated Industrial Finance Party Limited Third Party)* [2004] UKPC 39 [2004] 1 WLR 2807. There Lord Brown of Eaton-under-Heywood at [25] explained that "exceptional" in the context of non-party costs orders simply means outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. He then explained that the ultimate question in such a case is whether in all the circumstances it is just to make the order. That will always be fact specific.

27. Lord Brown went on in that paragraph to address funders, distinguishing between a "pure" funder with no interest in the litigation, against whom the discretion will not generally be exercised, and a non-party who does not merely fund the proceedings but substantially controls them or is to benefit from them. In this latter case justice would ordinarily require that if the proceedings fail they will pay the successful party's costs. In this passage Lord Brown also described the sort of non-party who would be made liable as someone not merely facilitating access to justice but gaining access to justice for their own purposes.

28. In *Dymocks v Todd* Lord Brown also referred to Australian cases on this topic and described the non-party as "the real party" at [25](3) (p2815G of the WLR); but then at H made the point, again from the Australian cases, that it was not necessary for the non-party to be "the only real party" provided the non-party is "a real party" in very important and critical respects.

29. *Dymocks v Todd* and in particular Lord Brown's paragraph 25 were followed and applied in the Court of Appeal in *Myatt v National Coal Board* [2007] EWCA Civ 307 (Dyson LJ with whom Lloyd LJ and Sir Henry Brooke agreed). There the claimants' solicitor was ordered to pay some costs because they were "a real party" to the litigation, even though the claimants themselves had a real albeit modest interest in the outcome.

A non-party costs order in a credit hire case: Farrell v Birmingham City Council

30. In 2009 the Court of Appeal (Sir Andrew Morritt C, Keene and Elias LJJ) decided *Farrell v Birmingham City Council* [2009] EWCA Civ 769, upholding a non-party

costs order made against a credit hire company for 80% of the defendant council's costs of defending an RTA claim brought against them which had been discontinued. The claimant discontinued the claim after the council amended its defence to allege fraud by the claimants. It was common ground that the credit hire company was not a participant in the fraud ([14]).

31. In upholding HHJ McKenna's decision below, Sir Andrew Morritt C held at [14] that the credit hire agreement in that case demonstrated that the initiation and prosecution of the claim were the direct consequences of the hire, and that the judge's finding that the credit hire company was in a real sense the instigator of the litigation was amply justified. Secondly, the claim was prosecuted by the solicitors in the names of the claimants at the behest of the credit hire company, because that is what the hire agreement provided. If and insofar as the company left it to the solicitors to get on with the claim, that was not inconsistent with the control of the litigation by the credit hire company, for which the hire agreement provided. There were also separate collective conditional fee agreements which governed the relationship between, at least, the solicitors and the credit hire company and provided in terms that the credit hire company had been appointed to manage and pursue the claims on behalf of the claimants. A natural inference was that the proceedings were pursued, and later discontinued, with the knowledge and approval of the credit hire company. The judge's conclusion, that the credit hire company was in control of the litigation, was fully justified. Therefore the making of a non-party costs order was upheld ([14]).

32. It was true that the credit hire company had not paid the solicitors from time to time because there was a CFA in place. Nevertheless "the hire was the essential catalyst" of the proceedings, and that was funded by the credit hire company ([15]).

33. On the question of quantum the submission that the extent of the credit hire company's costs liability should match the extent to which it was commercially interested in the litigation was rejected. The judge might have awarded 100% of the costs of the claim and 80% was well within the range of his discretion ([16]-[17]).

Changes to the costs regime in 2012: QOCS

34. In 2012/13, and after *Farrell*, the cost regime applicable to RTAs changed. In 1990 s58 of the Courts and Legal Services Act 1990 (CLSA) had introduced the idea of enforceable CFAs. But in 2012 following recommendations in the Jackson Report, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) at s44 made amendments to the CLSA which, broadly, prevented the recovery of success fees payable under a CFA or recovery of ATE insurance premiums. These changes applied to most types of civil claims, including claims for personal injury, and it was in this context, on 1 April 2013, that the QOCS system was introduced.

35. As I explained recently in *Birley v Heritage* [2025] EWCA Civ 44 in a different context, the point of QOCS was to promote access to justice by mitigating the claimants' litigation costs risk in those cases (see [34] et seq). The scheme is in Section II of the Civil Procedure Rules Part 44, rules 44.13 to 44.17. By r44.13 the scheme applies to proceedings which include a claim for damages for personal injuries. By r44.14, subject to certain exceptions, a limit is placed on the ability to enforce a costs order against a claimant without the permission of the court. One of the exceptions is in r44.15 and applies if a claim is struck out on various grounds.

Another set of exceptions is in r44.16. There are three exceptions here: one is fundamental dishonesty (r44.16(1)) and another is for mixed claims at r44.16(2)(b). Mixed claims are cases in which, in addition to the claim for personal injury which triggers QOCS, there is also a claim which on its own would not trigger QOCS, such as a claim for damage to the claimant's vehicle. The third exception here is for proceedings which include a claim made for the financial benefit of a person other than the claimant. The relevant provisions for this third exception are r44.16(2)(a) and r44.16(3), as follows:

> **Exceptions to qualified one-way costs shifting where permission required**
>
> 44.16
>
> …
>
> (2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –
>
> (a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or
>
> …
>
> (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.

36. A number of important points arise from this. First, part of the way the respondents put their case was as if the only exception to QOCS which Parliament intended was concerned with abuse or fundamental dishonesty. However that is not accurate. Proceedings which include a claim for the financial benefit of someone other than the claimant (or the dependant in a Fatal Accidents Act case) have also been identified as an exception to QOCS from the outset. There are exceptions to the exception: for care, employment or medical expenses, but they are not relevant here.

37. Second, r44.16(3) expressly contemplates a non-party costs order against the other person referred to in r44.16(2)(a). That is clear on its face and also from the reference to r46.2 which is the procedural rule about non-party costs orders. Thus it can be seen that while QOCS has been brought in to protect claimants in personal injury claims, it was not brought in to protect persons, other than the claimant, for whose financial benefit the whole or part of the claim was made. This is also consistent with what was said in *Dymocks v Todd* about the concept of exceptionality and the distinction from the "ordinary run of cases" where parties pursue or defend claims for their own benefit and at their own expense. Proceedings which include claims made for the

financial benefit of a person other than the claimant are examples of claims outside that ordinary run.

38. Both parts of the rule (r44.16(2) and (3)) make it clear that there is a discretion to be exercised when these circumstances arise. It was common ground in this appeal that the law applicable to non-party costs orders was not altered by this rule and I will deal with the case on that basis.

39. Nevertheless, while of course this rule makes no difference to the jurisdiction created by s51 of the Senior Courts Act 1981, I must say I can see scope for an argument that the right approach to the exercise of the s51 jurisdiction in a QOCS case under CPR Part 44 might be simply to start by applying the rule, asking whether the proceedings include a claim which is made for the financial benefit of a person other than the claimant, rather than (for example) seeking to fit the non-party into an existing category such as an intermeddler or "real" claimant. It may not make any difference in the end and in the light of the way the case has been put I will not pursue that further.

40. Third, at the same time as the new rules in Part 44 were introduced, a new accompanying Practice Direction 44 also came into force, with provisions about QOCS at paragraph 12. The relevant terms of paragraph 12 are as follows:

> **Qualified one-way costs shifting**
>
> 12.1 This subsection applies to proceedings to which Section II of Part 44 applies.
>
> 12.2 Examples of claims made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 within the meaning of rule 44.16(2) are subrogated claims and claims for credit hire.
>
> *[...]*
>
> 12.5 The court has power to make an order for costs against a person other than the claimant under section 51(3) of the Senior Courts Act 1981 and rule 46.2. In a case to which rule 44.16(2)(a) applies (claims for the benefit of others) –
>
> (a) the court will usually order any person other than the claimant for whose financial benefit such a claim was made to pay all the costs of the proceedings or the costs attributable to the issues to which rule 44.16(2)(a) applies, or may exceptionally make such an order permitting the enforcement of such an order for costs against the claimant.
>
> (b) the court may, as it thinks fair and just, determine the costs attributable to claims for the financial benefit of persons other than the claimant.

> 12.6 In 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.
>
> […]

41. Paragraph 12.2 identifies credit hire as an example of a claim made for the financial benefit of a person other than the claimant. Given the terms of r44.16(2), the nature of credit hire, and in the light of the Court of Appeal's decision in *Farrell*, one might have thought that paragraph was unsurprising. However the respondents referred to it as divisive and submitted it was wrong. They also made the point that paragraph 12.2 was irrelevant because practice directions have no legislative force, and if and insofar as they contain statements of law which are wrong, they carry no authority at all (citing *U v Liverpool City Council* [2005] EWCA Civ 475).

42. The preparation and drafting of new rules and practice directions of this kind is carried out as a package by the Civil Procedure Rule Committee (CPRC). In that context, by s5 of the Civil Procedure Act 1997 amended on 3 April 2006, the CPRC has statutory authority to give practice directions in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005. The point in *U v Liverpool City Council* was whether a practice direction could give the court a power to do something which would subvert a scheme set out in governing statute, regulations and rules. Given the nature of practice directions, the answer was No, as one would expect. It might be said that the terms of a paragraph in a practice direction made at the same time as a new rule, which on its face purports to give an interpretive example of the wording in that new rule might be a legitimate aid to the rule's interpretation, but we have not heard full argument on this issue and I will not take the terms of paragraph 12.2 into account any further.

43. PD 44 paragraphs 12.5 and 12.6 are relevant in any case, irrespective of paragraph 12.2. They provide as follows:

    i) Paragraph 12.5(a) of the PD directs that when r44.16(2)(a) applies the court will *usually* (my emphasis) make an order that the other person pays costs. The costs referred to are "all the costs of the proceedings or the costs attributable to the issues to which r44.16(2)(a) applies". By contrast the last words of para 12.5(a) make clear that it will only be *exceptional* (my emphasis) for the court to make an order permitting enforcement of the costs order against the claimant.

    ii) By stating in paragraph 12.5(b) that 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, the PD emphasises the width of the court's discretion to attribute costs in these circumstances.

    iii) Paragraph 12.6 makes clear for both fundamental dishonesty (r44.16(1)) and the non-party costs cases (r44.16(2)(a)) the enforcement of such a costs order

> will not normally be the conventional QOCS limit of the aggregate of damages etc. awarded to the claimant.

44. Bearing in mind the court's wide powers in relation to costs in general terms and the fact that this is all part of a package introducing a new scheme (QOCS) which operates as a derogation from the general rule that unsuccessful parties will be ordered to pay the costs, these provisions in the PD provide guidance on a balanced approach. When a claim fails and QOCS protection would normally apply to protect the claimant, in a case in which r44.16(2)(a) applies, it will be exceptional for the claimant to lose their QOCS protection whereas by contrast it would be usual for the non-party for whose financial benefit all or part of the claim was made to have to pay costs, either all of the costs or those attributable to that claim.

45. Finally it is worth observing that paragraphs 12.5 and 12.6 seem to me to do little more than spell out in terms what one would infer the practical operation of r44.16 would be if one thought it through, bearing in mind that QOCS has been brought in to protect claimants in personal injury claims and not non-parties.

Later cases on non-party costs orders: Deutsche Bank v Sebastian, Excalibur Ventures v Texas Keystone, and XYZ v Travellers

46. In *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23 Moore-Bick LJ giving the judgment of the court (Moore-Bick, Lewison and Simon LJJ) upheld a non-party costs order against the sole shareholder and director of the unsuccessful defendant company. He reviewed the authorities on non-party costs orders, expressed concern at [62] that non-party costs orders risked becoming over-complicated by authority and held (also at [62]) that *Dymocks* contains an authoritative statement of the modern law and that in that case the Privy Council explains and interprets the guidelines in *Symphony* (in particular as regards what is exceptional) concluding:

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

47. Later that year in *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144, Tomlinson LJ (with whom Gloster and David Richards LJJ agreed) upheld a non-party costs order against commercial funders of an unsuccessful claimant which was made on an indemnity basis. At the outset at [1] Tomlinson LJ distinguished between "pure funding" (such as in *Hamilton v Al Fayed No 2* [2003] QB 1175) in which a non-party costs order will not ordinarily be made if the claim failed and "commercial funding" in which it would. In that paragraph Tomlinson LJ described the commercial funder as an investor who hopes to make a return on his investment and at [24] the funder is described as someone seeking to derive a financial benefit from the claim. The point is that justice will usually require the commercial funder to pay the successful party's costs if the funded proceedings fail [1].

48. In 2019 the Supreme Court decided *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48. The leading judgment was given by Lord Briggs (with whom Lady Black and Lord Kitchin agreed). Lords Reed and Sumption concurred in the result and gave judgments of their own. The case was about a non-party costs order against a defendant's liability insurers when the proceedings involved insured and uninsured claims. After the defendant went into administration, judgment was obtained against

it by the claimants with claims outside the insurance cover. A non-party costs order was made below in relation to these uninsured claims.

49. Lord Briggs started with the general law at [25], including s51, *Aiden Shipping*, *Symphony*, *Dymocks* and *Deutsche Bank* and highlighted the range of different circumstances in which non-party costs orders were made, noting that neither *Symphony*, *Dymocks* nor *Deutsche Bank* were about liability insurers. At [30] Lord Briggs concluded that the limit of the general principles was what had been stated in *Deutsche Bank* (above).

50. Lord Briggs went on to focus on liability insurers and held one of two bases of liability for a non-party order would have to be satisfied: as an intermeddler or as the real party in all but name (see [36]-[38]).

51. There are three aspects of *XYZ* which need to be addressed: one is about the nature of the interest required in order to find someone to be a real party in all but name, another is about the causation test, and the third aspect is the relevance of *XYZ v Travelers* for cases which are not about liability insurers.

52. I will start with the last question. Lord Briggs made the answer very clear at [30]. It was not the purpose of his judgment to reassess the generally applicable principles comprehensively, rather the decision was concerned with the principles which "ought to apply to that distinct part of the broad spectrum of non-parties occupied by liability insurers". In other words the focus of *XYZ v Travelers* is expressly the liability insurance context. That makes sense if I may say so. From the point of view of principle, it is not obvious why in such different areas of practice as, for example, liability insurance, litigation funding, company directors and credit hire, it would follow that the particular considerations feeding into the justice of a non-party costs order in one of those areas should necessarily be the same as in another, save perhaps at such a high level of generality to lack practical utility.

53. Turning to the real party in all but name, the respondents submitted that *XYZ v Travelers* establishes that the nature of the interest required to identify a non-party as a "real" party was exclusive in nature, and in particular was an interest to the exclusion of the (effectively) nominal claimant. The respondents submitted that the distinction between "the real party" and "a real party" in previous cases was not there to allow for shared interests, rather the idea of "a" rather than "the" real party simply allowed for the possibility that the non-party had an exclusive interest in part of the claim while the party (e.g. the claimant) had an interest in another part. This submission was based primarily on Lord Reed's judgment in *XYZ v Travelers*. Lord Reed expressed general agreement with Lord Briggs but made additional observations including on the "real party" approach in terms of its history (see e.g. [90]) and the Scots law approach based on identifying the non-party as the *verus dominus litis* (or real master of the litigation) ([94]-[103]).

54. I acknowledge that the language used by Lord Reed provides support for the respondent's submission, most of all perhaps [98] in which the distinction is drawn between some "ultimate consequent benefit", which is held not to be enough, and "the whole interest for all practical purposes", which is what is required. However neither the credit hire cases nor the commercial funder cases were before the court in *XYZ v Travelers*. Commercial funder cases such as *Excalibur Ventures* are examples of non-

party costs orders made where the funder clearly does not have rights in the litigation to the exclusion of the funded claimant, and if the exclusive interest test applied in credit hire cases it would also mean that *Farrell*, which had unsurprisingly not been cited in *XYZ v Travelers*, had been overruled. I cannot read Lord Reed's judgment as aiming to lay down a principle which applied to these other kinds of non-party costs orders.

55. Finally, on causation, this is an important aspect and, as Lord Briggs put it in his summary section at [80] causation "remains an important element of what an applicant under s51 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 under section 51." The appellants submitted that the need for a causative link described in *XYZ v Travelers* was confined to the intermeddler cases and did not apply to the "real" party cases. I disagree. In my judgment Lord Briggs drew no such distinction. However again, while Lord Briggs was not drawing that distinction, he was addressing the liability insurer context and the judgment needs to be understood in that way.

56. The most recent relevant Court of Appeal authority on non-party costs orders is *Goknur v Aytacli* [2021] EWCA Civ 1031 in which Lord Justice Coulson gave the leading judgment with whom Lewison and Dingemans LJJ agreed. In this case a non-party costs order against the director (Mr Aytalci) of an insolvent company (Orchard Village) who had controlled and funded the company's unsuccessful litigation was refused. The Court of Appeal upheld that refusal, citing *Dymocks* and a number of other cases concerning directors and companies, only some of which have been cited to us. At [54] Coulson LJ, in addressing a submission that even if the company was the "real party" to the litigation, Mr Aytalci was the "real party" too, rejected it saying that the concept of there being two "real parties" introduced a level of complication and granularity which finds no reflection in any of the authorities. The right approach was to look at the matter in the round or (as Coulson LJ put it in [53]) to stand back and look at the underlying economic reality.

Recent non-party costs orders in credit hire cases

57. To complete my review of the authorities I will refer to a series of decisions in the High Court on non-party costs orders in credit hire after the QOCS regime came into force. The first one is *Mee v Jones (Select Car Rentals (North West) Ltd, third party)* [2017] EWHC 1434 QB. It comes after *Deutsche Bank* and *Excalibur Ventures*, and before *XYZ v Travelers*. In this case an RTA claim for personal injuries and other losses failed. The largest item of damages had been credit hire. QOCS protected the claimant and the defendant's insurers sought a non-party costs order against the credit hire company which was joined for that purpose. The Recorder made the order, requiring the credit hire company to pay 60% of the costs of defending the claim. Turner J dismissed the appeal. One issue was whether CPR r44.16 had changed the law or the nature of the discretion in relation to non-party costs orders. Turner J held that it had not ([29]). I have mentioned above that this conclusion is common ground (above) albeit I made observations on that. At [32] Turner J also addressed PD paragraph 12.2 which gives credit hire as an example of a claim within r44.16(2)(a) and brought for the financial benefit of a person other than the claimant. He regarded paragraph 12.2 as little more than a statement of the obvious.

58. The second case is *Amjad v UK Insurance Ltd* [2023] EWHC 2832 (KB) although it is not a non-party costs case and so is not directly on point. Here parts of an RTA claim, including a claim for personal injury, succeeded but the claim for credit hire charges was dismissed. The county court judge decided that the case fell within r44.16(2)(a) as a claim for the benefit of the credit hire company and also r44.16(2)(b) since the credit hire claim was not a claim to which QOCS applied. He made an order permitting enforcement of costs against the claimant above the level of the damages. He was not asked to make a non-party costs order. Ritchie J allowed the appeal on the basis that it was wrong to make an order against the claimant in this case when r44.16(2)(a) applied and he refused to permit a non-party costs order to be made at that late stage. I agree with the result. I am doubtful about the statement at [92] that once a case falls within r44.16(2)(a) the court would have no power to lift the QOCS protection at all, but I prefer to leave that to a case in which it matters.

59. In *Kindertons v Murtagh* [2024] EWHC 471 (KB) Turner J again dealt with an appeal about a non-party costs order against a credit hire company. An RTA claim was brought involving personal injury and credit hire charges. The general damages for personal injury could be for no more than about £3,000 and the credit hire (and other credit charges such as repairs and recovery) were over £16,000. The claim failed on various grounds including that the damage to the car was not the result of the accident. The Recorder also found the two claimants had been fundamentally dishonest. They disappeared without paying the defendant's costs. The defendant's insurer applied for a non-party costs order against the credit hire company Kindertons. The Recorder found that the claim included a claim which was made for the financial benefit of Kindertons and awarded the insurers 80% of their costs against the company.

60. In rejecting the submission that the claim was not for Kindertons' financial benefit Turner J said this at [39]:

> 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.

61. At [44] to [47] Turner J rejected the submission that there was no proper basis on which the Recorder could find that the company controlled the litigation. He rejected this on two grounds. First he pointed out that the concept of control should not be treated as a "traffic light" governing access to the jurisdiction because the only immutable principle is that the discretion must be exercised justly. Second he noted on the facts that there was a high degree of control because the contractual terms identified tied the claimant (Mr Ibrahim) into bringing the claim and continuing it at the risk of incurring serious financial consequences if he failed to comply. As Turner J put it at [46] "It is the threat and not the execution of repercussions which forms the usual basis for control."

62. At [48] to [58] Turner J addressed causation. Kindertons submitted that the right approach was a "but for" test. In other words they said the insurer could not establish

that Kindertons' involvement resulted in the insurer incurring more costs in the litigation than they would have done in any event. *XYZ v Travelers* was relied on. Turner J rejected that kind of strict approach to causation and applied a wider approach, not based on a strict "but for" test (see [57]). Nevertheless in doing so Turner J distinguished *XYZ v Travelers* on the basis that the passages on causation were concerned with intermeddling rather than a real party case. As I have held above, I do not believe that is right. Turner J also cited two earlier cases (*Total Spares v Antares* [2006] EWHC 1537 (Ch), Richards J and *Turvill v Bird* [2016] EWCA Civ 703, Hamblin LJ giving the leading judgment). *Total Spares* was about asset stripping to frustrate a costs order and is a long way from the facts of the present case. Turner J noted that Hamblin LJ in *Turvill v Bird* made the point that a strict consideration of causation can sometimes interfere with the court's discretionary power to do justice.

63. Overall, Turner J upheld the Recorder's non-party costs order. The respondents submitted that the causation aspect of Turner J's judgment was wrong even if the remainder was not. I will come back to causation below.

64. The final case to mention is *Ali v HSF Logistics* [2024] EWCA Civ 1479, a recent decision of the Court of Appeal (Macur, Nicola Davies and Stuart-Smith LJJ). The case does involve credit hire but is not concerned with the issues we have to decide. At one stage before us there was a suggestion that a point arose from the costs order in *Ali v HSF*, but the point was not pursued and there is no need to grapple with it.

Guidance applicable to non-party costs orders in credit hire cases

65. Having run through the various authorities and rules, and despite the fact that the only immutable principle is to do justice, I believe there are some principles which can be pulled together to assist judges in determining applications of this kind in credit hire cases in future.

66. While the overall decision can always be made in the round, I suggest that in most cases in the credit hire context it would be convenient to approach the exercise of the discretion in two steps, first by asking whether in the circumstances a non-party costs order of some kind against the credit hire company should be made, and second, if so, then deciding on the amount of costs. In other words the first stage involves examining if the non-party costs jurisdiction is engaged, while the second stage looks at what a just costs order would be, including questions of attribution.

67. These cases are RTAs in the county court in which the claimant is making at least two claims, one for damages for personal injury and the other for credit hire charges. That matters because it means that QOCS applies, including r44.16(2) and I am still ignoring paragraph 12.2 for this purpose. The premise of this analysis is that a costs order has been or is being made against the claimant in the defendant's favour and the claimant is protected by QOCS.

68. Another important feature is that the credit hire claims in issue are based on *Lagden*. In other words there is an allegation the claimant is impecunious. That matters because in such a case the credit hire company cannot expect to recover the credit hire charges from the claimant on any realistic commercial basis. The principles here are addressed to the sort of case I have just described.

69. A next important feature relates to the terms of the credit hire contract. I have deliberately left examining the detail of the various contracts until this stage because they do differ. Nevertheless I believe they all share at least the following essential characteristics. The hire is on credit, in other words no hire charges are expected to be paid at the start or over the hire period. The payment is deferred until the conclusion of the action for damages which includes the hire charges, made against the party alleged to be liable for the accident, possibly with a long stop period (such as 11 months in either contract). Hire on credit with a deferral by reference to an action for damages are the essential characteristics of the contracts here.

70. The contract may explicitly require the hirer to pursue a claim for hire charges as the DAML contract does at clause 5(ii). However while the Spectra contract does not contain words to that express effect, its version of clause 5 makes the deferral of the hire charges conditional on the pursuit of a claim for damages against the third party alleged to be liable. By Spectra clause 8, if the condition in clause 5 does not apply, then all hire charges are due on demand. In my judgment the deferral arrangements in both cases, connected as they are to a claim for damages by the hirer against the third party who caused the accident, coupled with the alleged impecuniosity of the claimant, combine to make litigation (or its settlement) inevitable for all practical purposes. Litigation (including settlement) is the only realistic means by which the credit hire company will be paid for the hire. It follows therefore that in a very real sense the credit hire agreement, for which the credit hire company is responsible, is a fundamental cause of the legal costs incurred by the defendant. That is enough to satisfy the requirement for causation sufficient at the first stage of the exercise. For this reason I would hold that Turner J was right on causation in *Kindertons*.

71. To engage this jurisdiction, it is not necessary to consider whether, but for the credit hire claim, the costs would be any higher than the costs of the PI claim. This follows from the inevitability of the litigation (or its settlement). Moreover a "but for" causation approach generally breaks down when there are multiple causes. It could equally be asked how much a modest personal injury claim caused by way of an increase in the costs of a large credit hire claim. Questions about dividing litigation costs into elements relating to personal injury or credit hire, or looking at additional costs of one element as compared to the other, are best addressed at the second stage if the exercise gets that far.

The appointment of solicitors

72. Previous cases have examined who did or could appoint the solicitors. I believe that is likely to be irrelevant in these circumstances. In the DAML contract clause 5(ii) which required the hirer to pursue the claim also provided that they would appoint solicitors nominated by DAML. We were told that in practice DAML would not prevent a hirer from appointing other solicitors but if the solicitors were not to DAML's liking they might refuse to hire the vehicle. In the Spectra case a separate Form of Authority document was signed and this authorised and requested Spectra to recover all the claimant's uninsured losses, authorised Spectra to appoint a solicitor but also explicitly made clear that the claimant could also appoint a solicitor of their choice.

73. The relevance of who appoints the solicitor, in the context of a non-party costs order, would be to the question of control. However in my judgment the credit hire

company has sufficient control of the litigation arising from the structure of the credit hire arrangements themselves, with the deferral of payment and the practical inevitability of litigation against the defendant or their insurers, or settlement with them. Any competent solicitor advising a claimant in an RTA case with PI and credit hire elements would understand the implications of the deferral of the credit hire charges. They would know, for example, that the wise course if a settlement was offered was to ensure the credit hire company was content with the sum involved. The control is not absolute, as the Spectra case illustrates, but it does not have to be. As a practical matter the structure of the arrangements puts all the risk associated with the credit hire charges on the claimant if they were to settle at what the credit hire company considered to be an undervalue, or as in Spectra, to discontinue. That is why the circumstances give the credit hire company effective control in practice. The control is all the more effective for not having to be overtly exercised.

Overall

74. The elements I have described taken together are enough for a court to conclude that absent some reason why not, when a claimant has been ordered to pay the costs and QOCS applies, a non-party cost order against the credit hire company is likely. The credit hire company is a person for whose benefit the credit hire claim was being made. As *Giles v Thompson* establishes a claimant in a credit hire case does have a real legal claim, although it is relevant to have in mind that the premise here is that the claimant is being ordered to pay the defendant's costs, no doubt either because their claim failed or was discontinued. As a matter of reality – practical and economic – it is the credit hire company which is the real beneficiary of the litigation for the damages in respect of charges for credit hire. The fact that payment of the sums obtained in a successful claim to the credit hire company benefits the claimant by extinguishing their debt to that company does not alter this reality.

75. The fact that the provision of a replacement vehicle to the claimant obviously means they benefit from the credit hire agreement is true too, but is not the point. Nor is it relevant that credit hire achieves a worthy societal purpose (*Giles v Thompson*). There was no suggestion here that fixing credit hire companies with costs risk when the claims fails would prevent them from offering the service. Such a risk is a healthy discipline (*Giles v Thompson*). It also bears spelling out that nothing in the analysis I have undertaken involves saying anything which is done is improper or unlawful.

76. I do not believe either or both of: (i) the genuine nature of the benefits the claimant derives: from the car they received and from the removal of the debt they incur, and (ii) the legal correctness of the damages claim the claimant brings as claimant in the proceedings, would be enough to negative the practical and economic reality that the credit hire company is the real beneficiary of the litigation for these damages. Therefore these credit hire companies satisfy the real party in all but name test.

77. Having found that the jurisdiction is engaged, the second step is to consider what the appropriate costs order would be. No doubt there are others but three obvious possibilities are: i) an order for all the costs of the litigation; ii) an apportionment based on the sizes of the credit hire claim and the PI claim; and iii) an award of the extra costs attributable to the credit hire as compared to the litigation without it. When the credit hire claim is several times larger than the PI claim (as in both DAML

and Spectra) an order for all the costs of the litigation would be likely, absent some special feature.

Analogy with lawyers acting on a no-win no-fee basis

78. In argument a submission was repeatedly made by the respondents that there was no principled distinction between the position of credit hire companies here and the position of lawyers acting on a no-win no-fee basis. It was said that if a non-party costs order was made in these two cases, then it ought to be made against lawyers acting on a CFA, when it is clear and undisputed that the latter is not right (*Hodgson v Imperial Tobacco* [1998] 1 WLR 1056)

79. In my judgment there is no relevant analogy between lawyers acting on a no-win no fee basis and credit hire companies and I do not accept this submission. CFAs were introduced to improve access to justice and as *Hodgson* decides (at p1065F-G) the circumstances in which a lawyer acting under a CFA can be made personally liable for costs of the other party do not differ from those applicable to lawyers not acting under a CFA. The lawyer still owes the client the same duties they would owe absent a CFA and remains under the same duty to disregard his own interests in giving advice to the client and in performing their other responsibilities (*Hodgson* p1065B-C). The lawyer is not the genesis of the claim, the lawyer's fees are not the subject of the claim, and neither the CFA nor the lawyer acting under the CFA can or do expressly or in effect bind the claimant to pursue the claim. For these reasons, which are a summary of Mr Mallalieu KC's submissions on the point, comparing credit hire with lawyers on a no-win no-fee basis does not advance the respondents' case.

The provisions of the CPR – rules and PDs

80. I have derived the guidance above by applying the general principles to this kind of case. The rules and PD were also described above and looking at the two together, in my judgment the same approach would arise if one applied r44.16 (2)(a) and (3) and then worked through the terms of PD paragraph 12.

81. In general terms a credit hire case is one to which r44.16(2)(a) applies (assuming of course it is brought alongside a PI claim to which QOCS applies and in which a costs order against the claimant has been made). That is because a claim for credit hire charges is a claim made for the financial benefit of a person other than the claimant. It also therefore follows that PD paragraph 12.2 makes an accurate statement about the application of rule 44.16(2)(a). Credit hire necessarily falls within that provision. In *Mee v Jones (Select)* at [38] Turner J made the point that the fact that r44.16(2)(a) applies does not mean a non-party costs order must follow. I agree, although as I have now explained such an order will be likely absent special circumstances, which is in effect what is provided for in paragraph 12.5(a).

DAML

82. In the DAML case the litigation failed and a costs order, including QOCS protection, was made in the defendant's favour against the claimant. The judge decided not to make a non-party costs order. His findings of primary fact are not challenged on appeal. The issue is the inferences drawn from them. I would hold that for the reasons already explained above, the credit hire company DAML is the real

beneficiary of the claim for damages for the credit hire charges. Therefore the conclusion that the "real party" test was not satisfied, was not right. The judge also held that DAML did not decide when to issue proceedings, that they were not given copies of the court documents, and that they were not informed about settlement, strategy or other significant events in the case. These three matters are irrelevant on these facts. They do not undermine the tacit control DAML has over the litigation. Therefore the causation and control aspects of the test to engage the jurisdiction are satisfied. The fact that, as the judge held, DAML's involvement did not lead to extra costs being incurred does not mean that the jurisdiction is not engaged. There are no other special circumstances which might suggest no order should be made at the first stage. The fact the terms in DAML's contract are commonplace in the industry (as the judge held) is not a factor against exercising the jurisdiction either. A non-party costs order ought to be made in this case.

83. One might make an apportionment but given that DAML's credit hire charges are several times larger than the damages for personal injury, I would order DAML to pay all the claimant's costs.

Spectra

84. The Respondent's Notice on this appeal sought to overturn the judge's conclusions that Spectra was the principle beneficiary of the credit hire claim and that Spectra was a cause of the litigation from the outset and the primary cause after rejection of the offer in November 2020. Given what I have said above about credit hire cases in general, the judge's conclusions were right. I would dismiss the Respondent's Notice.

85. The judge made other findings about the circumstances which he thought tended to militate in favour of a non-party costs order in this case because he was approaching the matter at large. I can understand why he did this given the absence of authority on the application of the principles to these cases but that ought not to be necessary in future.

86. The refusal of a non-party costs order turned on the "good fortune" point, i.e. that based on the rejection of the defendant's application for a finding of fundamental dishonesty, the conclusion was that but for the discontinuance, the insurers AXA would have had to bear the costs of the claim in any case.

87. The appellant submitted this was an error because it ignores a principle applicable in the context of the application of the rules on discontinuance (CPR r38.6). The rules provide that unless the court "otherwise orders" the claimant will be ordered to pay the costs. The point made by the appellant is that it is well established that whether the claimant would or might well have succeeded at trial is not a good reason for using the power to "otherwise order" and relieving the claimant of the liability to pay the costs if they discontinue. The authority is *Nelson's Yard Management Company v Eziefula* [2013] EWCA Civ 235 at [14], in which the principles identified in *Brookes v HSBC Bank* [2011] EWCA Civ 354 were reformulated. This point was not made before the judge.

88. The respondent to this appeal did not dispute these principles as they apply to r38.6 but argued that the right way to look at what happened here was as follows. In deciding whether it was just for the respondent to pay the appellant's costs, the judge,

as he was entitled to, had attributed weight to the fact that the latter was only in a position to apply for costs because the claimant had been pressured into discontinuing – as a result of the appellant's own misplaced assertions of dishonesty – in circumstances to which the respondent had absolutely no connection.

89. In my judgment the *Nelson's Yard* point was relevant and ought to have been drawn to the judge's attention. The "good fortune" point would not have justified an order "otherwise" which relieved the claimant of costs liability, and there is no principled reason to draw a distinction between the claimant's position in this regard and the position of the credit hire company as someone seeking to derive a financial benefit from the claim (see *Excalibur Ventures* at [24] for a similar point in different circumstances). To attribute weight to the insurer's "good fortune" without taking *Nelson's Yard* into account would not be right. Therefore the discretion was exercised on the wrong basis, albeit there is nothing the judge could have done about that since *Nelson's Yard* was not cited.

90. Considering the matter afresh on appeal, I would hold that a non-party costs order in this case would be the just outcome. The fact the claim which was discontinued would or might well have succeeded does not justify a different order. The DDJ's original order required Spectra to pay 65% of the costs. No separate appeal was raised on that and so I would restore the DDJ's order.

A link between the credit hire company and the solicitors

91. A notable feature of the two cases is that in each of them there is an alleged link (to use a neutral term) between the credit hire company and the solicitors who represented the claimant in the original claim. DAML is in the same group as Bond Turner, while the directors of Spectra and of the company of which DGM was a trading name, were cousins. I mention this to make the point that I have not taken it into account. The non-party costs in the circumstances described above would be the likely result regardless, and so there should be no need for evidence of this kind to be given to the court deciding on the non-party costs order.

Conclusion

92. I would allow both appeals and make a non-party costs order against DAML for all the defendant's costs, and against Spectra for 65% of the defendant's costs.

Lady Justice Nicola Davies:

93. I agree.

Lord Justice Coulson:

94. I also agree.