QOCS and Credit Hire: a Pyrrhic victory avoided and…Autofocus: the End of the Road

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Select Car Rentals (North West) Ltd v Esure Services Ltd (2017) **[2017] EWHC 1434 (QB)**

In this case, involving a claim for £23,456.85 for credit hire charges, the Court held that third party credit hire companies might be vulnerable to adverse costs orders and that CPR 44.16 had not altered the powers of courts to exercise their discretion in such matters pursuant to CPR 46.2.

The defendant insurer Esure successfully defended an action for damages by four claimants whose claims were described as "very suspicious" by the trial judge but which he declined to find were in fact fraudulent allowing the defendant to pierce their QOCS protection and make an application for defence costs to be paid.

Many road traffic cases involving personal injury simultaneously found a claim for recovery for credit hire charges for a third party credit hire firm.

Since the Jackson reforms the QOCS regime intervenes providing a costs shield for those claimants unless they are found to be fundamentally dishonest.

In claims where there is the suspicion of fraud but no such finding is made by the Court the difficulty for defendants is typically as described by Mr Justice Turner in this case: "The claims were thus dismissed, but Esure had won a Pyrrhic victory. Who was going to pay their costs of meeting these dubious claims?"

Pyrrhus was of course the King of Epirus who famously defeated the Romans at one battle only to find he had lost so many soldiers in the process that he could not continue the war. He is said to have told a well-wisher something along the lines of: "Much more of this and I'll be going home alone".

In similar style, claims like this one frequently present a lose/lose situation for defendants banging their heads against the QOCS shield.

However, the recorder at the original trial referred to CPR r.44.16(2)(a) and concluded that Select was a person for whose financial benefit a claim had been made and that it was just to make a non-party costs order against it. Esure was awarded 60% of its costs of defending the claims.

CPR r.44.16 states:

"44.16

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

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses);

or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made."

Select appealed, arguing that the recorder had failed to resolve an issue which had arisen between the parties concerning the relationship between CPR r.44.16 and the general discretion flowing from the operation of CPR r.46.2. That rule states:

"46.2

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

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

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

(2) This rule does not apply –

(a) where the court is considering whether to –

(i) make an order against the Lord Chancellor in proceedings in which the Lord Chancellor has provided legal aid to a party to the proceedings;

(ii) make a wasted costs order (as defined in rule 46.8); and

(b) in proceedings to which rule 46.1 applies (pre-commencement disclosure and orders for disclosure against a person who is not a party)."

Select argued that r.44.16 did no more than preserve the court's pre-existing jurisdiction and that, by confining his analysis of the case to what was just, the recorder was in error by broadening the circumstances in which it should be appropriate to make a non-party costs order.

Esure for their part submitted that r.44.16 had created a new category of broader discretion to award costs in the context of credit hirers operating behind the protecting veil of the QOCS regime.

Mr Justice Turner held that Rule 44.16 did <u>not</u> introduce a bespoke and distinct type of discretion to be exercised in cases falling within the QOCS regime as it applied to non-parties. The fact that a credit hire company promoted litigation for its own financial

benefit, knowing that the party in whose name the claim was brought would enjoy some level of protection under the QOCS regime or would probably not be able to satisfy any adverse costs order in any event, was a factor which the court could take into account when considering whether it was just for the credit hire company to pay costs.

Even claimants otherwise protected under QOCS were not entirely immune from the enforcement of an order against them under r.44.16 although it would usually be the case that it was the relevant non-party who had sought a financial benefit who would be first in line.

Thus, r.44.16 did not change the nature of the discretion but merely operated in circumstances in which factors in favour of the exercise of that discretion might come into play.

The appeal judge referred to the judgment in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 234 W.L.R. 17 and the principles the Court of Appeal had distilled from the case of *Symphony Group v Hodgson* [1994] Q.B. 179: the procedure was summary; the subject party should have a close connection with the proceedings; should be just and fair to make such an order (that will be determined by the nature and degree of connection to the proceedings).

The wording of r.44.16 was entirely consistent with the way in which the proper approach to the discretion to order costs against a non-party had developed in recent case law.

The test of what was just was entirely consistent with the central observation in *Deutsche Bank* that: "the only immutable principle is that the discretion must be exercised justly" (para.31).

It followed that it was unnecessary for the recorder to resolve the dispute between the parties as to the impact, if any, which r.44.16 might have had on the nature of the discretion to be exercised. It would have made no difference whatsoever to the outcome (para.34).

The fact that CPR PD 44 expressly categorised a claim for credit hire as an example of a claim made for the financial benefit of another person did not give birth to a discretion to award costs against a non-party the content of which was any different from that which applied to claims to which the QOCS regime did not apply.

The recorder had applied the right test when exercising his jurisdiction to award costs against S (paras 40, 44).

Meanwhile, in other news for credit hire fans…

Accident Exchange Ltd v Nathan John George Broom & 6 ORS [**2017] EWHC 1096 (Admin)**

The Court dealt with the final chapter in the Autofocus saga which has been running since 2008.

As any credit hire geek will recall Autofocus were one of the foremost providers of spot rate reports for credit hire cases.

They purported to supply historical data for a wide range of hire vehicles which might be used to reduce the rates recovered by claimants for their credit hire charges (by stripping out the additional benefits and applying a reasonable market rate).

The Court found there was "overwhelming evidence" that the company had been involved in what was said to be the systematic, endemic fabrication of evidence in which the director and employees had knowingly and actively participated.

AEL applied to commit the defendant car hire rates surveyors to prison for contempt of court.

The insurer claimed that the defendants had engaged in conduct which interfered with the administration of justice.

The claimant's case was that each of the defendants had produced or verified written surveys, reports and/or witness statements with details of alleged telephone enquiries carried out which were false. It claimed that the reports and statements were signed with a statement that the contents were true, and that in some instances the defendants had given such evidence on oath in court as experts.

The insurer submitted that, despite the fact that settlements had been negotiated with other insurers, settlement did not represent the full value of the cases affected if dishonest evidence had not been deployed, and that it had suffered a considerable loss as a result of the company's activities.

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