St John's CHAMBERS

Taking back control: Credit hire, dishonesty and cost

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Patrick West looks at a case highlighting the interplay of fundamental dishonesty and costs orders against credit hire companies in *Mirzar Aamir Shahzad v Royal and Sun Alliance and Fastrack Solutions Ltd* [2023] 4 WLUK 92.

The issue of third-parties co-ordinating legal action by claimants which is to their own advantage is as old as the hills. To those with a passing familiarity with the modern phenomenon of credit hire, it may often seem that the real financial beneficiary of these cases is in reality the credit hire company.

A quick history lesson from Lord Mustill:

"My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, recourse was often required." (Giles Respondent and Thompson Appellant Devlin Respondent and Baslington Appellant (Conjoined Appeals) v Thompson [1994] 1 A.C. 142)

Criminal and/or tortious liability for champerty and maintenance was abolished by section 14 of the Criminal Law Act 1967, but discussion of these arcane offences was surprisingly resurrected in the conjoined appeal of Giles due to the exceptional provision of section 14(2) of the Act of 1967 which stipulated that the abolition of civil and criminal liability:

"shall not affect any rule of [the law of England and Wales] as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."

It did not take long for the House of Lords to find that champerty did not generally apply to straightforward credit hire cases.

The Lords adopted the description of the policy underlying the former criminal and civil sanctions expressed by Fletcher Moulton L.J. in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908] 1 K.B. 1006, 1014:

"It is directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse."

(This was a description of maintenance. For champerty there must be added the notion of a division of the spoils.)

Their Lordships found this simply did not fit the facts of credit hire per se. There was no "wanton and officious intermeddling" in arranging hire on credit. The hire company even if it paid for the litigation did not control it. The claimant might discontinue (albeit becoming immediately contractually liable for hire fees). The company does not meddle at all but allows the motorist to get on with the claim, and merely awaits a favourable result. Strictly speaking, the profit was from the hire not from the litigation. Credit hire was not in principle champertous nor invasive of any requirement of public policy.

Having reviewed a bit of medieval champerty, it is clear that the Shahzad case was not about that, but rather involved another avenue of attack, via section 51 of the Senior Courts Act 1981/CPR 46.2 which permit an order that a non-party should pay the Respondent's costs of defending the claim made by the Claimant. Unfortunately for him, Mr Shahzad was found to be a dishonest claimant.

District Judge James granted an application in those terms against the credit hire company behind Shahzad's claim and ordered the Appellant credit hire firm to pay two-thirds of the Respondent's costs assessed in the net sum of £6,666.67 together with the costs of the application in the inclusive sum of £15,000.

Mr Shahzad's claim began as a personal injury claim arising from a road traffic accident on 20th November 2015.

The Claimant claimed for: pain, suffering and loss of amenity; physiotherapy of £790; the pre-accident value of his vehicle of £4,130; credit hire charges of £27,780 and storage and recovery charges of £9200.

The Respondent defended the claim on the basis that it was a staged accident and the claim was fundamentally dishonest. The trial took place before District Judge James on 9th September 2020 and he handed down a reserved judgment on 5th October 2020 dismissing the claim and finding the claim to have been fundamentally dishonest. The protection which the Claimant should have had under Qualified One-way Costs Shifting (QOCS) was removed and he was ordered to pay the Respondent's costs assessed in the sum of £10,000.

On 4th January 2021 the Respondent issued an application seeking a non-party costs order against the Appellant under section 51 Senior Courts Act 1981 and CPR 46.2 . The Appellant was added to the proceedings as Second Defendant and an order was made for disclosure and the exchange of evidence. The trial of the application took place on 9th March 2022 and was held remotely. The Respondents evidence was submitted in writing and two witnesses gave evidence for the Appellant: Mr Mohammed Faraz the owner and a director of the Appellant company; and Mr Mujtaba Nabi, a director of Business Marketing Consultants Limited who trade as Fast Track Storage. The purpose of his evidence was to contend that Fast Track Storage was a separate company to the Appellant and was a completely independent business who dealt only with the storage of the Claimant's vehicle.

There was an issue between the parties about whether the Appellant, a credit hire company and Fast Track Storage, the storage company were in common ownership or connected. Both Mr Faraz and Mr Nabi gave categorical evidence that there was no legal connection between the two businesses. The Judge carefully analysed the evidence he had read and heard and concluded that, on the balance of probability, Fast Track Storage and Fastrack Solutions Limited were the same legal entity. The significance of this finding was that the Appellant was found to have the potential to benefit from the claim to the extent of its own claim against the Claimant for credit hire and storage charges.

In relation to the law the Judge referred to the notes in the White Book Volume 1 as follows:

"1) Although costs orders against non-parties are "exceptional", exceptional means only that the case is outside the ordinary run of cases which parties pursue or defend for their own benefit and at their own expense. The ultimate question in any such exceptional case is whether in all the circumstances it is just to make the order. Inevitably this will be fact specific to some extent.

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

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

The Judge found that the claims for credit hire and storage were brought for the benefit of the Appellant company. The Claimant may have had some benefit in his damaged car being stored and the use of a replacement vehicle but it was the Appellant who stood to benefit from any financial payment made to the Claimant in the claim. The Judge reminded himself of the phrasing in the passage above which derives from *Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807" if the non-party not only funds but controls or benefits from the proceedings"* the implication being that the Appellant would benefit from the proceedings.

The Judge recorded that the Appellant was not funding the proceedings in this case and also accepted that it was not controlling the proceedings either.

The Judge then referred to another authority *Select Car Rentals (North West) Limited v Esure Services Limited [2017] WLR 4426* . It was a factually similar case where the credit hire company did not fund the claim but the Judge at first instance analysed the extent to which it controlled and stood to benefit from the litigation.

District Judge James in this case compared and contrasted the situation in *Select Car Rentals* with the current case identifying some similarities and some significant differences. In the course of his own analysis the District Judge accepted that the Appellant was not acting as a claims manager in the current claim.

The two decisive issues for the Judge were the dishonesty of the storage claim and the value of the credit hire claim compared with the personal injury claim, and the claim for loss of the vehicle:

"30. I am satisfied that the storage claim in which I have found that the second defendant was a key participant was, frankly, dishonest. It was for the financial benefit of the second defendant, and the second defendant alone. The second defendant, who was proficient and experienced in credit hire matters, must have known that once the insurers and engineer had inspected the car and written it off, there was no legitimate reason for it to continue to be stored. Yet the second defendant continued to store it and presented an invoice for payment. I cannot see any legitimate justification for those actions. They are entirely illegitimate. They are tainted with dishonesty."

He found that the personal injury claim was worth about £3,500.00 and the vehicle claim (although inflated) was worth about £4,200.00. This led the Judge to the following conclusion:

"By contrast the credit hire was £28,000, and the claimant had entered into a binding legal agreement to pay those costs to the Second Defendant. It seems to me that that has a very substantial weight to play . Who is the real party to this litigation? Surely the real party to the litigation is the person who stands to benefit many times over by comparison with anybody else. The totality of the second defendant's benefit amounted to £36,000 or so. The totality of the Claimant's benefit was £8,000 or so – less than a quarter of the total. Who was the real party to the litigation? It must be the Second Defendant. I cannot see any other explanation I accept that the second claimant did not seek to exercise control. But then I do not see that the second claimant needed to exercise control. The claimant had gone to the firm of solicitors to whom the second defendant had referred him, had instituted a retainer, had issued a claim in the County Court, and had incorporated special damages, including all his liabilities, to the second defendant. What other control did the second defendant need to exercise? I cannot see that it needed to do anything else. But in terms of settling the claim, it seems to me that the claimant must have been placed in an extremely difficult position. He now had legal liability to pay £36,000 or so to the second defendant, while he sought only £3,500, plus the loss of his car, which was a modestly priced vehicle. To put it another way, if a solicitor had given him hard-headed advice: 'You have serious difficulties with your claim. I think you should discontinue', on the one hand, the claimant might have wished to do so; but, on the other hand, he faces the prospect that he is now legally liable for £36,000, which he does not have and which would bankrupt him. It must have exercised some substantial weight in his thinking when making the decision in the first place whether to issue a claim and, in the second place, whether to pursue it to trial."

The District Judge recorded that the Appellant did not seek out the Claimant's business nor pay any referral fee to the Claimant or his solicitors. He accepted that the decision to stage the accident was made by the Claimant and that this decision could not be laid at the door of the Appellant.

As a result, he apportioned the costs award ordering the Appellant pay two-thirds on the rough basis that it was more likely to benefit than the Claimant.

Section 51(2)(3) of the Senior Courts Act 1981 provides the statutory basis for the making of orders relating to costs. These are sufficiently broadly defined as to encompass the making of costs orders against non-parties:

"(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings

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

CPR r 46.2 sets out the relevant procedure:

"(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 the 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."

An appeal can only be granted in the following circumstances:

"CPR 52.21

(1) Every appeal will be limited to a review of the decision of the lower court unless–

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.(2) Unless it orders otherwise, the appeal court will not receive–

(a) oral evidence; or

(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was–

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

The case law

The appeal court summarised the modern case law as follows.

The Court relied on the helpful guidance appeared in the subsequent decision of the Privy Council in *Dymocks*. The guidance which the District Judge relied on from the White Book in paragraph 5 above is a direct quotation from the speech of Lord Brown at paragraph 25.

There were numerous examples of the application of this rule thereafter, for example in *Flatman v Germany [2013] 1 WLR 2676* where Lord Justice Leveson found:

"In my judgment, therefore, the legislation does visualise the possibility that a solicitor might fund disbursements and, in that event, it would not be right to conclude that such a solicitor was "the real party" or even "a real party" to the litigation"

And as a consequence:

"In those circumstances, contrary to the submissions of Mr Brown, I agree with the issue of principle advanced by the Law Society (and Mr Carpenter) that payment of disbursements, without more, does not incur any potential liability to an adverse costs order."

In *Gardiner v FX Music Limited* [2000] All EF 144 Geoffrey Vos QC held:

"An order for costs against a non-party was always an exceptional order. In the case of a sole or guiding director of an insolvent company, such an order was not normally made unless it could be shown that the director caused the company to bring or defend proceedings improperly. On the facts of the case, the court did not agree that the Respondent's evidence was disingenuous. Had the evidence been deliberately misleading, then the fact that the alleged deception was not consummated by reliance upon it in court would not have been sufficient to allow the Respondent to escape because costs were incurred as a direct result of the evidence that he swore. The court accepted that the Respondent was the guiding spirit behind FX, and that he might, had FX not gone into insolvent liquidation and won the litigation, have been personally financially benefited, however, that was not enough by itself to warrant an order under s 51(3) *."*

On appeal, HHJ Gosnell held that what Flatman and Gardiner have in common is that both the solicitor in the first case and the director in the second case escaped responsibility by doing something that was both in their own interests, but also in the interests of their client or company. He pointed out that had they behaved improperly, by putting their own interests above that of their client or company, the result may have been different.

HHJ Gosnell went on to review *Select Car Rentals (North West) Limited v Esure Services Limited [2017] WLR 4426*, which was relied on heavily by DJ James in his judgment.

On appeal in Select Car Rentals, Mr Justice Turner recorded the factors which the Recorder had listed as relevant to the exercise of his discretion to make an order for costs against the credit hire company:

"During the course of his judgment, the Learned Recorder identified the aspects of Select's role in the litigation which led to the exercise of his discretion in favour of Esure. They included the following:

i) Select had actually retained solicitors, Samuels Law, to act on their behalf in the claim. It was no coincidence that these solicitors were also instructed by the claimants. Select's retainer eventually was terminated by letter dated 9 July 2015, nearly two years after the accident;

ii) Select was in direct email contact with Esure concerning the progress of the claim saying that Samuels Law was acting on their behalf and expressly inviting Esure to comment to them on the issue of liability;

iii) There was a close association between Select and a company by the name of Roy Lloyd Limited. They shared a common director, Mr Justin Lloyd, who was the author of the witness statement relied upon by Select in resisting Esure's claim for costs. In a written agreement between Miss Mee and Roy Lloyd Limited in respect of credit storage, recovery and repair Miss Mee was contractually obliged to cooperate in the appointment of a solicitor nominated by the company in pressing a claim for damages. In the event that Miss were to choose another solicitor her credit would automatically be terminated;

iv) Under her rental agreement with Select, Miss Mee gave Select the power to deduct directly from any monies she may recover in respect of her personal injury claim to pay for any shortfall in damages relating to Selects own claims against her;

v) Miss Mee gave an irrevocable authority to her solicitors to provide any engineering report in respect of her vehicle and further updates relating to that vehicle to Select;

vi) Miss Mee further granted Select the right to pursue an action in her name; and

vii) Select were not merely providing Miss Mee with a hire car on credit, they were operating as de facto claims managers as is evidenced by their pro forma letter heading which states: "Revolutionising the way your claims are managed"."

Addressing the QOCS provisions of CPR 44.16(3) and CPR 44PD 12.5 the Judge found that those provisions did not add to the common law, a finding which HHJ Gosnell agreed with.

Mr Justice Turner said:

"In a conventional credit hire case, the claim for the hire charges will be made for the financial benefit of the credit hire organisation. In this regard the Practice Direction, in my view, amounts to little more than a statement of the obvious. The party making the claim for costs against the credit hire organisation does not have to prove that the actual agreement was a profitable one as District Judge Avent appears to have held to be the case. The financial benefit is made out because, however good or bad the original deal, it is to the financial benefit of the credit hire organisation to recover the monies due under the hire agreement through the process of the claimant's litigation. Some money is better than no money."

He made it clear however that a finding that a non-party had stood to benefit from the litigation was not enough to found a claim under s51 (3) Senior Courts Act 1981:

"*A finding that proceedings include a claim which is made for the financial benefit of a person other than a claimant does not automatically expose that person to costs liability. The party making the application must still persuade the court that such a finding satisfies the "immutable principle" that the discretion must be exercised justly. CPR 44.16 (3) provides that the court may make an order against a person for whose financial benefit the whole of part of the claim was made. The making of an order thus remains a matter firmly within the discretion of the court. The finding of financial benefit is thus a necessary but not sufficient condition of exposure to liability to an adverse costs order in this context."*

The ratio of the decision of Mr Justice Turner was summarised as follows:

"40 It follows from my findings above that I am satisfied that the Learned Recorder applied the right test when exercising his jurisdiction to award costs against Select.

41. Select, however, go on to complain that the Recorder should have taken into account the fact that the terms of the agreement with Miss Mee were in a form commonly found in credit hire agreements and that direct communications between credit hirer and insurers are standard practice under the ABI general terms of agreement between subscribing insurers and credit hire organisations. However, even if these terms and this practice are to be taken as standard in the industry, this does not provide Select, or for that matter any other credit hire company, immunity from a non-party costs order. To find otherwise would be to re-introduce the concept of the narrow requirement for exceptional circumstances which was firmly rejected by Lord Brown who observed in Dymocks at paragraph 25:

"Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will

often be a number of different considerations in play, some militating in favour of an order, some against."

42. Select go on to contend that there is no evidence that the contractual rights which they enjoyed under the agreement were actually exercised in practice and that the fact that Select approached Esure rather than the claimant's own solicitors to enquire about the progress of the case would end to suggest they were no exercising control over the litigation.

43. In my view, these objections lack sufficient force to undermine the Learned Recorder's conclusions. What modest weight they may have is decisively counterbalanced by the other features in the case. He performed a careful balancing exercise and, in my view, reached a result which not only fell within the broad bounds of his discretion but one which I would probably have reached myself if, hypothetically, I had found some flaw in his approach which would have required me to exercise it afresh."

The Recorder concluded Select and Miss Mee were "absolutely locked together" and that Select did in fact have the necessary degree of control to be categorised as the "*real party*".

Mr Justice Turner found that this finding was open to the Recorder and he was not wrong to reach this conclusion on the facts. HHJ Gosnell held that his conclusion earlier in the judgment, that the proceedings had been conducted for the benefit of Select was obiter, as that alone would not have been sufficient to fasten the credit hire company with responsibility for the costs of the successful defendant. He held that it arose in the context of a discussion about the effect of CPR 44.16(3) and CPR 44 PD 12.5 which the Judge rightly concluded added nothing to the pre-existing common law jurisprudence on the issue of when it was just to make a non-party costs order.

A number of other similar fact cases were discussed by the Court in Shahzad.

HHJ Gosnell held that decisions in cases such as these were fact sensitive. The court must enquire whether the non-party has controlled the proceedings for their own benefit to the extent that they are the "*real party*" or whether they have funded the litigation which would not have taken place without their support.

In Shahzad, District Judge James found that Fastrack Solutions Limited and Fast Track Storage were the same legal entity and the appeal court held that finding was open to him on the evidence.

District Judge James found that the Appellant did not fund the proceedings and the Claimant was given the names of four solicitors who had worked with the Appellant before but he was not compelled to use any of them.

District Judge James therefore found that although the Appellant was benefitting (or potentially benefitting) from the proceedings it was not controlling them and the Judge recorded *"and this is significant".*

DJ James made a direct comparison with the factors in Select as follows:

Select had retained the Solicitors for the Claimant – the Appellant did not;

Select was in direct email contact with the insurer – the Appellant was not;

The claimant was obliged by the credit hire agreement to co- operate in the instruction of a solicitor nominated by the company- common to both cases;

The claimant gave Select the power to deduct the hire charges directly from any personal injury damages- not the case with the Appellant;

The claimant gave Select an irrevocable authority to provide any engineering report and updates to Select – not the case with the Appellant;

The claimant granted Select the right to pursue an action in her name – the same was granted to the Appellant;

Select operated as de facto claims managers – the Appellant did not.

HHJ Gosnell held that there were clearly more differences than similarities with the position in Select and that, together with the Judge's previous finding that the Appellant was not controlling or funding the litigation should have led to only one answer to the application: its dismissal.

The District Judge was however persuaded by two additional factors that it was nevertheless just to grant the application even though his finding that the Appellant was neither funding nor controlling the litigation should have led to the dismissal of the application.

The first factor was the storage claim which the District Judge found was made on behalf of the Appellant for its financial benefit and was dishonest but there was no evidence of dishonesty on the part of Fast Track Storage. Even the claimant's dishonesty did not go to the storage issue. HHJ Gosnell found the District Judge was simply wrong in this regard.

District Judge James' finding that the credit hire company was the real party to the litigation was not sustainable either as it was inconsistent with the earlier finding that the Appellant was not controlling the litigation.

On the authorities, it was clear that it is only by exercising control over the litigation that a non-party can be treated as the " *real party* " in the litigation. Recommending a list of four solicitors in Shahzad was not enough.

At the end of the day only the Claimant could decide whether to bring a claim, how to pursue it and on what terms to settle it and furthermore had the benefit of advice from his own solicitors who were instructed to, and obliged, to act and advise in the Claimant's interest only.

If District Judge James was right then a credit hire company would be at risk of paying the successful insurer's costs in any claim where a decision on liability went in the Defendant's favour. This would be the case even where there was no dishonesty on the part of the Claimant and the judge merely preferred the Defendant's version of events.

That was not a sustainable conclusion. There had to be evidence that the credit hire company had controlled the litigation to such an extent that an objective analysis would suggest that it was the real party and the actual claimant merely a nominal claimant whose interests were distinctly secondary.

In Shahzad those factors were lacking and the District Judge fell into error.

So what do we take away from Shahzad? The key principle to allow an order for costs against a credit hire firm will always be that it exercised sufficient control to be deemed the real party. That will be fact dependent and so analysis of the background will be necessary. Comparison with the case of Select and others will be useful but each case will no doubt have differing factors which must be carefully balanced to determine if there was the necessary level of control over the claim.

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