Out of credit

Colin Campbell explains a significant new ruling for credit hire claims

Had a prang in the car and it was not your fault? What next? Two issues will require immediate thought. First, if there were personal injuries, how can compensation be obtained? Second, what about the vehicle? If it needs repairing or is likely to be a 'write off', meaning that you cannot go to work or collect the children from school, how will you get about?

The answer to the first question will involve the investigation and treatment of the injuries, a medical report or reports, interaction with the other driver's insurers, and ultimately agreement about the compensation you receive for your pain and suffering. In default of agreement, the last stop will be the county court, where a judge will decide how much it is just to award. The second will require a 'quick fix'. A replacement hire car will be needed until the repairs are completed or you can buy another car from the pay-out you receive from the insurance company of the driver at fault, in the event that your own vehicle is written off.

None of this is likely to happen quickly, since there is no possibility that the insurers for the other driver will contact you to say 'our cheque book is open. How much do you want?'. On the contrary, before your claims for 'bent metal' can be settled, there will need to be inspectors and motor assessors to look at the vehicle, estimates for the repairs, storage charges for your car, and so on. While this is going on, the pair of wheels you need will be covered by insurance, and you do not have to pay for it because the credit hire bill for the replacement car will form part of any damages claim. Should it not prove possible to agree terms, the matter will, in the last resort, go to court.

That, at least, is the theory, but the practice can be far from straightforward. For years, insurers for the driver at fault have argued that the charges for credit hire are too often out of all proportion to the claims for personal injuries. Not only that, but some cases fail and are dismissed by the court with costs; and where that happens, claimants who have brought their claims honestly, pay no costs because they have protection under Rule 44 of Part II of the Civil Procedure Rules (CPR) through the regime for qualified one-way costs shifting (QOCS). If, and only if, the claim has been struck out as having disclosed no reasonable grounds for bringing it, or is an abuse of the court's process, or the claimant's conduct has been likely to obstruct the just disposal of the proceedings, will QOCS protection be automatically lost (See CPR 44.15).

Aside from a CPR 44.15 situation, QOCS means that the costs order is valueless, although at further expense, a successful defendant can apply for it to be enforced where the court makes a finding that the claimant was fundamentally dishonest and gives permission (see CPR 44.16(1) – but note that CPR 44.16(2) has other exceptions beyond the scope of this article). Even then, the order for costs may not be worth the paper it is written on because the claimant has no money, so the defendant's insurers must bear their own costs of successfully defending the claim, and recover nothing from the dodgy driver who brought it.

Defeating claims involving personal injuries and credit hire charges are not, however, the only issues about which insurers for defendant drivers have expressed concern. Suppose the claimant wins and the damages for pain and suffering are agreed in the hundreds or low thousands, there may still be claims for credit hire which dwarf those damages several times over. That can happen where the claimant's vehicle takes weeks rather than days to be repaired, or there is a delay in paying the claimant out where the insurers deem it to be a write off and there is a squabble about its value. In such circumstances, the best that the defendant insurers can hope for is that the court will cut down the number of hire car days it has to pay for, but even then, those costs can still significantly exceed the amount paid out for pain and suffering.

Is there any mechanism under which those defendant insurers can recover their costs where the action has failed but the claimant has QOCS protection, and the costs order otherwise is worthless? Could an entity not being a party to the action, such as the company which provided the credit hire, be a legitimate target? That was the question which the Court of Appeal grappled with in *Tescher v Direct Accident Management Limited* and *AXA Insurance UK PLC v Spectra Drive Ltd* [2025] EWCA Civ 733; or, as Birss LJ, who gave the lead judgment, summarised the point in issue: '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?'

These were two conjoined appeals. In *Tescher*, the claim for personal injuries and credit hire were dismissed at trial, but the claimant had QOCS protection, so the costs order could not be enforced. The credit hire charges had represented 85% (£19,633.36) of the value of the special damages claim for £22,000, but an application for a non-party costs order against the credit hire company, which was joined as a second defendant for the purposes of costs, was unsuccessful. The judge below was not satisfied that the company was the 'real party' to the claim, and that the company had caused costs to be incurred which would not have been the case but for its involvement, so the application failed.

In *AXA*, the claimant's car had been written off and liability admitted for her claim which sought special damages of £20,000, of which £16,160 was for 89 days' credit hire. The claimant received a payout of £2,550 for the value of her car, but the hire charges remained in issue. It was the defendant's case that the claimant had insured another vehicle within 10 days of the accident and that her assertion that she had needed a hire car for nearly three months was false. The claimant had then discontinued her claim under CPR 38, explaining that she had simply done what her solicitors 'told her' to do. An application for a finding of fundamental dishonesty under CPR 44.16 failed, meaning that the costs order could not be enforced, but before the district judge, the defendant had another string to its bow: it applied for, and obtained, an order against the credit hire company for 65% of its costs as a non-party under s.51 Senior Courts Act 1981.

Success, however, was shortlived. On appeal, the circuit judge reversed the decision granting the non-party costs order. While there had been some factors distinguishing the case from a standard credit hire claim which militated in favour of such an order, including the admission of liability and a settlement offer under CPR 36, the defendant's insurers had had 'good fortune' in having escaped a judgment and costs due to the discontinuance, so the order was set aside.

Next stop, the Court of Appeal. Birss LJ explained that where a personal injury case has failed, QOCS protection will normally apply, and it would be exceptional for a claimant to lose that protection. By contrast, where a non-party is involved for whose financial benefit all or part of the claim has been made, it would be usual for that non-party to pay costs; either all the costs, or those attributable to that claim.

How did that general observation square with the appeals before the court so far as credit hire was concerned? The most convenient way, continued Birss LJ, was to approach the exercise of the court's

discretion in two steps: the first, to ask whether in the circumstances, a non-party costs order should be made; that is, was the non-party jurisdiction engaged; and second, if so, the amount of costs, including questions of attribution.

Important in answering these questions would be the impecuniosity of the claimant. *Lagden v O'Connor* [2003] UKHL 64 had established that credit hire charges could be recovered in cases in which the claimant had no money, and that the rates might well be higher than the spot hire rate available to a claimant who had the financial means to hire a replacement car personally. That mattered because in such a case, the credit hire company could not expect to recover the hire charges from the claimant on any realistic commercial basis.

Another important feature was the terms of the credit hire agreement. Hiring 'on credit' meant that no charges would be paid at the start of the hire, with payment deferred until the conclusion of the action when liability for the accident and consequential damages would be known. It followed that litigation (including settlement) was the only realistic means by which the credit hire company could be paid for the hire. Therefore, in a very real sense, the credit hire agreement, for which the company was responsible, was a fundamental cause of the legal costs incurred by the defendant. That was enough to satisfy the requirement for causation.

As to who was the beneficiary of the litigation for the damages in respect of the credit hire charges, as a matter of practical and economic reality, it was the credit hire company. While payment of any sums obtained in a successful claim went to the credit hire company and thereby benefited the claimant by extinguishing their debt to that company, that did not alter that reality.

As to the relevance of who appointed the claimant's solicitors in the context of a non-party costs order, the question was one of control. Any competent solicitor advising a claimant would know that if there were settlement discussions, it would be wise to ensure that the credit hire company was content with the sum involved. By such means, the

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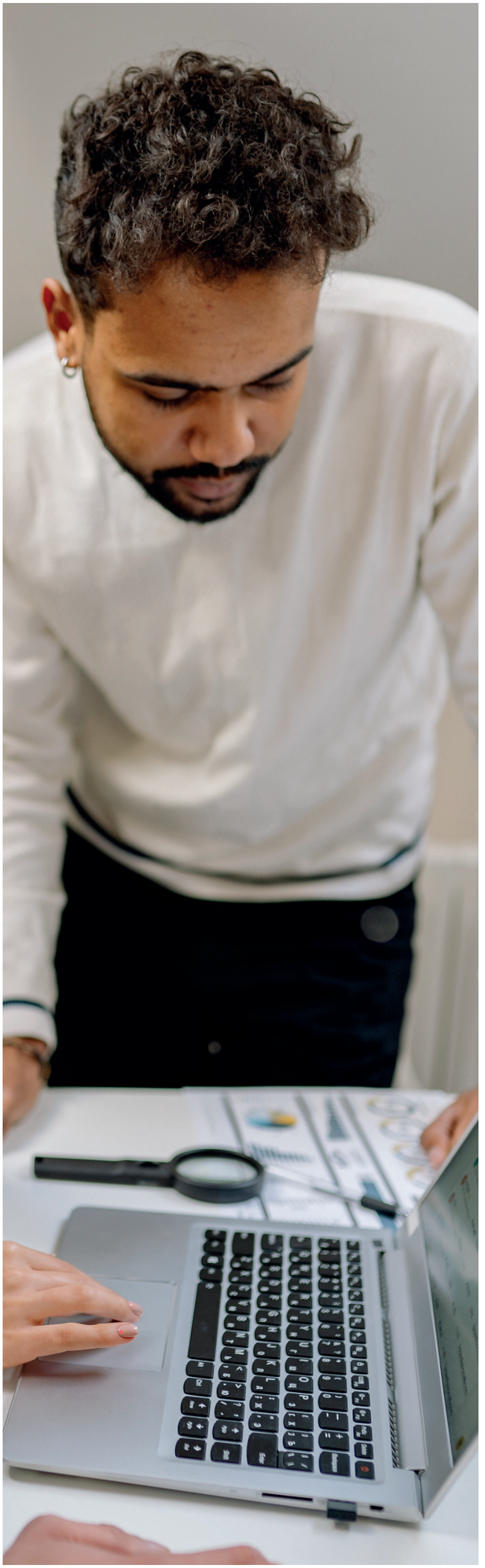

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company had sufficient control of the litigation, which did not have to be absolute. That way, the 'real party' test would be satisfied in all but name.

Having found that the non-party jurisdiction was engaged, stage two was to consider the appropriate costs order. There were three candidates. First, an order for all the costs of the litigation. The second, an apportionment based on the size of the credit hire claim vis-a-vis the personal injuries claim. The third, an award of the extra costs attributable to the credit hire as compared to the litigation without it. Where the credit hire charges were several times higher than the personal injury claims, an order for all the costs would be likely.

Applying this guidance, Birss LJ concluded that since in both *Tescher* and *Axa*, the credit hire claims significantly outweighed the damages sought for the personal injuries, non-party costs orders were required against the credit hire companies to meet the justice of the situation. In *Tescher*, that was a 100% order. In *Axa*, the decision of the district judge was restored, meaning that 65% of the costs of the defendant's costs of the action would be met by the credit hire company, with the remaining 35% payable by the claimant but subject to QOCS protection.

Clarity and victory for the defendant insurers in both cases, one where the claim had succeeded on liability and the other where it had not. Looking ahead, there are important takeaways.

KEY POINTS

First, honest claimants need not be concerned if their claim fails because (1) the QOCS regime will prevent any costs order being enforced against their assets and (2) the terms of the credit hire contract will provide that the hire charges are to be deferred, and that successful litigation is the only realistic means of payment. However, the companies providing the credit hire will need to be ultra-careful because if the case fails, the defendant's insurers will henceforward routinely apply for non-party costs orders against them, now secure in the knowledge that they will succeed if the credit hire charges are several times higher than the claim for personal injuries.

Second, if the claimant wins on liability, warning bells should still ring where the period of hire is likely to be extended for any reason, meaning that the hire charges will substantially exceed the claimant's damages for personal injuries. In that context, *Lloyd v RSA Insurance* [2025] NIKB 43 provides a hard lesson, albeit in a case where the claimant suffered no injuries. The hire period was 149 days and the storage period 253 days. McLaughlan J cut down the recoverable periods to 7 and 17 days respectively, meaning that the claims were reduced by £41,106 and £7,500 respectively! Since this was still a 'win' for the claimant, the non-party costs jurisdiction was not engaged, but his recoverable costs were limited to fixed costs and not High Court costs.

Back to *Tescher*. Overall a good day in court for the defendant insurers and a bad one for the credit hire companies. Does that mean that the latter will tighten their credit hire agreements so that the contract provides not just for deferred payment on a win, but also for payment on demand if there is a shortfall, or worse still, unconditional payment on demand? Careful drivers watch out!

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