

Non-Party Costs Orders

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Basis of the Jurisdiction

- Sections 51(1) and (3) Senior Courts Act 1981
- *Aiden Shipping v Interbulk* [1986] AC 965
- Procedural requirements in CPR 46.2

Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807

- “Exceptional” means outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense
- The ultimate question is whether it is just to make an order
- “Pure” funders will not generally be ordered to pay costs: *Hamilton v Al Fayed (No. 2)* [2003] QB 1175
- Is the respondent “the real party” or “a real party”? Consider funding, benefit and control
- Impropriety may support an order, but is not a requirement
- The non-party must have caused the costs in question to be incurred
- The absence of a warning is relevant, but rarely significant
- Delay in making the application can be relevant

Deutsche Bank AG v Sebastian Holdings Inc [2016] 4 WLR 17

“We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind” [62] per Moore-Bick LJ

Directors and Shareholders

- The early cases:
 - *Taylor v Pace Developments Ltd* [1991] BCC 406
 - *Symphony Group plc v Hodgson* [1994] QB 179
 - *Metalloy Supplies Ltd (in Liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613
- Broader approach in *Deutsche Bank*
- Recent retrenchment in *Goknur Gida Maddaleri Enerji Imalet Ithalat Ticaret ve Sanati AS v Aytaccli* [2021] 4 WLR 101

Key points from *Goknur*

- Main question is whether the director/shareholder is *the* real party (there can only be one)
- Funding, control and benefit are indicia of being the real party, but not determinative
- *“A director who is controlling and funding the litigation to help preserve the company or advance its legitimate interests cannot usually be said to be seeking to gain personally from the litigation. He or she is merely doing what their duties as a director require them to do. Conversely, the director who is looking for a personal windfall from the litigation, or is seeking to preserve his personal position or reputation, knowing that the company has no money to pay the other side’s costs if they lose, is vulnerable to an order under s.51, because he or she is ‘the real party’ to the litigation”* (Coulson LJ at [46])
- Otherwise, *serious* impropriety/bad faith required

Litigation Funders

- Commercial litigation funders will generally be ordered to pay costs
 - *Arkin v Borchard Lines* [2005] 1 WLR 3055 – the *Arkin* cap
- The *Arkin* cap held to be a matter of discretion only
 - *Davey v Money* [2019] EWHC 997 (Ch)
 - Upheld by the Court of Appeal [2020] EWCA Civ 246

Burnden Holdings (UK) v Fielding [2019] EWHC 2995 (Ch)

- Liquidator's firm (Griffins) funded discrete part of proceedings – appeal against strike out order
- Once successful, regular commercial funding obtained
- Claim failed – D settled with the commercial funder
- Held that Griffins not liable for costs incurred after they ceased to fund
- *Arkin* cap applied

Maranello Rosso Ltd v Lohomij BV [2025] EWHC 1112 (Ch)

- Claimant and respondent (HVA) entered into two agreements:
 - (1) “Vehicle Sale Agreement” for sale of 1953 Alfa Romeo for £566,000 with 24 month buyback period, provided everything due under the “Funding Agreement” had been paid
 - (2) “Litigation Funding Agreement” rescheduled existing loans and provided for success fee of 10% of damages recovered and the right to buy a 1951 Ferrari for £1
- Funding of c. £495,000 provided in a single payment
- Next payment by another third party 8 months later
- Held:
 - (1) the economic reality was a single agreement, under which HVA was a commercial funder
 - (2) HVA should pay 100% of the costs up to the time of the subsequent payment and one third of the costs thereafter
 - (3) No *Arkin* cap

Credit Hire Companies

- The significance of QOCS

44.16— Exceptions to qualified one-way costs shifting where permission required¹

(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.

Practice Direction 44

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.

Court of Appeal Guidance

- *Tescher v Direct Accident Management Ltd; AXA Insurance UK plc v Spectra Drive Ltd* [2025] EWCA Civ 733
- *Tescher* – claim dismissed at trial – DJ refused to make a costs order against DAML – leapfrog appeal to CA
- *Spectra Drive* – claim discontinued – DJ ordered SD to pay 65% of D’s costs – set aside on appeal to Circuit Judge

The Approach in Credit Hire Cases (1)

- A two-stage process
 - Stage 1 = decide whether the jurisdiction is engaged in principle
 - Stage 2 = decide what costs order to make
- Absent something unusual, at stage 1, the jurisdiction will invariably be engaged
 - Who appoints the solicitors is generally irrelevant
 - How much control the hire company in fact exercises is irrelevant
 - Benefit to the claimant from hiring the car is irrelevant
 - The law's recognition of claims for credit hire charges by claimants is irrelevant

The Approach in Credit Hire Cases (2)

- It is not relevant at stage 1 that the D's costs might have been the same even without the credit hire claim
 - *“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”* (Birss LJ at [71])
- Absent a special feature, at stage 2, the most likely order is to pay all of D's costs
- Commercial/personal link between hire company and solicitors is irrelevant and should not be put in evidence
- Guidance specifically related to cases where the claimants were alleging impecuniosity – different where the claimant is in any event liable for the charges and could pay them?