

**Non-party costs orders and credit hire – the latest skirmish**  
***Kindertons Limited v (1) Georgina Murtagh (2) Esure Services Limited [2024] EWHC 471***  
**(KB)**

Non-party costs orders (**NPCOs**) made pursuant to CPR 46.2 are now frequently sought against credit hire companies (**CHCs**) when credit hire claims are defeated, generally in the County Court. CHCs often seek to defend such applications on the grounds that: (a) they did not benefit from the claim, which was brought in the name and interest of the claimant who hired a vehicle after an accident; (b) they did not have the power to control or actually control the litigation, or have the requisite degree of control to justify the making of a NPCO; and/or (c) the applicant cannot prove that the CHC caused costs to be incurred, because there would have been some kind of claim in any event (e.g. when there is a dispute over liability, or other special damages are claimed beyond the CHC’s charges).

The judgment of Turner J in *Kindertons* addresses all three of those common arguments.

### **Benefit**

As to “benefit”, Turner J described the contention that the underlying claim was not brought for the benefit of Kindertons as “brave” [38]: *“Kindertons had a very strong financial stake in the litigation and...any benefit to [the Claimant] in pursuing the claim for hire charges was all but illusory”*. The judge also cited the judgment in *Amjad v UK Insurance Limited* [2023] EWHC 2832 (KB), in which Ritchie J said: *“If the claimant has paid nothing to the CHC and, despite the passage of years since the vehicle was returned, the CHC has not enforced the charges, or if the CHC has tacitly agreed not to enforce the charges unless and until the claimant wins damages, then there is no real benefit to the claimant in the claim for CHC charges.”*

### **Control**

On the subject of control, Turner J rejected the appellant’s arguments in favour of a more nuanced analysis, saying:

*“There is a danger that the concept of “control” is wrongly treated as if it were a traffic light, governing access to the exercise of court’s discretion to make a non-party costs order, which is showing either red or green. Control is almost invariably a matter of degree. As a concept, it is relevant to the extent that, in any given case, the greater the level of control exercised by the*

*non-party the more likely it will be that the court will exercise its discretion in favour of making a NPCO.” [44]*

On the facts of the case, there was a high degree of control, given the nature of the CHC’s standard contractual terms and the fact that Kindertons had specifically encouraged the Claimant to ignore any offers of a replacement car made by Esure.

## **Causation**

Finally, as to causation, Turner J rejected Kinderton’s submission that it was necessary for Esure to prove the causation of costs on a but for basis. Kindertons had relied heavily on the judgment of Lord Briggs in the Supreme Court’s decision in *XYZ v Travellers Insurance Co Ltd* [2019] UKSC 48. Turner J considered that *“Lord Briggs was not intending to lay down any general guidance on causation applicable to all NPCO applications”* [52] and went on to distinguish the decision in *XYZ*, which concerned liability insurance, where the insurer is typically *“an involuntary rather than voluntary funder of litigation”*. Moreover, *XYZ* concerned *“intermeddling”*, rather than the *“real party”* test, as was applicable to Kindertons’ case.

Turner J considered that the Recorder was right to make a NPCO on the facts of the case and that he was not obliged to make any specific finding in respect of *“but for”* causation.

## **Conclusion**

The decision in *Kindertons* is unlikely to be the last word on NPCOs in respect of credit hire claims, but it amounts to a significant defeat for CHCs and the arguments commonly deployed by them in respect of such applications.

Stephen was instructed by Graeme Mulvoy, Stuart Hill and Nick Colgan of Horwich Farrelly Solicitors

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