Case 88
Kazakhstan Kagazy plc and Others

v

Zhunus and Others

[2019] Costs LR 1749

Neutral Citation Number: [2019] EWHC 2630 (Comm)
High Court of Justice, Queen's Bench Division, Commercial Court
8 October 2019

Before:
Jacobs J

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Headnote

Following judgment in which the trial judge found two of the defendants liable to pay $298,834,593 with an interim payment on account of costs ordered in the sum of $8m and in which neither payment had been made, it was appropriate to consider non-party costs orders. Between the defendants, there had been multiple transfers of millions of dollars with a view to dissipating assets. In these circumstances, it was just to make a non-party costs order against the wife and mother-in-law of the unsuccessful defendants, whose defences they had funded by using monies transferred to them by way of a family asset-dissipating exercise. Orders accordingly.

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Cases Cited

Abraham v *Thompson* [1997] 4 All ER 362
Arkin v *Borchard Lines Ltd and Others* [2005] 4 Costs LR 643; [2005] EWCA Civ 655; [2005] 1 WLR 3055
Catalina London Ltd v *Kapsokolis* [2018] EWHC 1309 (QB)
Davey v *Money and Others* [2019] Costs LR 399; [2019] EWHC 997 (Ch)
Deutsche Bank AG v *Sebastian Holdings Inc* [2016] EWCA Civ 23; [2016] 4 WLR 17
Dweck v *Forstater* [2010] EWHC 1874 (QB)
Dymocks Franchise Systems (NSW) Pty Ltd v *Todd and Others (No. 2)* [2005] 1 Costs LR 52; [2004] UKPC 39; [2004] 1 WLR 2807
Excalibur Ventures LLC v *Texas Keystone Inc and Others* [2014] 6 Costs LO 975; [2014] EWHC 3436 (Comm)
Jackson v *Thakrar* [2007] EWHC 626 (TCC)
Knight v *FP Special Assets Ltd* (1992) 107 ALR 585; 174 CLR 178
Metalloy Supplies Ltd v *MA (UK) Ltd* [1998] 1 Costs LR 85; [1997] 1 WLR 1613
PR Records Ltd v *Vinyl 2000* [2008] EWHC 192 (Ch)
Sony/ATV Music Publishing LLC and Another v *WPMC Ltd (in Liquidation) and Others* [2018] 5 Costs LO 665; [2018] EWCA Civ 2005
Symphony Group plc v *Hodgson* (1993) Costs LR (Core) 319
TGA Chapman Ltd v *Christopher* [1998] 1 WLR 12
Total Spares & Supplies Ltd v *Antares SRL* [2006] EWHC 1537 (Ch)
Travelers Insurance Company Ltd v *XYZ* [2018] 3 Costs LO 401; [2018] EWCA Civ 1099
Turvill v *Bird and Others* [2016] EWCA Civ 703

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Judgment

Jacobs J:

The Application

1. The first to fourth claimants ("the claimants") apply for non-party costs orders under s 51 of the Senior Courts Act 1981 against the fourth defendant ("Mrs Arip") and the fifth defendant ("Ms Asilbekova"), who is Mrs Arip's mother.

2. The application arises from substantive proceedings that were resolved following a thirteen-week trial in the Commercial Court. In December 2017, Picken J handed down a judgment finding that the claimants had successfully established a very substantial fraud claim against the second defendant ("Mr Arip") and the third defendant ("Ms Dikhanbayeva"). Mr Arip is Mrs Arip's husband and was effectively CEO of the claimants. Ms Dikhanbayeva is not related to either of them, but was effectively the CFO of the claimants. The trial judge held that both of these defendants had given extensive dishonest evidence to the court, as well as calling a number of other dishonest witnesses in an attempt to corroborate their false account of events.

3. The claim against Mr Zhunus, the first defendant, was settled in 2016 and did not proceed to trial. Neither Mrs Arip nor Ms Asilbekova were party to the original proceedings.

4. On 28 February 2018, in a further judgment on consequential matters, Picken J found that Mr Arip and Ms Dikhanbayeva were liable for the sum of US$298,834,593 and ordered them to pay £8,000,000 as interim payment on account of costs. No part of Picken J's judgment has been satisfied.

5. The claimants have pursued various avenues to try to enforce the judgment. These have included steps which have led to the present application. On 27 April 2018, they made a without notice application under s 37 of the Senior Courts Act 1981 against the defendants' former solicitors Cleary Gottlieb ("Cleary") and two partners of that firm, Mr Sunil Gadhia and Mr Tihir Sarkar, seeking disclosure of the identity of individuals and entities who had paid Cleary's fees and disbursements for the main proceedings. On 20 July 2018, Knowles J made an order requiring Cleary to provide this information. Pursuant to that order, Mr Gadhia filed a witness statement confirming that Mrs Arip had paid around £13.9 million between February 2014 and

February 2018, and that Ms Asilbekova had paid £500,000 on 8 December 2014 towards Cleary's fees and disbursements.

6. The claimants now seek orders that each of Mrs Arip and Ms Asilbekova should pay the costs which they incurred in the proceedings. Up until 17 January 2018, those costs amounted to £12,095,278.43, after allowance for a deduction of £75,000 in respect of certain costs of applying for a freezing order. Those costs were principally incurred after the claimants' present solicitors, Allen & Overy, had replaced Zaiwalla & Co on 1 April 2015.

7. Although applications under s 51 are usually determined by the trial judge, the parties were ultimately agreed that it was preferable for the hearing of the application to take place before me, rather than the trial judge. There were a number of reasons for this, including the need to avoid further delay. In addition, there has been a very significant volume of post-judgment applications, and these have been dealt with by a number of different judges. These included a successful application by the claimants to cross-examine Mrs Arip with a view to the effective enforcement of a worldwide freezing order which they obtained in September 2018. A particular reason why the parties were agreeable to my resolving the s 51 application was that I had recently dealt with the one-day application for cross-examination (see [2019] EWHC 1693 (Comm)), and the principal facts and arguments relevant to the s 51 application were not dissimilar to those relied upon in the context of that application. The cross-examination had taken place, before a deputy judge, on 15 and 16 July 2019.

The Factual Background

8. In this section, I describe in broadly chronological order the principal events relevant to the parties' arguments.

9. The detailed factual background to the action can be found in the two judgments of Picken J. The more recent procedural background is set out in paras [3]–[18] of my earlier judgment.

10. In summary, the claimants are part of a corporate group (the "KK Group") which is in the business of recycling paper and packaging in Kazakhstan. The first to third defendants are former directors and/or shareholders of companies in the KK Group. The claims in the proceedings related to their conduct during their time as directors.

11. Harbour Fund III, LP ("Harbour") is a litigation funder that has

provided a substantial amount of funding for the claimants to pursue these proceedings. Harbour was joined as an Additional Party to these proceedings pursuant to Knowles J's order on 22 January 2018.

12. In or around July 2007, Mr Zhunus, Mr Arip and Ms Dikhanbayeva left Kazakhstan for Dubai where they worked on a business involving the exploitation of oil assets in Siberia. This business was carried out through an Isle of Man company called Exillon Energy plc ("Exillon"), which underwent an initial public offering ("IPO") in 2009.

13. In January 2009, Mr Arip arranged for some valuable shareholdings in Exillon to be issued to a trust called the WS Settlement of which Mr and Mrs Arip were the beneficiaries. Initially, their children were also named as beneficiaries but they were later removed. Subsequently, the WS Settlement also acquired further shareholdings in Exillon from third parties including Mr Zhunus. In consequence, the WS Settlement held around 30.17% of the issued share capital of Exillon.

14. Between June 2010 and December 2013, the trustees of the WS Settlement carried out a sale of the Exillon shares. The shares were sold in three tranches and raised a total amount of around £97 million and a further US$300 million. The sale proceeds were received by the WS Settlement, and then largely distributed to Mrs Arip (as set out in para 17 below).

15. In the meantime, on 2 August 2013, the claimants had commenced proceedings in England alleging fraud against the defendants. On the same day, His Honour Judge Mackie QC, on a without notice application, granted a worldwide freezing order ("WFO") against Mr Zhunus and Mr Arip in the amount of £100 million. Subsequently, on 20 November 2013, the amount of the WFO was reduced to £72 million.

16. In accordance with the WFO, on 12 August 2013, Mr Arip provided a sworn affidavit which annexed a schedule of his worldwide assets. Two of the most significant assets identified by Mr Arip were his interests in two trusts: the WS Settlement and another trust known as the Wycombe Settlement, which owned a property in London.

17. Although Mr Arip's interest in the WS Settlement formed a substantial part of his assets, it is now common ground that this trust no longer retains any significant funds over and above the £72 million which was the reduced amount of the WFO. The surplus funds over

and above that sum were, save for US$ 1 million, distributed to Mrs Arip. In particular, Mrs Arip admits receiving the following transfers from the WS Settlement:

a) £14,744,938 paid in three tranches between July and September 2010;
b) £62,597,000 on 6 April 2011;
c) US$181,911,000 on 18 December 2013.

18. The first two distributions were made prior to the commencement of the present proceedings. The third distribution was made subsequent to the commencement of those proceedings, and after the WFO had been obtained. However, since the sum of £72 million was retained within the WS Settlement, there is no suggestion that this distribution was in breach of the WFO. Mrs Arip admits that this distribution was made following a request from her to the trustees of the WS Settlement. It is also clear that it was made with the knowledge and approval of Mr Arip. This is evident from Mr Arip's "Letter of No Objection" dated 17 December 2013, by which he informed the trustees of the WS Settlement that he did not object to the transfer as long as the value of the assets held by the trust did not fall below £72 million as required by the WFO.

19. It was very shortly after this distribution that Mrs Arip's funding of the defence of Mr Arip started. On 25 February 2014, Mrs Arip paid approximately £1,500,000 to Cleary from her account at one of her banks, LGT Bank Ltd in Liechtenstein. Her evidence was that this payment was made because she was told by her husband that he had run out of money. She said that it was "inconceivable that any wife would fail to support their husband in these circumstances". Her agreement to do so was, she said, "borne purely out of love and affection, to help my husband. Maksat had run out of money and it seemed natural to me that as his wife I would support him".

20. Two further payments to Cleary, totalling £470,000, were made in 2014, although it is possible that some of these monies related to services to Mrs Arip personally as well as for services to Mr Arip and Ms Dikhanbayeva. A number of further payments were made in 2015, 2016, 2017 and 2018. Some of these payments were made following Picken J's judgment in December 2017. The total amounts paid, according to the evidence of Mr Gadhia of Cleary, is £5,980,991.77 and US$10,391,228.03. This equates to around £13.9 million, which

is more than 50% of the total amount paid to Cleary (approximately £25 million) for the defence of Mr Arip and Ms Dikhanbayeva, and in excess of the amounts which the claimants incurred on the case.

21. These payments have contributed, but in a relatively small way, to the depletion of almost the entirety of the funds that Mrs Arip received from the WS Settlement. According to the evidence of Mrs Arip in response to various orders for disclosure of her assets, her assets are now worth approximately US$25 million, and this includes certain debts whose recoverability is questioned by the claimants: see para [48] of my earlier judgment. Such assets are less than 10% of the fortune that was transferred to her by the trustees of the WS settlement between 2010 and 2013. The principal reason for this depletion is not the payment of Mr Arip's legal bills, but rather the transfer by Mrs Arip of very significant sums to other individuals or trusts. Most significantly for present purposes, Mrs Arip paid a total of US$97.5 million to her mother, Ms Asilbekova, of which US$20 million was repaid. She also paid US$37 million to her brother of which US$20 million was repaid by him.

22. The claimants contend that the transfers of funds to her mother and brother were not, as Mrs Arip and Ms Asilbekova contend, acts of selfless generosity to close relatives. Rather, they say that Mrs Arip retains practical control over funds transferred to her mother. They point, amongst other things, to evidence which has emerged from documentation obtained from Bank Julius Baer in Guernsey ("BJB") and Julius Baer International ("JBI"), the bankers to Mrs Arip and Ms Asilbekova. This shows, for example, that by no later than September 2014, Ms Asilbekova granted a very broad power of attorney over her accounts with BJB to Mrs Arip. The claimants rely upon this and other evidence which shows practical control by Mrs Arip over her mother's assets. They also contend that the receipt of funds by Ms Asilbekova was part of efforts made by Mrs Arip to assist her husband in dissipating his assets and impeding or frustrating the claimants' claims, and that Ms Asilbekova has either been willingly involved in these efforts or been content to allow herself to be used as an instrument or nominee for those purposes. These points were repeated or restated in various ways in Ms Vaswani's 48th witness statement, filed on behalf of the claimants.

23. In December 2014, Ms Asilbekova made her only direct payment of monies to Cleary in respect of the fees which were due.

This was in the sum of £500,000. However, the claimants also rely upon transfers made by Ms Asilbekova to Mrs Arip in November 2016, shortly before the commencement of the trial of the claimants' action (which was in April 2017). At that time, Ms Asilbekova transferred back some part of the funds that she had received from Mrs Arip. Thus, on 7 November 2016, Ms Asilbekova made two separate transfers of US$13,945,000 and the equivalent of US$2,148,777.24 to Mrs Arip. The claimants contended that these payments contributed, indirectly, towards the funding of Mr Arip's legal fees. This was disputed by Mrs Arip and Ms Asilbekova, who relied upon the fact that at around the same time, Mrs Arip made four payments back to Ms Asilbekova and that these were close to the sum previously transferred by her.

24. As described above, Mr Arip and Ms Dikhanbayeva fought the trial and lost. Neither Mrs Arip nor Ms Asilbekova were party to the proceedings. At one stage, Mrs Arip was joined in relation to a tracing claim which the claimants sought to pursue. In January 2015, however, Leggatt J set aside her joinder on the basis that the tracing claim had no sufficient prospect of success.

25. In December 2017, Picken J handed down his judgment in favour of the claimants. By a further judgment on 28 February 2018, he found that Mr Arip and Ms Dikhanbayeva were liable for the sum of US$298,834,593 and ordered them to pay £8,000,000 as an interim payment on account of costs. In his February 28 order, Picken J also increased the amount of the freezing order to US$315 million.

26. In January 2018, i.e. after Picken J had handed down his judgment in favour of the claimants but before he had dealt with consequential matters including quantum, Mrs Arip commenced without notice proceedings in relation to the WS Settlement (in the Nicosia District Court) and the Wycombe Settlement (in the Larnaca District Court) in Cyprus. These proceedings sought orders from the Cypriot courts prohibiting the claimants from taking steps to enforce their judgment against the assets of these settlements before any court outside Cyprus. Between January and March 2018, the Cypriot courts granted two interim worldwide anti-suit injunctions in the terms sought by Mrs Arip. However, neither order is currently in force. The order relating to the Wycombe settlement was discharged in October 2018 and the order in connection with the WS Settlement was abandoned by Mrs Arip in May 2019. The claimants contend that

these events are significant, because they show Mrs Arip taking determined steps to prevent enforcement of the judgment which the claimants had obtained. They say that this is consistent with steps taken to move assets around prior to judgment, again with a view to preventing enforcement. They contend that all of these matters evidence the fact that her provision of funding to Mr Arip was not motivated by love and affection, but rather her concern to ensure that the claim failed so that assets transferred to her or her mother should not be available for enforcement.

27. By contrast, Mrs Arip contends that the proceedings in Cyprus were taken as a result of legal advice following judgment, and with a view to protecting the assets of trusts for the benefit of her children and wider family members. She said that she simply sought to protect assets which, as she had been advised and believed, were not available to the claimants for enforcement purposes. She did not personally formulate this strategy. She did not believe that any of those measures was aggressive or out of the ordinary.

28. The subsequent steps taken by the claimants to enforce Picken J's judgment include the pursuit of several charging order applications in relation to properties in London which are owned by a number of trusts which are, or [are] alleged to be, Arip family trusts. The claimants are also applying to commence a tracing claim to identify the proceeds of the sums misappropriated by Mr Arip. Mr Arip himself claims to have no material assets with which to meet the judgment against him. He has filed for bankruptcy in Cyprus, but his ability to do so there is contested by the claimants.

Legal Principles

29. Section 51(1) of the Senior Courts Act 1981 provides that "the costs of and incidental to all proceedings in … the High Court … shall be in the discretion of the court". Section 51(3) clarifies that this includes the power to determine "by whom and to what extent the costs are to be paid".

30. The principles applicable to non-party costs orders are those summarised in the judgment of Lord Brown, delivering the judgment [of the] Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd* v *Todd and Others* [2004] 1 WLR 2807, in particular at [25]:

> "A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their

Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows.

(1) 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.

(2) Generally speaking the discretion will not be exercised against 'pure funders', described in para 40 of *Hamilton* v *Al Fayed (No. 2)* [2003] QB 1175, 1194 as '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'. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence – see, for example, the judgments of the High Court of Australia in the *Knight* case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd* v *MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd* v *Christopher* [1998] 1 WLR 12, 22 as 'the defendants in all but name' …

(4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests."

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31. In *Deutsche Bank AG* v *Sebastian Holdings Inc* [2016] EWCA Civ 23; [2016] 4 WLR 17 at [62], Moore-Bick LJ (delivering the judgment of the Court of Appeal) said that:

> "the exercise of the discretion is in danger of becoming over-complicated by authority. The decision of the Privy Council in *Dymocks*, which contains an authoritative statement of the modern law, explains and interprets the *Symphony* guidelines in a way which reflects the variety of circumstances in which the court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that an order of this kind is 'exceptional' only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Similarly, it has made it clear that the absence of a warning is simply one factor which the court will take into account in an appropriate case when deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. 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."

32. More recently, in *Travelers Insurance Company Ltd* v *XYZ* [2018] EWCA Civ 1099 at [6], Lewison LJ reiterated that whilst the courts had given guidance from time to time, none of it is immutable:

> "On an application of this kind the court is not concerned with legal rights and obligations but with a broad discretion which it will seek to exercise in a manner that will do justice. The only immutable principle is that the discretion must be exercised justly … It also follows that previous cases in which judges have or have not exercised their discretion in different ways cannot be regarded as laying down prescriptive rules."

33. Some older authorities, predating *Sebastian* and *Travelers,* suggest that a spouse who provides funding to a husband or wife is ordinarily to be regarded as, or at least as akin to, a "pure funder" in the sense described by Lord Brown in para [25](2) of *Dymocks*. These authorities were reviewed by Coulson J in *Jackson* v *Thakrar* [2007] EWHC 626 (TCC), paras [21]–[29]. In *Dweck* v *Forstater* [2010]

EWHC 1874 (QB), HHJ Thornton QC said that the expression "pure funder" had no precise meaning, so that it was not easy to state what the interest is that a person needs to have before being considered as an interested party and not a pure funder. He went on to say that those with "an indirect interest, particularly if it is linked to emotional or family involvement with the party being supported, are not to be regarded as interested parties".

34. In my view, however, these older authorities cannot (in the light of *Sebastian* and *Travelers*) be regarded as laying down any firm rule as to how funding provided by a family member is to be regarded in the context of an application under s 51. I have no doubt that in the majority of cases where a family member has provided emotional and financial support to a close relative who requires funds in order to vindicate his or her rights in litigation, whether as claimant or defendant, a court would be unlikely to consider that the justice of the case made it appropriate to impose liability under s 51. This is really for the same reason that the Court of Appeal in *Hamilton* v *Al Fayed (No. 2)* [2003] QB 1175 was reluctant to grant a non-party costs order against people who had contributed to Mr Hamilton's fighting fund, in an early example of what is now called "crowd-funding". In such cases, the public interest in ensuring access to justice prevails over the public interest in the successful party recovering their costs. However, I do not consider that this is invariably the case where a family relative has provided funding, since it is always necessary to look at the particular facts in order to deal with a case justly. The fact that there is no invariable rule is clear from *Dymocks* at [25], where Lord Brown indicated that "generally speaking" the discretion would be exercised in favour of pure funders, and that this was the court's "usual approach". Similarly, Coulson J used qualified expressions in *Jackson* at [21], saying that the court will be "much less likely" to make a s 51 order against a "pure" funder, and "much more likely" to make one against a professional funder.

35. The authorities provide guidance on a number of other matters which are relevant to the arguments of the parties in this case.

(1) Causation

36. The authorities generally require a causal connection between the involvement of the non-party and the incurring of costs by the successful party. A non-party will therefore not ordinarily be made

liable for costs if those costs would in any event have been incurred even without such non-party's involvement. The relevant authorities in this area were reviewed by Christopher Clarke J in *Excalibur Ventures LLC* v *Texas Keystone Inc and Others* [2014] EWHC 3436 (Comm) and by Snowden J in *Davey* v *Money* [2019] EWHC 997 (Ch), paras [39]–[47].

37. The point is of potential importance in the present case for a number of reasons.

a) The funding provided by Mrs Arip only started in February 2014, which was some time after the commencement of the proceedings by the claimants, and after some significant interlocutory hearings. The claimants therefore incurred costs prior to that date in any event; i.e. the funding did not cause some part of the claimants' costs to be incurred.
b) It was argued on behalf of Mrs Arip and Mrs Asilbelkova that if no funding had been provided to Mr Arip after February 2014, the claimants would still have incurred costs. Since they were claimants, it would have been necessary for them to prove their case in order to obtain a judgment in their favour. It was said that Mr Arip could have defended the case as a litigant in person, and that the claimants would have had to incur significant costs in any event. Indeed, it was suggested that fighting a litigant in person can be as costly, if not more so, than fighting a represented defendant; because when a defendant is represented, the case proceeds more smoothly and efficiently.
c) The funding provided by Ms Asilbekova was, it was argued, limited to the £500,000 that she provided in December 2014. It was said on her behalf that this was de minimis in terms of causing costs to be incurred. If she had not provided the funds, the payment would "inevitably have been made by Mr or Mrs Arip at a later date". Her case was that the absence of causation – between the payment of £500,000 and the costs incurred by the claimants – was alone a sufficient reason to dismiss the application as against her.

38. It is important to recognise, however, that causation is not a pre-condition to the making of a s 51 order. This is clear from one of the cases to which I was referred: the decision of the Court of Appeal in *Turvill* v *Bird and Others* [2016] EWCA Civ 703. The Court of Appeal there approved the approach taken by David Richards J in *Total*

Spares & Supplies Ltd v *Antares SRL* [2006] EWHC 1537 (Ch). In *Total Spares*, the judge said at [54]:

> "In the light of these recent statements, it cannot in my judgment any longer be said that causation is a necessary pre-condition to an order for costs against [a] non-party. Causation will often be a vital factor but there may be cases where, in accordance with principle, it is just to make an order for costs against a non-party who cannot be said to have caused the costs in question."

David Richards J made a s 51 order against a non-party (connected with the defendant in that case) who had been involved in a transfer of assets which was intended to make it more difficult for the claimant to recover any damages or costs, and where the non-party transferor knew and intended the transfer to have this purpose.

39. It is also therefore clear from *Total Spares* and *Turvill* that there can be a relevant causal link to the conduct of the non-party not only where costs have been incurred as a result of the non-party's conduct, but also where that conduct impeded the winning party's ability to recover its costs from the losing party: see *Turvill* at para [28]. This is in accordance with the broad discretion in s 51.

(2) Claimant or Defendant

40. A relevant factor, in the view of some judges, is whether the funded party was a claimant seeking to advance a claim, or a defendant seeking to resist one. The latter circumstance could be a factor which made it less appropriate to exercise a discretion to make a s 51 order: see *Jackson* at [44] and *PR Records Ltd* v *Vinyl 2000* [2008] EWHC 192 (Ch) at [26]. However, it is important not to overstate the importance of this distinction. As Morgan J said in the latter case, this is something which "may be a relevant consideration, this being, after all, a fact sensitive jurisdiction". In *Turvill* v *Bird*, for example, the successful s 51 applicants were the claimants in the underlying proceedings.

(3) Summary Process

41. It is for the applicant for a costs order against a non-party to establish the facts relied upon in support of the application. If the applicant does not establish essential facts, on the balance of probabilities, then the application will fail: see *Catalina London Ltd* v *Kapsokolis* [2018] EWHC 1309 (QB) at [25] (Slade J). Prior to the

hearing, the solicitors for Mrs Arip and Ms Asilbekova had confirmed in writing that it was "open to the court to reach a conclusion on disputed issues, based on the evidence before it, if it considers that the relevant facts have been proved to the appropriate standard".

42. However, the court must be mindful of the constraints of the summary procedure that is usually followed in applications of this nature. In some cases, the trial judge will have had the opportunity of assessing the reliability of a particular witness during the trial, and may have resolved issues which are relevant or important in the context of the s 51 application. This is not the case here, since neither Mrs Arip nor Ms Asilbekova was party to nor a witness at the original trial. If there are disputed matters which were not resolved at trial, then it may be difficult or unfair to seek to resolve those in a summary procedure against the non-party, with the result that a very significant liability is imposed in circumstances where there has been nothing equivalent to a trial.

43. Ultimately, it was common ground that my approach should be in accordance with the statement of Floyd LJ in *Sony/ATV Music Publishing LLC* v *WPMC Ltd* [2018] EWCA Civ 2005 at [34]:

> "Considerable caution needs to be exercised, in a summary procedure, in rejecting material evidence of a non-party who has not given evidence at the trial, or had his credibility significantly dented. The imposition of a substantial liability for costs by summary procedure in those circumstances risks injustice."

This means that whilst it is open to me to make findings adverse to the defendants on the existing evidence, I should proceed cautiously in that regard, particularly if the allegations were of dishonesty or fraud or similar seriousness. Disputed factual issues can, however, in some cases fairly be resolved on a s 51 application, depending on the nature of the evidence put before the court: see *Total Spares* at para [48].

(4) Warning

44. Neither Mrs Arip nor Ms Asilbekova was warned by the claimants that she may be the subject of a non-party costs order. The absence of a warning is a relevant factor to be taken into account in exercising the court's discretion. It is not automatically a determinative factor. As Moore-Bick LJ said in *Deutsche Bank* at [32]:

> "[t]he importance of a warning will vary from case to case and may

depend on the extent to which it would have affected the course of the proceedings."

(5) The "Arkin" Cap

45. In *Arkin* v *Borchard Lines Ltd* [2005] 1 WLR 3055, the court was reluctant to hold a professional funder, who had financed a portion of the claimant's costs, liable for the costs of the opposing party beyond the extent of the funding provided. I do not think, however, the "*Arkin* cap" is of any real relevance for the present application. The court's comments in *Arkin* were made in the context of professional funders (see [44] of Lord Phillips's judgment), and neither Ms Asilbekova nor Mrs Arip were such. Moreover, recent authority shows that, even in the case of professional funders, the "*Arkin* cap" is not an inflexible rule. Snowden J said in *Davey* v *Money* [2019] EWHC 997 (Ch) at [89]:

> "[W]hat has become known as the Arkin cap is, in my judgment, best understood as an approach which the Court of Appeal in *Arkin* intended should be considered for application in cases involving a commercial funder as a means of achieving a just result in all the circumstances of the particular case. But I do not think that it is a rule to be applied automatically in all cases involving commercial funders, whatever the facts, and however unjust the result of doing so might be."

The Evidence for the Hearing

46. The evidence relevant to the present application comprised, principally:

a) The second affidavit of Mona Vaswani, the solicitor at Allen & Overy LLP with responsibility for the conduct of the claimants' case. This affidavit was dated 25 September 2018, and was deployed in support of the WFO granted by Andrew Baker J. It was sworn at the start of the s 51 proceedings, and the materials available to the claimants thereafter increased very considerably: in particular as a result of (i) Mrs Arip's asset disclosure ordered pursuant to the WFO against her, and (ii) documents which the claimants obtained from certain banks. The claimants' case as ultimately presented drew heavily upon these materials.
b) The response by Mrs Arip and Ms Asilbekova comprising: the fourth witness statement of Mrs Arip dated 7 June 2019; the first witness statement of Ms Asilbekova dated 6 June 2019; and the

fourth witness statement of Smeetesh Kakkad (the solicitor with conduct of their case).

c) The 48th witness statement of Ms Vaswani responding to that evidence. This was served on 8 July 2019, some two weeks prior to the date fixed for the hearing.

47. In addition, the parties referred to:

a) The evidence served for the application to cross-examine Mrs Arip: the 39th witness statement of Ms Vaswani dated 11 April 2019; the fourth affidavit of Mrs Arip, dated 24 May 2019 in response; and the 43rd witness statement of Ms Vaswani in reply.

b) The evidence of Mrs Arip under cross-examination on 15 and 16 July 2019, albeit that the effect of the submissions of both parties was that there was little or nothing in this evidence which was material or enlightening.

48. The shape of the evidence in the principal affidavits and witness statements was as follows.

49. In her second affidavit, Ms Vaswani described the circumstances in which her firm discovered that a significant portion of Mr Arip's legal representation had been paid for using funds that he had not disclosed in his asset schedule. She provided details of the claimants' application against Cleary seeking disclosure of the identity of individuals and companies who had paid their fees and disbursements in connection with the present proceedings and the information that her firm received as a result of that application.

50. Ms Vaswani then sought to suggest that Mrs Arip and Ms Asilbekova had a personal interest in the outcome of the proceedings against Mr Arip. She attempted to substantiate that assertion on three bases. First, it was said that a significant proportion of the funds that Mr Arip misappropriated from the claimants was ultimately transferred to Mrs Arip and Ms Asilbekova. Second, it was suggested that in the light of the close family relationship between Mr Arip, Mrs Arip and Ms Asilbekova, and in view of Mrs Arip's extravagant lifestyle, Mrs Arip had an interest in Mr Arip avoiding judgment being entered against him. Third, Ms Vaswani alleged that Mrs Arip and Ms Asilbekova were complicit in Mr Arip's fraud and in the concealment of his assets, in particular, by acting as nominal holders of his assets.

51. Ms Vaswani then went on to assert that Mrs Arip and Ms

Asilbekova did not have any source of significant wealth apart from the funds that were transferred to them by Mr Arip. Insofar as Mrs Arip had made profitable investments, the capital for these investments came from Mr Arip and they represented the proceeds of Mr Arip's frauds against the claimants. Accordingly, she said, Mrs Arip would have been aware of the risk that the claimants might seek to take enforcement action against her assets if they were successful in these proceedings.

52. As for the fact that the claimants had not warned Mrs Arip or Ms Asilbekova about the fact that they intended to apply for a costs order against them, Ms Vaswani pointed out that it was only recently that her firm had discovered the third-party funding in relation to Mr Arip's defence. In any event, she said, there was a significant risk that had Mrs Arip and Ms Asilbekova been warned, they would have attempted to dissipate their assets in order to frustrate the enforcement of a costs order against them.

53. In response, in her fourth witness statement, Mrs Arip explained that she had no ulterior motive in agreeing to help Mr Arip pay his legal fees. She thought it "inconceivable" that any wife would fail to support their husband in circumstances where he was incapable of funding his own defence. She suggested that her agreement to fund his defence was borne out of love and affection and that she was most certainly not thinking of herself when she agreed to do so. Mrs Arip also said that she played no role in conducting Mr Arip's defence.

54. Mrs Arip admitted that she had received substantial funds from the WS Settlement. She said, however, that she was not aware at the time that either the trust funds or historic distributions from the trust would be jeopardised by the outcome of the claims against Mr Arip. As for the claimants' failure to warn her of their intention to seek costs from her, her evidence was that had she been warned, she would have been forced to reassess whether she should provide further funding to Mr Arip taking into account the possibility of a costs order against her and the risk that this might pose to her and her children's welfare.

55. Ms Asilbekova's evidence in her first witness statement was that Mr and Mrs Arip were travelling at the time when she made the payment of £500,000 towards Mr Arip's legal costs. Thus, it was not easy for them to arrange for the payment to be made. This was the reason why she agreed to make it. In doing so, she said, she was only doing her daughter and son-in-law a favour. She also confirmed that

she did not involve herself in the proceedings in any way. If she had not made the payment, Ms Asilbekova was certain that other arrangements would have been made to ensure that Cleary's request for payment was met. Ms Asilbekova confirmed that the payment of £500,000 was made from the monies that she received from Mrs Arip which, in turn, were derived from distributions made by the WS Settlement. However, she denied that she had assisted Mr Arip in concealing the proceeds of fraud.

56. The fourth witness statement of Mr Kakkad, the solicitor in charge of the case on behalf of Mrs Arip and Ms Asilbekova, was mainly concerned with responding to the allegation in Ms Vaswani's second affidavit that the defendants had pursued an aggressive litigation strategy throughout the proceedings which involved taking every point and arguing every issue. He pointed out that the defendants were represented throughout the proceedings by an experienced and reputable team of solicitors and counsel. He considered it unlikely that members of this legal team would have raised points that they did not consider to be properly arguable. As far as Ms Asilbekova is concerned, he said that she only provided a limited sum in December 2014. His evidence was that it could not realistically be said that the funds provided by Ms Asilbekova had a material impact on the course of the litigation.

57. In her 48th witness statement, Ms Vaswani responded to the principal points made in the evidence on behalf of Mrs Arip and Ms Asilbekova. She made various points arising out of the disclosure received from BJB and JBI. She identified the very substantial assets placed by Mr Arip into the WS Settlement. The majority of these assets were distributed to Mrs Arip. Mrs Arip then transferred a significant amount of these funds to her mother, a part of which was repaid by her mother to Mrs Arip. Ms Vaswani sought to make two points by reference to these transfers. First, she said that it was artificial to treat the funding provided by Mrs Arip and Ms Asilbekova as separate from Mr Arip. In practice, she said, the funding was available to Mr Arip in the same way as it would have been had it been held in his name. Second, she said that in the absence of a satisfactory explanation for the way in which the funds were moved around, the logical conclusion ought to be that Mr Arip and/or Mrs Arip were using Ms Asilbekova to hold money as a nominee.

58. Ms Vaswani challenged the explanation in Ms Asilbekova's

witness statement that she had provided £500,000 because Mr and Mrs Arip were travelling at the time. She pointed out that Ms Asilbekova's payment instruction was verbally confirmed with Mrs Arip. Within hours, Mrs Arip was also able to return a signed form to manage some compliance issues. She contended therefore, that, contrary to Ms Asilbekova's evidence, it would not have been difficult for Mrs Arip to make the payment had she wished to do so.

The Claimants' Submissions

59. The claimants' main submissions at the hearing were as follows. In recognition of the need to proceed with "considerable caution" in the context of a summary procedure, these were somewhat more limited and refined than those foreshadowed or made in the evidence and written argument which had been served prior to the hearing.

60. The claimants submitted that the claim did not depend upon the court making findings of dishonesty, but rested on a number of facts which were either common ground or not capable of serious dispute:

a) Mr Arip was the origin of the monies which had been used, ultimately, to pay his legal costs. His business activities, whether honest or dishonest, generated the flow of monies into the WS Settlement.
b) The monies in the WS settlement were then distributed to Mrs Arip as a result of arrangements to which Mr and Mrs Arip were parties. Significant amounts of those monies were then distributed to Ms Asilbekova, as a result of arrangements between her and Mrs Arip.
c) Those monies were then used, by virtue of contributions both by Mrs Arip and Ms Asilbekova, to fund a defence which was thoroughly dishonest, and which caused the claimants to incur very substantial costs.
d) Viewed objectively, the effect of these arrangements was that Mr Arip, as well as Ms Dikhanbayeva, were able to fund their defence in circumstances where they had no effective risk as to costs. Mr Arip claims to have no assets, and has made an application in Cyprus to declare himself bankrupt. This must have been the "calculated" effect of the arrangements that were made. By contrast, had the claimants lost the claims, they would have been required to pay the defendants' costs.
e) The funding of the defence was also for the benefit of Mrs Arip and

Ms Asilbekova. As people to whom assets had been transferred, a successful defence would prevent the claimants from taking enforcement action in respect of those assets.

61. In those circumstances it was fair and just that Mrs Arip and Ms Asilbekova, who had received all the monies from which, in substantial part, the defences of Mr Arip and Ms Dikhanbayeva were financed, should be required to pay the claimants' costs. The claimants' primary submission was that the subjective intentions, claimed by Mrs Arip and Ms Asilbekova as their reasons for providing the funds, were not relevant. What really mattered was not the natural love and affection from which Mrs Arip and Ms Asilbekova claim to have acted, but the objective effect of the arrangements entered into, whereby all of the money that might otherwise have gone to Mr Arip was "funnelled" instead to Mrs Arip and then on to Ms Asilbekova, out of which funds were made available to provide a defence to Mr Arip who now claims to be in no position to pay anything. The objective effect of the arrangements was to denude Mr Arip of readily available assets from which he could pay the claimants' costs if his defence failed, whereas Mrs Arip and Ms Asilbekova were sitting on large sums of money which they were able to use to fund the defence; money for which they had received no consideration at all. The effect of these arrangements was to produce a position of acute injustice and unfairness to the claimants.

62. The claimants therefore submitted that whatever the subjective beliefs of Mrs Arip and Ms Asilbekova as to whether they understood that assets received by them were subject to possible enforcement, the arrangements made were calculated to create and have created a wholly unjust position. Monies originating from Mr Arip had been given to Mrs Arip and Ms Asilbekova and used to fund his defence in circumstances where the claimants were fully at risk as to costs but Mr Arip was not. Furthermore, as a matter of objective fact and whether Mrs Arip or Ms Asilbekova appreciated it or not, the spending was for their benefit; because there was always a risk that the claimants would be seeking to enforce against those assets. This meant that they could not properly be described as "pure funders". There was a clear benefit to them in seeking to avoid the risk that the claimants would seek to enforce against assets which they had received.

63. On this argument, it was not necessary to come to any

conclusion as to whether or not Mrs Arip and Ms Asilbekova had really acted simply out of natural love and affection in providing the funds. However, if it were necessary to explore that issue, the case that this was purely their motivation is incredible and untrue and cannot be reconciled with their conduct. The claimants say that they must have been motivated, in whole or substantial part, by a desire to protect assets which they had received from possible enforcement by the claimants, in the event of a successful claim.

64. The claimants submitted that the evidence showed that Mrs Arip had taken systematic and sustained steps, prior to judgment as well as after, to dissipate and conceal the monies which she had received. They had been transferred to, amongst others, her mother, brother and various trusts. The upshot is that Mrs Arip received the equivalent of around £188 million in total from the WS Settlement, but now has (on a generous view) only US$25 million in assets.

65. Furthermore, a large amount of the money received had not been accounted for, despite orders of the court for disclosure of information. The claimants produced a table, based in part on information provided by the solicitors for Mrs Arip and Ms Asilbekova, as well as answers given by Mrs Arip in the cross-examination previously ordered. This identified the main payments made by Mrs Arip from the £188 million that she had received from the WS Settlement. It showed that of the net sum of £77 million which had been given by Mrs Arip to her mother, and which had allegedly been invested in properties, assets totalling only just under £20 million had been identified; so that £57 million was "missing". Additionally, the location of a further £51 million, transferred to Mrs Arip's brother and into various trusts, was unknown; so that currently a total of £108 million was either missing or unexplained.

66. The significance of these matters, on the claimants' case, was that Mrs Arip and Ms Asilbekova, as well as Mr Arip, fully appreciated that they needed a plan to try to judgment-proof their assets. Part of that plan involved defending the claim. The back-up was to dissipate the assets and tuck them away. The court should reject the suggestion that, without any plan, (i) Mr Arip was simply behaving very generously to his wife, (ii) Mrs Arip was behaving very generously to her mother, and (iii) money was then given out of natural love and affection back to Mr Arip in order to enable him to defend the proceedings.

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67. The desire to protect assets can also be seen from Mrs Arip's conduct – subsequent to Picken J's judgment on liability, but prior to the hearing on consequential matters – in obtaining without notice anti-suit relief from the Cyprus courts which prevented the claimants from enforcing against certain trusts.

68. The claimants submitted that it was just and fair for an order to be made, for the full amount of the costs, against Ms Asilbekova as well as Mrs Arip. The money was, they said, simply transferred from one pocket to another, and then passed round the Arip family. It was not appropriate to distinguish between the two defendants. They had both stood to benefit from the funding, with one of the main purposes of funding the defence being to protect the assets under the family control, including Ms Asilbekova's control, from potential claims by the claimants as a result of the claim against Mr Arip. Funds were transferred between Mrs Arip and Ms Asilbekova indiscriminately and were under the control of either or both of them. Mrs Arip had a power of attorney over her mother's assets, and it was not appropriate to draw any distinction between them.

69. It was not necessary that Ms Asilbekova should have funded at all, in order for the wide discretion under s 51 to be applied. It would be sufficient if the situation were that Mrs Arip had simply "funnelled" money on to her in order to insulate her from an order for costs. But the evidence showed that Ms Asilbekova had allowed herself to be treated as a "pocket for the convenient parking of funds". If no order were made against her, the effect would be that just as Mr Arip had successfully insulated himself from an order for costs, so had Mrs Arip.

70. During the course of their submissions, the claimants relied upon a number of other matters which were said to render it just that there should be a s 51 order. In particular:

a) The principle of "reciprocity" applied. The claimants had to provide substantial security for the defendants' costs. Had the case failed, Mr Arip's costs would have been paid and the money would then have been returned to the Arip "family pot". Since the case had succeeded, reciprocity required that the "family pot" should pay.
b) Certain documents obtained from the bankers to the Arip family

were said to evidence the fact that Mr and Mrs Arip viewed the litigation as a shared endeavour.

c) Other documents, again obtained from the bankers, were said to show that the Arips treated the funds held by Mrs Arip and Ms Asilbekova as part of a family pot. For example, Mrs Arip routinely paid invoices addressed to Mr Arip or her mother. There were also numerous emails in which Mrs Arip gave instructions for payment on her mother's account.

The Submissions on Behalf of Mrs Arip and Ms Asilbekova

71. Mr Auld QC's central argument was that Mrs Arip and Ms Asilbekova fell within the description of a "pure funder", so that the general approach was that no s 51 order for costs would be made. They were close family members providing funds to enable a person to meet a serious claim against a husband and son-in-law. Such cases do not warrant a third party order. There were no different or exceptional circumstances in the present case that would lead to a contrary result. He invited the court to accept the evidence of Mrs Arip and Ms Asilbekova that the funding had been provided to help someone who was facing major litigation and who could not afford to defend himself otherwise. There was no ulterior motive in so doing. Mrs Arip believed, based on what her husband told her, that there had been no wrongdoing. Positive advice was given by Cleary.

72. Mrs Arip was, he submitted, "quite plainly a pure funder, no interest or involvement in the litigation, no benefit from the litigation because she had her own separate assets" and she was not given any warning.

73. Ms Asilbekova's position was equally straightforward. She made one payment which, in context, was small. She did so because she was asked to help. She too was a pure funder, with no interest or involvement in the case. She had no reason for thinking that the claimants might come after her assets if Mr Arip lost the case.

74. Mr Auld noted that it was common ground that the money used to pay the costs was ultimately derived from distributions from the WS Settlement, and that the assets of that settlement had ultimately been derived from the shares in Exillon. However, the settlement of the assets into the trust, and the subsequent payments out of the trust were all perfectly proper, lawful arrangements, and there was no basis for concluding otherwise on the evidence before the court. The generosity

shown by Mrs Arip to her mother and brother, with the funds that she had received, was also lawful. It was not appropriate to apply the words "channelling" and "funnelling" to describe what had happened, and there was no basis for doing so. There was nothing in these arrangements which justified a third party costs order. A legitimate trust arrangement was not to be regarded simply as a "family pot", and expressions used to that effect by bankers in documents were not probative of anything. The claimants' case involved using emotive language to describe a perfectly straightforward family trust arrangement, and gifts made within a family following huge business success. Funds were provided by Mrs Arip and Ms Asilbekova perfectly lawfully, from their own money.

75. Nor was there any basis for describing the payments which Mrs Arip had made, from monies received, as being the dissipation or concealment of assets. Such a conclusion could not be reached in a summary process. Moreover, those payments had started long before the proceedings against Mr Arip were commenced in 2013. Much money was invested in properties in Central London, which is not typical of a person seeking to dissipate or conceal assets.

76. Considerable caution also needed to be exercised in drawing any conclusions as to whether the monies paid to Mrs Arip or Ms Asilbekova represented the proceeds of Mr Arip's frauds. This was the subject of the potential tracing claim, but was manifestly unsuitable for determination at a summary hearing.

77. Mr Auld pointed to other factors which should weigh against a discretionary decision to make a s 51 order:

a) Mr Arip was a defendant seeking to defend hostile litigation. He was not a claimant. Money was provided in order to enable him to fight a massive action fairly and on a level playing field.
b) No warning was given. The claimants had a WFO against Mr Arip, and it was apparent that Mr Arip was no longer requesting that his funds be used for legal expenses. This naturally gave rise to the question of who was providing the funds. The claimants should have asked. This could and would have led to the necessary warning. Had a warning been given, Mrs Arip would have arranged her affairs differently, as she said in her statement.
c) Neither Mrs Arip nor Ms Asilbekova had been party to the proceedings. An attempt to join Mrs Arip to the proceedings, in

relation to one of the alleged frauds, had been dismissed by Leggatt J in January 2015.

d) There was no good evidence that the payment of costs by Mrs Arip and Ms Asilbekova caused the claimants to incur any costs. Causation was a complete answer in the case of Ms Asilbekova.

e) If an order were made, it was likely that the claimants would take steps to make it difficult or impossible for Mrs Arip to comply with it; because it would be said that the assets that she wished to use to discharge it were assets into which the claimants were entitled to trace.

Discussion: Mrs Arip

78. I consider, for the reasons that follow, that the justice of this case requires Mrs Arip to pay the costs which the claimants incurred in this litigation. I have considered whether such order should be limited to the costs incurred by the claimants after 25 February 2014, which was the date of Mrs Arip's first payment on account of costs. However, I do not consider that it should be so limited. Although the incurring of costs by the claimants prior to that time cannot be said to be causally related to any conduct of Mrs Arip, such causation is not a pre-condition to an order under s 51. Furthermore, the exercise of the discretion under s 51 can take into account conduct of a non-party who has taken steps to render it more difficult for a claimant to recover costs from a defendant.

79. I consider that there are a number of features of the facts of the present case which are remarkable and which mean that this is far from a typical case where a close relative provides funding out of a sense of affection or familial responsibility.

80. It is relevant, but principally as a matter of background, that (as is common ground) Mr Arip was the origin of the monies which Mrs Arip then used to discharge his legal costs. The monies in the WS Settlement represented the proceeds of sale of Exillon shares which Mr Arip had settled into the WS Settlement. I do not consider that this in itself would be a sufficient reason for making an order, and I would regard it as positively undesirable for s 51 applications generally to require an investigation as to when and how a spouse acquired assets in the course of a marriage. In many marriages, a spouse may have acquired assets from his or her partner over many years, whether through ordinary gifts, transfers which are made as legitimate tax

avoidance measures, or for other perfectly legitimate reasons. The fact that these transfers may be made by the only or principal bread-winner in the family should not, in my view, mean that a s 51 liability should invariably attach when the recipient decides to use his or her assets so acquired in order to assist his or her spouse in pursuing or defending litigation. Indeed, Mr Howe QC for the claimants did not suggest that this fact on its own would be sufficient or determinative.

81. What is more important, in my view, is that the funding of Mr Arip's legal costs by his wife, and his mother-in-law, began very quickly after the distribution of approximately US$181 million that took place from the WS Settlement in December 2013. The effect of this distribution was to reduce the assets of the settlement to the £72 million which was the then amount of the WFO which had been granted against Mr Arip, together with an additional US$1 million which was retained in the trust. The practical effect was therefore to denude the settlement of assets which could otherwise have been paid to the beneficiaries, who at that point in time were Mr and Mrs Arip. This was, no doubt, the reason why Mr Arip's consent was sought and obtained to the very substantial distribution to his wife that then took place. The effect of the distribution was therefore to put an end to any possibility of the trustees providing funds to Mr Arip for the purposes of enabling him to defend the substantial litigation which was by then in progress, or indeed to discharge any potential liability to pay the costs of the opposing party in the litigation. Mr and Mrs Arip would necessarily have understood that this was the case, with the result that following the distribution – unless Mr Arip had other funds on which to draw – it would be necessary for Mr Arip to look to his wife for funds, rather than looking to the trustees.

82. Within a very short space of time, this is what happened. Mr Arip's consent to the distribution was given on 17 December 2013. The distribution itself was made on the following day. Mrs Arip's evidence was that she agreed to make the payment after "Maksat explained to me that he had run out of money and needed help from me to pay his ongoing legal fees". The first payment was made on 25 February 2014. Accordingly, this is not simply a case where Mr Arip was the source of the funds which were used to discharge his legal costs. It is a case where those funds (whilst in trust) were potentially available to Mr Arip to discharge his legal expenses, but arrangements were then made by Mr and Mrs Arip which resulted in the monies

being no longer available to him – other than via his wife – because they were all paid over to her. Furthermore, this occurred at a time when it was apparent that significant costs were being incurred by Mr Arip, and would no doubt continue to be incurred in the future. The litigation was commenced in August 2013, and Mrs Arip's fourth witness statement confirms that between October 2013 and December 2013, the amounts paid to Cleary were (i) £2,300,663 plus an additional £500,000, (ii) US$3,834,404.91 plus an additional US$382,871, and €461,501. Legal expenses were therefore being incurred on a rapid and considerable scale.

83. Moreover, the amount of money paid out to Mrs Arip in December 2013 was staggering: some US$181 million. No thought appears to have been given by the Arips to leaving any significant money within the trust, over and above the £72 million sum of the WFO, so as to provide for possible distributions to Mr Arip to enable his legal fees to be met. It would have been very easy to have left sufficient money in this trust to provide for Mr Arip's future legal bills (leaving aside provision for the costs of the opposing party in the event that Mr Arip's defence failed), but still allow for Mrs Arip to receive significant funds. Indeed, if US$40 million had been left in the trust to provide for future bills, Mrs Arip could still have received no less than US$140 million.

84. I consider that this is all a very long way indeed from the usual and simple case of a wife advancing her own funds, acquired during the course of a marriage, out of natural love and affection. Indeed, standing back from the detail, the practical effect of the arrangements was simply to substitute, as far as the US$181 million is concerned, Mrs Arip in place of the trustees of the settlement; i.e. as a source to which Mr Arip could potentially look for the funding of his defence. It is therefore unsurprising in my view that when the time came for funds to be paid to Mr Arip's lawyers, Mr Arip did indeed look to his wife, whereas previously he could have looked to the trustees. When he looked for those funds, they were readily forthcoming and were used to fund a defence which the judge rejected on the basis that Mr Arip had been dishonest throughout, and which resulted in the awarding of indemnity costs.

85. I consider that since Mrs Arip participated in these arrangements, it is in principle just that the claimants should now be able to look to her for payment of the costs which they incurred. I say

"in principle" because I will need to consider below Mrs Arip's arguments as to causation, the effect of absence of warning, and other discretionary considerations. Before doing so, however, I return to the question of whether this is, or is akin to, a case of a pure funder providing funds out of natural love and affection. For the reasons which follow, I do not consider that it is. I say this bearing in mind the need to proceed with caution in circumstances where there has been no trial or evidence from the participants.

86. First, it seems to me to be improbable in the extreme that, at the time of the transfer of US$181 million to Mrs Arip in December 2013, there was no plan as to how Mr Arip's legal bills would be met. This was the major litigation to which Mr Arip was responding, with substantial sums having been paid to Cleary and, inevitably, further significant expenditure which could reasonably be anticipated. Mrs Arip's witness statement suggests that, at some point between December 2013 and 25 February 2014, Mr Arip revealed to her that he no longer had any funds to meet his legal bills, and that her agreement to provide funding was a response to this development. However, Mr Arip's supposed inability to find funds to meet those bills seems to be the entirely foreseeable and predictable consequence of his decision, only weeks earlier, to allow his wife to receive US$181 million from the WS Settlement. In my view, some thought must have been given by the Arips, prior to that distribution, as to how Mr Arip's legal bills would be met in the future. The overwhelming likelihood is that what happened, namely the funding by Mrs Arip of his legal bills with the proceeds of US$181 million, was thought about and planned in advance.

87. Secondly, Mrs Arip's evidence – that her funding came about after her husband revealed his inability to pay his legal bills – is inconsistent with the evidence that Mr Arip did in fact, at least to some extent, fund his legal bills after February 2014. Evidence to this effect was given by Ms Vaswani in her 48th witness statement, where she summarised the amounts which had been paid to Cleary by Mr Arip after February 2014. There were four further payments, made at around the same time each year: on 12 February 2015, 24 February 2016, 3 March 2017 and 27 February 2018. Ms Vaswani's evidence to this effect was not disputed. She concluded by saying that these payments "demonstrated that Mrs Arip's claims that she paid for Mr Arip's legal fees because 'he had run out of money' are false". No

evidence from Mrs Arip was served responding to what was clearly an important point made by Ms Vaswani. There is therefore no explanation as to how Mrs Arip's account, as to how her funding came about, was consistent with Mr Arip's continued funding of his legal expenses.

88. Mr Auld's only response to the evidence in Ms Vaswani's 48th statement was that it had been served late; that there had been no proper opportunity to respond to the points which she had made and which were derived from the extensive disclosure of banking documents which the claimants had obtained; and that the claimants had "cherry-picked" documents from that extensive disclosure.

89. I did not consider that there was any substance in that argument, particularly in the present context. Ms Vaswani's witness statement was served some two weeks before the hearing of the s 51 application. There was, therefore, time for some response to be made by Mrs Arip, even if only to the most important points that Ms Vaswani had raised. No request was made by Mrs Arip for an adjournment in order to enable her to respond to that evidence. Mr Auld explained that her position was that she wanted to get on with the hearing, and that there was limited funding available for a full review of the disclosed documents in any event. Even so, the fact is that Ms Vaswani's evidence remained unanswered. Moreover, this particular point, as to Mr Arip funding his own costs even after February 2014, did not arise from the disclosure obtained from the banks, but rather from evidence served by Mrs Arip's former solicitors some time previously.

90. In any event, the position – as far as concerns the disclosure of banking documents – is that the substance of the points made by Ms Vaswani in her 48th witness statement had been made in her 39th witness statement served in connection with the application to cross-examine Mrs Arip. That witness statement had been served on 7 June 2019, and had also not been responded to by Mrs Arip. Following my judgment on the cross-examination application, the claimants provided full disclosure of the banking documents.

91. Against this background, it seemed to me that, as I indicated at the hearing, the present application should be decided on the basis of all the evidence that had been adduced, and that there was no basis for disregarding any of the evidence of Ms Vaswani in her 48th witness

statement because it had been served late or because there had been no opportunity to respond.

92. Thirdly, Mrs Arip provided funding not simply of the defence of her husband, but also the defence of Ms Dikhanbayeva. Ms Vaswani had drawn attention to this fact in her second affidavit on at least two occasions. But, as Ms Vaswani pointed out in her 48th witness statement, neither Mrs Arip nor Ms Asilbekova provided any explanation of why they were prepared to pay the legal fees of Ms Dikhanbayeva. The point is important, because the funding of Ms Dikhanbayeva cannot reasonably be ascribed to any natural love and affection. Moreover, there was no evidence from Mrs Arip that Ms Dikhanbayeva was in similar alleged financial difficulties to those of her husband, or had come to her because she had run out of money. The funding by Mr Arip of his joint defence with Ms Dikhanbayeva prior to February 2014, and the subsequent funding by Mrs Arip of both Mr Arip and Ms Dikhanbayeva in February 2014 and thereafter, interspersed with further funding by Mr Arip himself, indicates that what happened was seamless. It supports the conclusion that the use of the US$181 million, distributed to Mrs Arip in December 2013, for the continued defence of the litigation was a use which was planned, and that there was no watershed moment in or around February 2014 when Mr Arip told Mrs Arip that he had run out of money.

93. Fourth, even if I were wrong in my conclusion that the use of the funds released was planned, I consider it unrealistic to regard the funding as a manifestation of the ordinary love and affection that one would expect in a marriage. Having received, with the consent of her husband and for no consideration, the sum of US$181 million from the trust only a matter of weeks earlier, Mrs Arip could not reasonably refuse to provide the funding which Mr Arip needed. Any other decision would involve the most extraordinary display of ingratitude, which in any normal circumstances could be expected to be destructive of the relationship between them. Even assuming no plan, the size of the amount received and its proximity to the request for funding created an overwhelming moral obligation on Mrs Arip to provide funds for Mr Arip's continued defence of the proceedings.

94. Fifth, the concept of a "pure funder", as explained by Lord Brown in *Dymocks*, is a person who derives no benefit from the successful outcome of the litigation. The older case-law suggests that this concept would include a spouse who provides funding from

natural love and affection, notwithstanding that a successful outcome to litigation would benefit the spouse in maintaining or even enhancing his or her ordinary standard of living and enjoyment of life. However, there can be no absolute rule to this effect and there may be questions of degree. The evidence in this case suggests that Mrs Arip, together with her husband, enjoyed an extravagant lifestyle with art collections, numerous properties in different parts of the world (owned by trusts in which they or their children were interested), and various businesses and investments. When an application was made to vary the WFO against Mrs Arip to allow for expenditure of ordinary living expenses, it was said that Mrs Arip's living expenses were an average of US$280,000 per month, equating to around £3 million per year. The money paid to Cleary in this case was for the purpose of defeating very substantial claims which would potentially threaten that extravagant lifestyle. I see no reason why, on the facts of a case such as the present, this factor should be disregarded when it comes to considering whether or not Mrs Arip was to derive a benefit from the outcome of the litigation.

95. In the present case, however, the point goes somewhat further as, in my view, the claimants correctly submitted. Both Mrs Arip and Ms Asilbekova were the recipients, for no consideration, of substantial assets ultimately derived from Mr Arip. In circumstances where Mr Arip was accused of fraud, there was the obvious potential for such assets to be the object of potential enforcement measures in the event that the claim succeeded. The expenditure on Mr Arip's legal costs would, if the defence succeeded, potentially benefit both Mrs Arip and Ms Asilbekova because assets which they had received would not be susceptible to enforcement.

96. Accordingly, for these reasons, I do not regard Mrs Arip as, or akin to, a pure funder in the sense described or contemplated in *Dymocks*. This reinforces my conclusion that in principle it is just for an order to be made against Mrs Arip pursuant to s 51.

97. In reaching this conclusion, it is not necessary to try to determine matters such as whether or not the claimants have an entitlement to trace into any particular assets, and in particular whether any such assets represent the proceeds of Mr Arip's frauds. There are unresolved issues as to whether it is permissible for the claimants to pursue such a tracing remedy at the present stage, and

these issues have been adjourned and reserved to the trial judge for determination.

98. Having addressed Mrs Arip's principal argument that she was or was akin to a pure funder, I now address the other reasons advanced as to why no order should be made.

Warning

99. First, reliance is placed on the fact that the claimants gave no warning as to the possibility of seeking a s 51 order. The cases show that this is a factor to be taken into account. But I do not consider that it is a point of any weight in the present context, particularly when weighed against the facts already described. The claimants did not know, until after the conclusion of the litigation, that funding was being provided either by Mrs Arip or Ms Asilbekova. It was argued in the skeleton argument on their behalf that it would have been obvious from the absence of notifications "from 2014 onwards that Mr Arip's legal fees were being paid by a third party". The "notifications" referred to were the standard notifications of proposed expenditure on legal expenses when a WFO is in place. However, as far as I could tell, the evidence did not clearly establish that no notifications were given subsequent to 2014: I do not therefore know whether notifications were given in respect of the four payments that were made by Mr Arip subsequent to that date.

100. Nevertheless, assuming in favour of Mrs Arip that no such notifications were given, then it is fair to say that the claimants could, if they had spotted this point, have asked the question as to how Mr Arip's legal fees were being funded. However, whilst it is possible to obtain information about funders in order to facilitate an application for security for costs, it is far from clear that Mr Arip would have been obliged to identify his funder or funders in the absence of any such application and in advance of judgment being obtained: see *Abraham* v *Thompson* [1997] 4 All ER 362. Given the hard-fought nature of the litigation, I think it most improbable that Mr Arip would have revealed anything to the claimants that he was not required to disclose. Any failure by the claimants to ask the question did not therefore, in my view, have any relevant consequence: i.e. it cannot be said that, if the question had been asked, the claimants would have been in a position to warn either Mrs Arip or Ms Asilbekova.

101. Furthermore, even if a warning had been given, I regard it as

wholly improbable that Mrs Arip, or indeed Ms Asilbekova, would have acted differently. It is in my view fanciful to think that a warning would have led either of them to decide that they were no longer prepared to support Mr Arip's defence. Indeed, Mrs Arip's evidence was that it was inconceivable that a wife would fail to support their husband in circumstances where he would have lost the ability to defend himself. In fact, Mrs Arip continued to fund Mr Arip's costs after the judge had rejected his case and held him to have acted dishonestly throughout.

Causation

102. Mrs Arip's funding was provided after 25 February 2014. Her funding actions had no causative impact on the costs incurred by the claimants prior to that date. After that date, there can in my view be no doubt that there was a sufficient causal connection between her actions and the costs incurred by the claimants to make it just to make a s 51 order. In her fourth witness statement, Mrs Arip says that if she had not provided funding after Mr Arip had run out of money, the "alternative would have been that he would have lost the ability to defend himself". In his witness statement in response to Ms Vaswani's second affidavit, Mr Kakkad acknowledged that "it is indeed the case that Mr Arip would not have been able to defend himself in the proceedings to the same extent without the benefit of funding from, primarily, Mrs Arip".

103. I do not consider that the possibility that Mr Arip might have defended the proceedings as a litigant in person, if funding had not been forthcoming, is a reason for declining to make an order on the grounds of lack of causation. The factual position is that Mrs Arip did provide significant funding to Mr Arip's lawyers, and in consequence the litigation was fought hard and with professionalism. The claimants had to respond to the way in which the litigation was in fact being conducted on the other side, and incurred their expenditure in so doing. Given that this was what actually happened, I do not consider it appropriate to speculate as to whether Mr Arip would have defended the case as a litigant in person if the funding had not been provided. There was in fact no evidence that Mr Arip ever contemplated fighting the case as a litigant in person, or that he would have done so – rather than allowing the proceedings go undefended – if his wife's funding had not been forthcoming. Had the proceedings

been undefended by Mr Arip, the claimants would have had to prove their case, but there is no reason to think that their costs of doing so would have begun to approach the scale of costs necessary to fight a lengthy, heavily contested trial.

104. Ultimately, causation is not a legal pre-requisite to the making of a s 51 order, although I accept that it would not usually be just to make such an order unless the conduct of the non-party caused the applicant to incur the expenditure which he seeks to recover. In the present case, there was such causation in the period after 25 February 2014.

105. However, even if there were some elements of the claimants' costs which were not incurred as a result of Mrs Arip's conduct, I consider that a s 51 order is just and appropriate on the facts of the present case bearing in mind that Mrs Arip has not only funded her husband's defence, but she has also taken significant steps to make enforcement of a judgment against Mr Arip more difficult. Even bearing in mind the need for caution, I am satisfied on the evidence that steps have indeed been taken by Mrs Arip with a view to dissipating or concealing assets and thereby making enforcement of the claimants' potential or actual judgment against Mr Arip more difficult. In my view, the movements of assets described in the evidence have all the hallmarks of an asset dissipation and concealment exercise. In particular:

a) There has in my view been no proper explanation as to why it was necessary or appropriate to remove US$181 million from the WS Settlement in December 2013. I agree with Mr Auld that it is not unusual for a wealthy businessman, who has enjoyed business success, to place assets in a trust, and that therefore I could not proceed on the basis that there was anything improper in Mr Arip putting his Exillon shares into the WS Settlement. However, it is one thing for a businessman to place assets in a trust. It is another to have virtually the entirety of the trust paid out to the businessman's wife, at a time when fraud proceedings are well underway.
b) I do not consider that there has been any proper or good explanation for the significant transfers of money by Mrs Arip to Ms Asilbekova and back again, other than the explanation provided by the claimants: namely that assets were being moved

from Mrs Arip as part of an asset dissipation exercise, and being "parked" with Ms Asilbekova. I do not accept that payments on this scale can be explained as simply ordinary gifts from daughter to mother, and then (presumably) a gift back from mother to daughter. As I said in my judgment on the application for cross-examination, it is unusual for children to give away assets, on the scale in the present case, to their parents. The normal transmission of funds is the other way; from parents to children. Here, some US$97 million has been given by Mrs Arip to her mother, and approximately US$20 million has been returned. There is no basis for thinking that Ms Asilbekova needed money on this scale in order to carry on her daily life, or that this was done for example in order to assist her in investing in some business enterprise. Ms Asilbekova was described in the banking documents as a person with "no knowledge and experience", "unemployed" and "with no sophistication level like Mr and Mrs Arip". The claimants' case, that this was an exercise in parking assets with a nominee, is borne out by the documentation received from the banks. This shows, in substance, the control by Mrs Arip of Ms Asilbekova's assets, via instructions given on her mother's behalf and in due course by a power of attorney granted by Ms Asilbekova. I expand upon these matters below when dealing with the application against Ms Asilbekova.

c) Having received not only US$181 million in 2013, but also significant additional amounts before then, one would expect Mrs Arip to be a very wealthy woman. However, her asset disclosure in response to the orders made against her indicates that the overwhelming majority of her wealth has now gone. The obvious explanation is that there has been an asset dissipation exercise.

d) Despite various orders of this court for disclosure of assets, the whereabouts of assets totalling in excess of £100 million has, as the claimants submitted, not been revealed.

106. The importance of providing a good explanation of the transfers from Mrs Arip to her mother, and back again, was in my view clear from the way in which the claimants' case was being advanced in the weeks before the hearing.

i) On 7 June 2019, Ms Vaswani served her 43rd witness statement in the context of the application to cross-examine Mrs Arip. In that

witness statement, she referred to the transfer of US$77 million (net), for no consideration, and said that it was "for no logical purpose other than to distance overt ownership of those assets from Mr and Mrs Arip". She referred to the bank documents showing that Mrs Arip retained control over "funds ostensibly held by Ms Asilbekova", and to her belief that Mrs Arip did not intend to relinquish her interest in the funds transferred. She said that the value of the assets transferred, now far in excess of the value that Mrs Arip claims to have, "calls for an explanation".

ii) These matters were then heavily relied upon on the application to cross-examine Mrs Arip. At paras [27]–[30] of my judgment, I discussed the points which arose and indicated that "on the present material … the claimants are justified in their contention that an obvious inference is that these monies were being parked by Mrs Arip with her mother and brother".

iii) On 8 July 2019, some two weeks before the hearing, Ms Vaswani served her 48th witness statement. This responded to the evidence served on behalf of Mrs Arip and Ms Asilbekova, drawing upon the evidence which had emerged from Mrs Arip's asset disclosure and documents obtained from BJB and JBI. Ms Vaswani made various points including that Mrs Arip had actively co-operated with her husband in attempting to impede and frustrate the claimants' claims, and that Ms Asilbekova was willingly involved in those efforts or at a minimum was "content to allow herself to be used as an instrument or nominee for these purposes". She said that the "logical conclusion is that Mr Arip and/or Mrs Arip are using Ms Asilbekova to hold money as a nominee". She said that, at the very least, Ms Asilbekova "must have appreciated that she was merely being used as a nominee or pocket to hold monies that were readily available for Mr Arip to use should he need to do so".

iv) As previously discussed, neither Mrs Arip nor Ms Asilbekova sought to respond to, or engage with, the points which Ms Vaswani made in her 48th witness statement. Mrs Arip did answer, in cross-examination before the deputy judge, some questions relating to these matters, and I refer to that cross-examination below.

2015 Leggatt J Judgment

107. In January 2015, Leggatt J disallowed an amendment which would have resulted in the joinder of Mrs Arip as a defendant. The

amendment concerned an attempt by the first claimant (rather than the second claimant) to trace the proceeds of one of Mr Arip's alleged frauds. The principal basis of the judge's decision to disallow the amendment was the difficulty of the first claimant pursuing that claim, in view of the fact that there had been a legitimate transfer of certain assets to the second claimant. This judgment was relied upon, principally, as supportive of Mrs Arip's case that she did not subjectively believe that assets transferred to her were potentially subject to enforcement by the claimants.

108. I did not consider that the existence of this judgment provided any good reason for declining to make a s 51 order against Mrs Arip. The judgment was given some months after Mrs Arip's funding had started, and therefore can have had no impact on her decision at the outset. Although Mrs Arip's witness statement on the s 51 application referred to this judgment, it did not suggest that her decision-making was influenced by Leggatt J's judgment, and there is therefore no basis for thinking that it impacted either upon her decision to continue funding or more generally on her subjective understanding of whether assets transferred to her were potentially subject to enforcement. In any event, for reasons already given, I consider that an order under s 51 is appropriate irrespective of Mrs Arip's subjective understanding as to whether or not assets given to her were potentially subject to enforcement.

No Consent to Payment

109. Reliance was placed on an argument, similar to that which I rejected in the context of the application for cross-examination, based upon the unwillingness of the claimants to allow Mrs Arip to use certain assets to be used as security in place of the WFO. The claimants had declined to permit this, because the assets were the subject of a tracing claim which asserted proprietary rights to the assets. In my earlier judgment, I declined to criticise the claimants for this decision: see para [54].

110. In the present context, Mrs Arip argues that the claimants are likely to take the same attitude to any attempt by her to discharge any liability under a s 51 order. She says that since the claimants will make it difficult if not impossible for her to discharge any order, the court should decline to make it as a matter of discretion. I do not consider that this argument is any better in the present context than it was in

the context of the application to cross-examine. I have no reason to consider that, if Mrs Arip seeks to discharge her liability under the order which I propose to make, the claimants will act improperly by seeking to prevent her from doing so.

Harbour

111. Some reliance was placed upon the fact that the litigation has been funded by Harbour, who are therefore the party with the real interest in the recovery of costs and indeed the litigation as a whole. Mr Howe told me, however, that there were creditors of one or more of the claimants who had a real interest in the outcome of the litigation. I do not consider that these matters are of any significance to my decision. I do not think that the justice of this case changes because the litigation has been funded by Harbour, which has spent significant sums on the litigation, rather than the claimants themselves. Litigation funders can provide a valuable benefit in order to enable just claims to succeed, and in the present case the claimants have obtained a very large judgment in respect of Mr Arip's fraud. I think that it would be unfortunate if the involvement of a litigation funder, which has advanced monies to support a valid claim, should be a reason for not making an order under s 51. Just as Harbour's involvement does not provide a reason against the making of an order for costs against Mr Arip, it equally provides no reason to exercise a discretion against the making of an order against Mrs Arip.

112. I now turn to the position of Ms Asilbekova, where the facts and arguments were somewhat different.

Ms Asilbekova: the Facts Relating to Her Assets and Funding

113. There is no evidence that Ms Asilbekova was involved, or instrumental in, the December 2013 transfer from the WS Settlement. Furthermore, Ms Asilbekova did not, at least directly, fund a large proportion of Mr Arip's costs. In Ms Vaswani's second affidavit in support of the s 51 application, served in September 2018, the claimants relied upon a payment of £500,000. This was paid in December 2014. The claimants' skeleton argument for the hearing similarly asserted that the funding by Ms Asilbekova was the £500,000 which had been paid, rather than any larger amount.

114. Towards the end of his opening submissions, however, Mr Howe said that this was not the complete picture. In November 2016, Ms Asilbekova transferred back to Mrs Arip the sums of around

US$16 million, comprising US$13.945 million and CHF 2.1 million. This amount was paid over in the run-up to the trial, which started in April 2017. A spreadsheet produced by Mr Howe shortly after the hearing provided an itemised list of the payments made from Mrs Arip's accounts to Cleary. This showed that significant amounts were indeed paid to Cleary in the period up to and around the time of the trial: the amounts paid between January and August 2017 were in the region of US$7 million.

115. This figure was substantial, but well below the US$16 million which Ms Asilbekova had transferred. I was not shown any evidence of a direct linkage between the money transferred by Ms Asilbekova and these amounts paid to Cleary. It was not clear to me, from looking at the lengthy exhibit (Tab 42) comprising Mrs Arip's bank statements, that the source of the funds used to pay Cleary was the money which Ms Asilbekova had transferred in November 2016. Indeed, in a brief post-hearing emailed submission, counsel for Ms Asilbekova drew attention to the fact that between November 2016 and March 2017 there had been transfers from Mrs Arip to Ms Asilbekova of approximately US$15 million, which virtually balanced the US$16 million payment which had been made in November 2016. Furthermore, no case was advanced that, in relation to the November 2016 transfers, Ms Asilbekova knew that the monies were to be used to pay Cleary for their defence of Mr Arip.

116. In the light of these matters, I consider that it would be inappropriate to proceed on the basis that Ms Asilbekova's funding exceeded the £500,000 which was provided in December 2014.

117. In relation to that funding, Ms Asilbekova's evidence was that this was provided as a result of a phone call from her daughter. Mrs Arip explained to her mother that a payment of £500,000 had to be made to Mr Arip's lawyers in respect of outstanding fees. Mrs Arip explained that since they were travelling, it was not easy for them to arrange payment themselves. Therefore she asked her mother whether she could help by making the payment. Ms Asilbekova said that she agreed "purely out of familial obligation and the fact that I was financially able to assist, given the circumstances". This led Mr Auld to submit that Ms Asilbekova was a "clear case of pure funding".

118. This explanation in Ms Asilbekova's evidence was, however, inconsistent with the documents which the claimants had obtained from JBI. These indicated that an email was sent on 5 December 2014

from Ms Asilbekova's email account instructing JBI to make payment to Cleary. JBI then verbally confirmed this instruction with Mrs Arip on the same day. There were, however, compliance issues with this payment, and JBI required a document called a "Form A". JBI's internal email on 5 December 2014 records:

> "This is the Form A issue again. Larisa is paying Sholpan's legal bills, suggesting that Sholpan is a beneficial owner of the account. I know that Zurich really needs this Form A before paying more bills (and presumably there will be more to follow in the coming days). Can we please obtain this form today."

119. Mr Djordjevic of JBI then emailed Mrs Arip, again on December 5, apologising for "all the mess this week" and saying that "this time it is Swiss law that is causing problems". His email explained that the issue "has to do with 'source of funds' and 'beneficial owner of the assets' and Zurich had small issues about it all". It was however, easy to resolve. His colleague would email a form that Ms Asilbekova would have to sign. The form "will also mention your name, NOT as beneficial of the account but assets". Mrs Arip was asked whether she could email the scan back to them immediately. Mrs Arip responded within less than an hour, attaching a scanned copy of the document that JBI wanted.

120. This "Form A" was headed "Declaration of identity of the beneficial owner". It was signed by Ms Asilbekova. The text of the form stated that the "contracting partner" (i.e. Ms Asilbekova):

> "hereby declares that the individual(s)/ partnership(s)/ legal entity (entities) listed below is/are the beneficial owner(s) of the assets deposited under the above relationship. If the contracting partner is also the sole beneficial owner of the assets, the contracting partner's details must be set out below."

121. The form then went on to list both Mrs Arip and Ms Asilbekova. The document therefore shows, as Mr Howe submitted, that Ms Asilbekova was recognising her daughter as a beneficial owner of the assets which had been deposited in Ms Asilbekova's account with JBI. This is of potential significance in relation to the claimants' argument that a s 51 order against Ms Asilbekova is appropriate in this case.

122. In addition, the documentation is potentially significant because, as Ms Vaswani submitted in her 48th witness statement, the

documents clearly showed that it was not, contrary to Ms Asilbekova's account, difficult for Mrs Arip to make the legal fees payment on that day. Thus, Mrs Arip was able both verbally to confirm this payment and to arrange for Ms Asilbekova to sign a form and return that form to JBI on December 5. I consider that Ms Vaswani's conclusions were well-founded in the light of the documents, and that they called for some explanation from Mrs Arip or Ms Asilbekova as to how, in the light of those documents, Ms Asilbekova's explanation of the circumstances of the payment could be maintained. However, there was no response by either Mrs Arip or Ms Asilbekova to this, or any other, point which Ms Vaswani made in her 48th witness statement.

123. The conclusion which I draw is that, contrary to Ms Asilbekova's evidence and Mr Auld's submission, the payment of £500,000 was not made by Ms Asilbekova out of a sense of familial obligation, and that Ms Asilbekova was not a "pure funder" in the sense of someone who provided money to a close relative out of natural love and affection. Rather, the position was that the assets which were held in Ms Asilbekova's name were a resource upon which Mrs Arip could draw in order to fund expenditure which she wished to make, including in respect of legal fees payable in respect of work carried out by Cleary in defence of her husband and Ms Dikhanbayeva. Indeed, the signed Form A acknowledged that Mrs Arip was a beneficial owner of the monies in Ms Asilbekova's account. If the reason for the payment of £500,000 had been some temporary difficulty resulting from Mrs Arip travelling, then one would reasonably have expected Mrs Arip to make a repayment to her mother shortly thereafter. But there is no evidence that this happened.

124. I also considered that there was other powerful evidence to support the conclusion that assets which were held in Ms Asilbekova's name were a resource upon which Mrs Arip could draw in order to fund expenditure which she wished to make, and that (as Mr Howe put it) "funds were transferred between them indiscriminately and under the control of either or both of them".

125. First, Ms Vaswani's 43rd witness statement, served on 7 June 2019 in the context of the application to cross-examine Mrs Arip, identified documentary evidence obtained from JBI which showed Mrs Arip exercising significant control over her mother's assets. Various documents dating back to 2010 and 2011 indicated that Mrs Arip was behind instructions ostensibly given by Ms Asilbekova to JBI: for

example, two email chains showed that Mrs Arip had access to her mother's Gmail account and used it to instruct JBI to make payments on her mother's behalf. Furthermore, by August or September 2014, Ms Asilbekova had granted Mrs Arip a broad power of attorney over her accounts at JBI. Thereafter, Mrs Arip regularly instructed payments on behalf of her mother without any apparent involvement from her. This evidence was then substantially repeated in Ms Vaswani's 48th witness statement, served on July 8 in response to the evidence served by Mrs Arip and Ms Asilbekova in opposition to the s 51 application. However, there was no response to the points which Ms Vaswani made on June 7 and again on July 8, in particular as to the evidence showing Mrs Arip's exercise of control of her mother's assets. This evidence to my mind refutes Mrs Arip's denial in para 108 of her fourth affidavit sworn in May 2019 – prior to the documentary evidence from JBI becoming available – that she exercised any measure of control over her mother's assets.

126. Secondly, Ms Vaswani's 48th witness statement gave examples of the way in which invoices had been paid, in support of the proposition that Mr and Mrs Arip, and Ms Asilbekova, "operated on the basis that the funds belonging to them, while nominally held in separate accounts, were in practice indistinguishable and the wealth was available to Mr Arip but held in the names of others, in particular Mrs Arip and Ms Asilbekova". Thus, Ms Asilbekova regularly paid invoices addressed to Mr Arip and/or Mrs Arip, often following these invoices being forwarded on to her by Mrs Arip. Similarly, Mrs Arip often paid invoices addressed to Ms Asilbekova, and transferred substantial sums to her. Mrs Arip also routinely instructed JBI to pay invoices addressed to her husband.

127. Thirdly, during the period 2011 to 2018, Mrs Arip gave her mother sums totalling approximately US$97.5 million, and received back approximately US$20 million. I have previously referred to paras [26]–[30] of my earlier judgment, and my conclusion that the claimants were justified in their contention that an obvious inference was that these monies were being parked by Mrs Arip with her mother (as well as with her brother).

128. Since that time, no additional evidence has been served either by Mrs Arip or Ms Asilbekova in order to explain these payments. Mrs Arip was, however, asked about them towards the beginning of her cross-examination before the deputy judge. Her initial explanation

was that her mother thought that she was wasting her money, and her mother "asked for some amount of money to give it to her so she could invest it on her discretion, as she see fit properly, in order to keep this money safe". This explanation supports the claimants' case that Mrs Arip was, as they put it, "parking" the monies with her mother; a case which is also supported by the declaration of beneficial ownership in Form A.

129. When asked by counsel, however, whether this answer meant that "she is keeping the money for you, is she?", Mrs Arip explained that her mother was "doing it for my children. I am not going to ask her for this money, ever". There were, however, obvious difficulties with this explanation:

a) It was clear that Mrs Arip had used the monies which she had given to her mother for purposes other than her children; for example by using £500,000 to pay Mr Arip's legal fees.
b) Ms Asilbekova had made a repayment to Mrs Arip of US$20 million, no doubt because Mrs Arip wanted that money.
c) Mrs Arip's explanation of the reasons for this repayment in her cross-examination was vague, involving some unspecified trusts who "are to close some deal and they did not have liquidity". The more obvious explanation is that the money given to Ms Asilbekova was a resource upon which Mrs Arip could draw.
d) A very considerable amount of the money transferred by Mrs Arip to Ms Asilbekova was (as described above) unaccounted for, notwithstanding the various disclosure orders made against Mrs Arip. If all the money was intended to benefit Mrs Arip's children, then one might expect to see all of it in family trusts of which the children were beneficiaries. But the evidence indicated that whilst some £19 million of the monies paid to Ms Asilbekova had been transferred into trusts of which the children were beneficiaries, some £57.8 million was unaccounted for.

130. On the materials before me, I considered that the obvious reason for the matters described above (in particular the transfers which Mrs Arip made to her mother, the return of significant funds by her mother, the use of £500,000 to fund Mr Arip's legal expenses, the control which Mrs Arip exercised over her mother's accounts at JBI, and the declaration in Form A) was that Mrs Arip had indeed "parked" assets which she had received with her mother, and that these were available

to her as a resource to be drawn upon as necessary. The bank documentation indicated that Ms Asilbekova was a person lacking in experience, knowledge and sophistication. The idea (as suggested by Mrs Arip in her cross-examination) that such a person should be given sums of US$97 million in order to make discretionary investment decisions is, in my view, fanciful.

Should a s 51 Order Be Made Against Ms Asilbekova

131. The essential question is whether, against the factual background described above, it is artificial (as Mr Howe submitted) to distinguish between Mrs Arip and her mother in the context of the present s 51 application. The practical reason why the claimants wish to obtain a s 51 order against Ms Asilbekova is their concern that Mrs Arip has now divested herself of most of her assets and the claimants wish to avoid being faced with a lengthy and potentially costly enforcement process, for example against a property in Switzerland or a bank account in Liechtenstein. The claimants submitted that the justice of the case required that they should not simply look to Mrs Arip, who had "simply funnelled money on to [Ms Asilbekova] to insulate herself against an order for costs". Money had simply been transferred as "pass the parcel around the Arip family". Money in the "family pot" was used to fund the defence of the family pot, and it did not matter who had ended up with that family pot. Furthermore, it was not a pre-requisite to a s 51 order that a person should have provided any funding at all. But here Ms Asilbekova had provided funding, at least to an extent.

132. In my view, the starting point is that Ms Asilbekova can be shown to have caused the claimants to incur some costs at least "to some extent": see *Turvill* para [28], and *Excalibur* paras [142]–[148]. However, I would not regard this as sufficient on its own to justify the making of a s 51 order against Ms Asilbekova for a number of reasons.

i) Ms Asilbekova's contributed only 2% towards Cleary's fees: some £500,000 out of approximately £25 million paid to Cleary. Realistically, therefore, it was the actions of Mr and Mrs Arip, who collectively paid 98% of Cleary's fees, which overwhelmingly caused the claimants to incur the costs which they did. I do not consider that it would be right to regard the sum of £500,000 as "de minimis", as Mr Auld submitted. It is a significant sum, and it

would buy a considerable amount of legal work on the part of Cleary. But it is certainly dwarfed by the monies paid by Mr and Mrs Arip.

ii) The evidence indicates that the £500,000, which came from Ms Asilbekova's account, comprised funds which had been transferred by Mrs Arip and of which (as acknowledged by Ms Asilbekova in Form A) Mrs Arip was a beneficial owner. Accordingly (as Mr Auld submitted in para 66 of his written argument in a slightly different context), it is reasonable to view this payment as Mrs Arip paying £500,000 from her own funds, albeit in Ms Asilbekova's account, in order to fund the litigation.

iii) I was doubtful whether Ms Asilbekova played any significant part in the making of this payment, except for signing the Form A. As Ms Vaswani's evidence indicated, Mrs Arip used her mother's Gmail account and was the recipient of a broad power of attorney in relation to the JBI account in question. It seems likely that this was a transfer decided upon and instructed by Mrs Arip, rather than her mother.

iv) There is force in Mr Auld's submission that if this particular payment of £500,000 had not been made from Ms Asilbekova's account, it would have been made by Mr or Mrs Arip at a later date from funds available to one or both of them.

133. If these were the only relevant facts, and the claimants' case was simply based on funding by the payment of £500,000, then they would reinforce the appropriateness of the order under s 51 against Mrs Arip, but they would not in my view justify an order against Ms Asilbekova.

134. However, for reasons already given, an order under s 51 can be made when this meets the justice of the case, even where the non-party has not caused the applicant to incur costs; including cases where the non-party has taken steps to deprive the applicant of the opportunity of recovering its costs. Here, I consider that the justice of the case makes a s 51 order against Ms Asilbekova appropriate, substantially for the reasons given by the claimants and summarised in paras 60–69 above. In particular, I consider that the following matters, upon which the claimants placed reliance, are significant.

i) Although there is no evidence that Ms Asilbekova participated in the arrangements made in December 2013 when US$181 million was distributed from the WS Settlement, she has received enormous

sums from distributions made to Mrs Arip. These sums have been "parked" with her by Mrs Arip, who is in a position to exercise and has exercised control over her mother's account at JBI, so that funds in her name are available as a resource to be drawn upon by Mrs Arip as necessary. Mrs Arip is herself liable to the claimants for the costs of the proceedings, pursuant to the s 51 order which is to be made against her.

ii) Mr Arip contends that he is bankrupt, and Mrs Arip contends that she only retains limited assets from the distributions received, such that enforcement of the s 51 order against her will be far from straightforward. By contrast, Ms Asilbekova has been the recipient, without consideration, of a net sum of US$77.5 million, and the whereabouts of the majority of this money is unknown notwithstanding disclosure orders made against Mrs Arip.

iii) For reasons already given (see para 105), I am satisfied on the evidence that there has clearly been an asset dissipation exercise by Mrs Arip, with substantial funds having been passed to her mother as part of that exercise. Ms Asilbekova has been content to assist. The obvious reason for this exercise is that Mrs Arip, with the assistance of her mother, has sought to protect family assets from potential and actual enforcement by the claimants. This motivation on the part of Mrs Arip must have been shared by Ms Asilbekova, and there is no other sensible explanation for the transfers which have taken place.

iv) The overall effect of these arrangements has been, as the claimants submitted, to denude Mr Arip of readily available assets from which he could pay their costs, and to render enforcement of an order for costs against Mrs Arip problematic.

v) Ms Asilbekova did contribute to the funding of Mr Arip's defence at least "to some extent". She did not provide £500,000 out of natural love and affection. The money was provided because assets were parked with her, and her daughter had practical control over her accounts. Whilst this contribution to funding would not, on its own, justify a s 51 order for reasons already given, it is nevertheless a relevant factor.

Conclusion

135. In these circumstances, I consider that the justice of the present

case is that the claimants should be able to look to both Mrs Arip and Ms Asilbekova for payment of their costs of the litigation.

Robert Howe QC and *Daniel Saoul QC* (instructed by Allen & Overy LLP) appeared for the first, second, third and fourth claimants.

Stephen Auld QC and *Alexander Milner* (instructed by Gresham Legal) appeared for the fourth and fifth defendants.