Neutral Citation Number: [2022] EWHC 136 (Ch)

Appeal Ref. No. CH-2021-000022
Claim No. HC-2016-001224

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
ON APPEAL FROM DEPUTY MASTER DOVAR

Royal Courts of Justice,
Rolls Building,
Fetter Lane, London, EC4A 1NL.

Date: 02/02/2022

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

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Between:

NICOLA BUSHBY	**Appellant**
- and -	
(1) MARIA GALAZI	
(2) IPHEGENIA GALAZIS	
(3) CHRISTOPHER CHRISTOFOROU	
(4) C. CHRISTO & CO. LIMITED	
(5) ANGLO PROPERTIES LIMITED	
(6) WELLSFORD SECURITIES LIMITED	
(7) ABBEE LIMITED	**Respondents**

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Vikram Sachdeva QC (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Shane Sibbel and **Barnaby Lowe** (instructed by **Fletcher Day Ltd.**) for the **First, Second, Sixth** and **Seventh Respondents**

Hearing dates: 7-8 December 2021
Further written submissions: 22 December 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE KLEIN

HH Judge Klein:

1. This is the judgment on an appeal, by Ms Nicola Bushby, from the decision of Deputy Master Dovar ("the Master"), made on 22 January 2021, that she "will pay the Claimants' and the Christo Defendants' costs of and occasioned by [the application, by notice dated 21 October 2020, for the sealing of a Tomlin order] and [her application, by notice dated 6 January 2021], pursuant to s.51 of the Senior Courts Act 1981…" ("the Costs Order"). The reference to "the Claimants" is a reference to Maria Galazi and Iphegenia Galazis (together "the Galazis") and a reference to Wellsford Securities Ltd. ("Wellsford") and Abbee Ltd. ("Abbee"). The reference to "the Christo Defendants" is a reference to Christopher Christoforou, C. Christo & Co. Ltd., Anglo Properties Ltd. and Northwest Enterprises Ltd. ("the Christo Defendants").[1]

2. This is also the judgment on the cross appeal of the Galazis, Wellsford and Abbee (together "the Respondents"),[2] from the Master's decision, on the same occasion, (1) that, if the costs liable to be paid to them under the Costs Order could not be agreed, they were to be assessed on the standard, rather than the indemnity, basis and (2) that Ms Busby had to pay £25,000 (and not a larger proportion of their claimed costs) on account of costs.

3. Bacon J gave Ms Bushby permission to appeal on 16 April 2021 and she gave the Respondents permission to cross-appeal on 30 June 2021.

4. Mr Vikram Sachdeva QC (who did not appear below) represented Ms Bushby before me. Mr Shane Sibbel, together with Mr Barnaby Lowe (who did not appear below), represented the Respondents before me. The other respondents to the appeal (that is, most of the Christo Defendants) did not appear and were not represented. In their solicitors' letter, handed to me by Mr Sibbel on the second day of the hearing at their request, they indicated that they had elected not to participate in the appeal; although, when I invited Mr Sachdeva and Mr Sibbel to make further written submissions about how, in the event that the Costs Order is set aside, I might re-determine the costs applications against Ms Bushby, they too volunteered written submissions, including that a costs order should be made against Christodoulos Galazis.[3]

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[1] Northwest Enterprises Ltd. is not a respondent to the appeal, probably because that it has the benefit of the Costs Order was missed as a result of the procedural complexities which have blighted the proceedings. Because it is not a respondent to the appeal, to the extent that the Costs Order relates to it, the order will continue to operate whatever the outcome of the appeal. For all other purposes, I do not distinguish between it and the other Christo Defendants in this judgment, because it is unnecessary and would be inconvenient to do so.

[2] Wellsford and Abbee are actually not respondents to the appeal, so that the Costs Order in their favour is not the subject of challenge. In practice, that probably does not matter. It would be surprising if they incurred any costs separate to those incurred by the Galazis. The omission to join in Wellsford and Abbee as respondents to the appeal reflects the procedural complexities to which I have already referred.

[3] Mr Galazis, the protected party in the proceedings for whom Ms Bushby has been litigation friend, as I shall explain, is not a respondent to the appeal. I discussed his absence as a party with counsel when the hearing began. Through Mr Sibbel, the Respondents confirmed that they do not, and will not, seek a costs order against Mr Galazis. (Counsel also agreed that, if I set aside the Costs Order, I can re-determine the applications for costs against Ms Bushby. They did not contend that, in those circumstances, I should remit the costs applications to

5. I must thank Mr Sachdeva, Mr Sibbel and Mr Lowe for all their assistance. How the parties found themselves at the hearing before the Master would have been unfathomable in the time available to me without counsels' careful explanation of the procedural history, for which I am very grateful. I am also grateful to them for their clear, and helpful, submissions on what have been difficult issues to resolve.

Background

6. Wellsford and Abbee are two British Virgin Islands-registered companies. At the time the Claim was begun, the Galazis were the registered holders of the shares in Wellsford, and Northwest Enterprises Ltd. ("Northwest") was the registered holder of the shares in Abbee. Wellsford and Abbee are the proprietors of properties in London which were bought with funds provided by Mrs Maria Galazi to Mr Christoforou, Mrs Galazi's brother, for investment. He used Wellsford and Abbee as corporate vehicles to invest in the properties.

7. The Galazis and Mr Galazis began a Claim on 18 April 2016 against the Christo Defendants and a firm of solicitors connected with them. By the Claim:

   i) in relation to Wellsford, the Galazis and Mr Galazis sought "a declaration for the avoidance of doubt that Wellsford…has throughout held its assets, income and entitlements on trust for" them;

   ii) in relation to Abbee, the Galazis and Mr Galazis sought a declaration that Northwest "holds Abbee…on constructive trust for [the Galazis and Mr Galazis], or alternatively for [Mrs Galazi]".

   It is important to note that, at all times, there has been no dispute between the Galazis, on the one hand, and Mr Galazis, on the other hand, that:

   iii) until January 2021, the Galazis were Wellsford's registered shareholders;

   iv) since January 2021, Mr Galazis is the registered holder of 25% of the shares in Wellsford;

   v) the beneficial owners of the shares in Wellsford have been Mrs Galazi (as to 50%), Ms Galazis (as to 25%) and Mr Galazis (as to 25%);

   vi) the beneficial owners of the shares in Abbee have been Mrs Galazi (as to 50%), Ms Galazis (as to 25%) and Mr Galazis (as to 25%).

   Quite what was the thinking behind the relief sought in relation to Wellsford is not clear but, as it has turned out, that does not matter.

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the Master.) As I have indicated, the Christo Defendants have elected not to participate in the appeal. In any event, they have not filed a respondent's notice inviting the court to make a costs order against Mr Galazis. In those circumstances, they too cannot obtain a costs order against him. The absence of Mr Galazis as a respondent is therefore no obstacle to the determination of the appeal.

8. Mr Christoforou, C. Christo & Co. Ltd. and Northwest filed a Defence and Counterclaim on 16 September 2016. They contended that Mr Christoforou was the beneficial owner of 50% of the shares in Wellsford, and that the remaining shares were beneficially owned by Mrs Galazi (as to 25% of the total shareholding), Ms Galazis (as to 12½% of the total shareholding) and Mr Galazis (as to 12½% of the total shareholding). They disputed that Northwest held the shares in Abbee on trust for the Galazis and Mr Galazis.

9. It follows therefore that, so far as is relevant, by the close of pleadings the issues between the Galazis and Mr Galazis, on the one hand, and (some or all of) the Christo Defendants, on the other hand, were (principally):

   i) whether Mr Christoforou had a beneficial interest in the shares in Wellsford;

   ii) whether Northwest held the shares in Abbee on trust for the Galazis and Mr Galazis.

10. A freezing injunction was made by consent on 14 November 2016. By the freezing injunction, which the Galazis and Mr Galazis had applied for on 18 April 2016, Mr Christoforou, Anglo Properties Ltd. and Northwest were restrained, until further order, from dealing with the shares in, and assets of, Wellsford and Abbee. The Galazis and Mr Galazis, and Mr Christoforou, Anglo Properties Ltd. and Northwest also agreed (and incorporated into the order ("the Freezing Injunction")) that they would not:

    > "give instructions to any company formation or administration agent, or person or entity offering similar services, anywhere in the world concerning the shareholding of Wellsford…or Abbee…, except pursuant to further order of the court…" ("the Non-Dealing order").

    It is important to bear in mind the following in relation to the Freezing Injunction:

   i) It was obtained at a time when the Galazis and Mr Galazi were all claimants, and defendants to the Counterclaim;

   ii) It was obtained at a time when they were all represented by the same solicitors;

   iii) It was sought by them together, against the respondents;

   iv) Its principal provision restrained the respondents from dealing with the shares in, and assets of, Wellsford and Abbee;

   v) It was expressed to continue until further order, and this limitation extended to the Non-Dealing order;

   vi) On the material to which I was taken, there is nothing to suggest that, at the time, there was any dispute, between the Galazis, on the one hand, and Mr Galazis, on the other hand, about whether Mr Galazis should be registered as the holder of shares in Wellsford. If this dispute did arise, as Ms Bushby believes it did, it only arose much later on.

Although I was not taken to any contemporaneous material which might shed light on the purpose of the application for the Freezing Injunction, or how come the Non-Dealing order was agreed in the terms it was, I infer that:

vii) the principal purpose of the Freezing Injunction generally was to restrain the respondents from dealing with the shares, and assets of, Wellsford and Abbee, because Mr Christoforou claimed to be a beneficial owner of shares in Wellsford, and Northwest claimed to hold the shares in Abbee otherwise than for the Galazis and Mr Galazis, so that they might have tried to act on that basis, and the Galazis and Mr Galazis disputed that;

viii) the principal purpose of the Non-Dealing order in particular was to hold the ring as between the Galazis and Mr Galazis, on the one hand, and the respondents, on the other hand, because they disputed the ownership of the shares in Wellsford and Abbee and, until the pleaded disputes were resolved, all those parties wanted the status quo maintained, as between the Galazis and Mr Galazi, on the one hand, and the respondents, on the other hand;

ix) it was not in the minds of the parties to the Freezing Injunction that the Non-Dealing order might later prevent the Galazis transferring to Mr Galazis the shares in Wellsford to which he has always been entitled, on the case of the Galazis and of Mr Galazis, and that was not a purpose of the Non-Dealing order (although, as it turned out, that was its effect), because there is no evidence to which I was taken to suggest that anyone had the transfer of shares to Mr Galazis in mind at the time.

11. On 5 April 2017, Richard Spearman QC, sitting as a Deputy High Court Judge, following a summary judgment application by the Galazis and Mr Galazis, declared that Northwest held the shares in Abbee as had been contended in the Particulars of Claim. I understand that, at some time before the period with which I am principally concerned (before about April 2020), Mr Galazis was registered as the holder of the shares in Abbee to which he has been beneficially entitled. Mr Sibbel told me that this happened in 2018. Whether or not that is so:

i) any failure to register Mr Galazis as the holder of shares in Abbee played no part in the hearing before the Master, or the period leading up to it, or at the hearing before me;

ii) the dispute as between the Galazis and Mr Galazis, on the one hand, and their opponents, in particular Northwest, on the other hand, as to the beneficial ownership of the shares in Abbee was resolved in 2017 (perhaps not in April but in July, as I shall explain).

12. By the time of the hearing before Mr Spearman, the Christo Defendants were questioning whether Mr Galazis had litigation capacity. Mr Spearman therefore gave directions for that question to be determined. It is enough to say, in this judgment, that that was a hotly contested issue, and, in due course, Gabriel Moss QC, sitting as a Deputy High Court Judge, in a judgment which can leave no-one who reads it uncertain about his views, was highly critical of the stance taken by the Galazis "and/or their legal representatives" on this issue. In any event, following a hearing before him on 25 July 2017, his order recited that Mr Galazis:

> "(a) is a protected party for the purposes of CPR Part 21; (b) requires a litigation friend and (c) lacks the capacity to manage his financial affairs."

The last recital was not necessary for the purposes of the proceedings. An adult requires a litigation friend (and is a protected party) if they lack capacity to conduct litigation, whether or not they can manage their financial affairs. It is, though, the conclusion that Mr Galazis lacks capacity to manage his financial affairs that perhaps partly explains why Ms Bushby acted as she did in the run up to the hearing before the Master. Mr Moss also retrospectively validated all the steps taken in the proceedings on Mr Galazis' behalf to date, so including Mr Spearman's order.

13. Ms Bushby is a respected private client litigation solicitor and a partner in a large firm. Chief Master Marsh appointed her as Mr Galazis' litigation friend "in [the] proceedings". She accepted that role as a professional litigation friend, having had no previous connection with Mr Galazis. At the time, Mr Galazis remained a claimant in the Claim. Although the remaining principal dispute between the Galazis and Mr Galazis, on the one hand, and the Christo Defendants, on the other, was as to Mr Christoforou's beneficial ownership of the shares in Wellsford as raised by the Counterclaim, the relief sought in the Particulars of Claim in relation to assets of Wellsford had not formally been granted and there were other relatively minor aspects of the Claim which had not been finally determined. Under CPR Part 21, Ms Bushby could have been expected to give an undertaking, to pay any costs which Mr Galazis might be ordered to pay in relation to the proceedings (subject to any right she may have had to be repaid from his assets), as a condition for her appointment, but, by the Chief Master's order, made on 13 October 2017, appointing Ms Bushby as litigation friend:

> "The requirement for [Ms Bushby] to provide an undertaking to pay any costs which [Mr Galazis] may be ordered to pay in accordance with CPR 21.4 (3) is dispensed with.
>
> Any order made against [Mr Galazis] to pay any costs must be enforced against [Mr Galazis] only."[4]

On the same day, reinforcing the point, the Chief Master approved a consent order which provided that:

> "Any order for costs made against [Mr Galazis] will be unenforceable against [Ms] Bushby and must be enforced against [Mr Galazis] only."

14. At about the same time, Mrs Galazi signed a retainer letter, instructing Ms Bushby to act for Mr Galazis, by which Mrs Galazi promised to pay fees, and Mrs Galazi also executed a deed of indemnity ("the Indemnity") in Ms Bushby's favour. What have

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[4] The Christo Defendants confirmed to the court that they were content for the requirement for Ms Bushby to give an undertaking to be waived.

been Mrs Galazi's obligations under the retainer letter and the Indemnity, whether those obligations continue, and whether Mrs Galazi has defaulted in paying Ms Bushby so that Ms Bushby is owed a substantial sum of money, is a matter of dispute and was a matter of considerable dispute in 2020.[5]

15. By August 2018, Ms Bushby had, on Mr Galazis' behalf, disinstructed the solicitors who had been acting for him and the Galazis, but she wanted Mr Galazis to continue to be legally represented. This presented a difficulty because it is very much the exception for co-claimants to have separate representation. At the time, on the statements of case the only issue in the proceedings in which Mr Galazis had a real interest (what I have referred to above as the remaining principal dispute) was Mr Christoforou's counterclaim that he had a beneficial interest in shares in Wellsford. On 6 August 2018, on his own initiative, the Chief Master removed Mr Galazis as a claimant and joined him, instead, as a defendant to the Claim. It was not disputed before me that the effect of that order was that any residual substantive claim Mr Galazis had in the Claim was brought to an end. Because Mr Galazis continued to be a defendant to the Counterclaim, he continued to have an interest in defending Mr Christoforou's counterclaim. Indeed, as I have just said, that was then really Mr Galazis' only remaining interest in the substantive issues in the proceedings. Mr Galazis continued to have an interest in the Freezing Injunction though.

16. On 25 October 2019, following a summary judgment application made on Mr Galazis' behalf by Ms Bushby, the Chief Master dismissed Mr Christoforou's counterclaim against Mr Galazis; in particular, Mr Christoforou's counterclaim that he was a beneficial owner of shares in Wellsford. The Chief Master dismissed the counterclaim with the consent of all the relevant non-protected parties and he approved the prior agreement, that that counterclaim would be dismissed, on Mr Galazis' behalf.

17. From that point on, Mr Galazis (and, by extension, Ms Bushby) had little, if any, role in the proceedings. As I have explained, any claim he had against the opponents against whom he had begun the Claim (principally, the Christo Defendants) had come to an end, at the latest when he was removed as a claimant. To put it more accurately, from then on, he was no longer pursuing any pleaded cause of action against them. Mr Galazis was also no longer defending the Counterclaim from October 2019. His only continuing role in the proceedings was as a beneficiary of the Freezing Injunction and as someone who was bound by the Non-Dealing order.

18. It makes no difference if, in fact, Mr Galazis did have any further role in the proceedings. Although no-one suggested to me that he did, the parties' statements of case and the procedural state reached by October 2019 is so complex that it may be that, on a careful combing through those statements of case, a further role might be identified. It makes no difference, because in the period with which I am principally concerned (that is, in the run up to, and at, the hearing before the Master), on the

[5] To provide Ms Bushby with further costs protection, on 22 October 2019 the Chief Master ordered, on Ms Bushby's request by a letter to him, that her reasonable costs and expenses and those of her lawyers are to be the subject of an indemnity basis detailed assessment and are to be paid out of Mr Galazis' estate.

material to which I was taken, when it is carefully analysed, Ms Bushby never contended that, otherwise than in relation to the Freezing Injunction, Mr Galazis had any interest in the proceedings (that is, to be clear, the proceedings by, and against, those against whom he began the Claim (principally, the Christo Defendants)).

The applications heard by the Master and the run up to them

19. Counsel agreed that the proximate cause of the application, by notice dated 21 October 2020, for the sealing of a Tomlin order ("the Galazis' application") was Ms Bushby's letter,[6] dated 10 September 2020, ("the 10 September letter") to the Respondents' solicitors ("Fletcher Day"). To understand its significance, I have to go a little further back in history.

20. On 27 February 2020, the Galazis and the Christo Defendants took part in a mediation. Ms Bushby was aware, in advance, of the mediation but was not present. She says that she was excluded from the mediation. The Galazis do not agree, but nothing turns on that. The mediation did not lead to a settlement immediately.

21. By that time, Ms Bushby had been acting for a considerable period without being reimbursed her fees and expenses. As I have indicated, it is her case that Mrs Galazi has been in default in payment of those fees and expenses; in particular, under the Indemnity. Nevertheless, aware of the mediation, Ms Bushby wrote to Fletcher Day on 20 April 2020 to identify "the issues that concern [Mr Galazis] in the…proceedings, namely, the completion of the share transfer in Wellsford…and the safeguarding of [Mr Galazis'] interests going forward". She said that she would not be able to consent to any settlement, or a variation or discharge of the Freezing Injunction, until the Galazis had agreed:

    i) to transfer the shares in Wellsford to which Mr Galazis was beneficially entitled ("the Wellsford shares") to him;

    ii) to not oppose an application by her firm's trust corporation in the appropriate jurisdiction to manage Mr Galazis' property and financial affairs;

    iii) to account to Mr Galazis for sums to which he was entitled as a result of his ownership of the Wellsford shares and his shareholding in Abbee ("the Abbee shares");

    iv) to consider the purchase of the Wellsford shares and the Abbee shares.

22. Fletcher Day responded on 29 April 2020, pointing out that Ms Bushby had been appointed as Mr Galazis' litigation friend "within the proceedings", that Mr Galazis no longer had any "direct active involvement in the proceedings", and that he was "primarily a passenger" in the proceedings.

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[6] In fact, the letter was from Ms Bushby's firm, which I infer she instructed to act on her behalf, as were the others to which I refer, although, like all relevant letters, Ms Bushby was the writer. I draw an inference that Ms Bushby instructed her firm to act on her behalf, because all the relevant correspondence refers to her as their client. I have not seen their retainer letter however.

23. Ms Bushby responded on 7 May 2020:

> While our client is currently sympathetic to your clients' position and understands they live together as a family unit, **your clients must, simultaneous to their settlement discussions with the other defendants, come to an agreed position with our client on behalf of Christodoulos**. Simply pretending he does not exist in these proceedings will not work.
>
> To clarify, this agreement must include
>
> a. An agreement to transfer 25% of the shareholding in Wellsford…to Christodoulos (w1th appropriate warranties and/or guarantees),
>
> b An agreement on the sum of money to be paid to Christodoulos referable to his share of the income your clients have received (or will) that has not been accounted to him.
>
> c An agreement on the appointment of a property and affairs deputy; and
>
> d. **Payment of our client's fees she has incurred**" (emphasis added).

24. In a lengthy letter in reply, dated 15 May 2020, Fletcher Day said:

> "First, in these proceedings there is no claim by [the Galazis] against [Mr Galazis], or vice versa. None of the matters referred to [by Ms Bushby, in her letter] form part of any currently pleaded claim between them. We do not therefore understand why any of the points…require agreement "simultaneously" with the Settlement Agreement and the conclusion of these proceedings.
>
> Second, it is unclear to us on what basis the third demand *(sic)* is said to be advanced "on behalf of Christodoulos"; it relates to monies claimed for Ms Bushby's own benefit."

25. Fletcher Day then informed Ms Bushby, on 19 May 2020, that they had filed at court a draft Tomlin Order for sealing, and they sent her a copy. The draft sent to the Chief Master is not in the appeal bundle. However, it is possible to deduce its terms from later versions which show tracked changes. The draft was in these terms:

> "…UPON the following parties being party to this order:
>
> (1) [the Galazis];
>
> …(3) Wellsford;
>
> (4) Abbee

(5) …the Christo Defendants

(together, "the Parties to this Order" and individually "a Party")

AND UPON the above Parties to this Order having agreed the following terms

BY CONSENT it is ordered that:

1. All further proceedings between **the Parties to this Order** in **these Proceedings** are stayed on the terms set out in the Schedule to this Order, except for the purpose of carrying those terms into effect.

2. The [Freezing Injunction] shall be fully discharged and set aside,…such that it has no further effect.

3. In respect of the Parties to this Order only, so far as costs orders have been made in the Proceedings which have not yet been fully executed, assessed or paid then no further steps shall be taken in that regard.

…5. The Parties to this Order have permission to apply in respect of enforcement of the terms of this order including (for the avoidance of doubt) the Schedule" (emphasis added).

26. Ms Bushby wrote to the Chief Master the following day, as follows:

"A copy of the proposed draft order (Schedule omitted) has been provided [to me]. On reviewing the draft order, it is noted that Paragraph 2 provides for the discharging and setting aside of the Order sealed on 14 November 2016. The Order referred to is a Freezing Injunction to safeguard, among other things, the Protected Party's [(Mr Galazis')] interests and is in place until further order of the court. **For the avoidance of doubt, the Sixth Defendant [(Mr Galazis)] does not** (and cannot) **consent to the discharge of the Freezing Injunction until we have considered with our client the terms of settlement**.

We ask the Court <u>not</u> to seal this order at this juncture until such time as the Litigation Friend can provide her approval.

This is especially important because: -

1. **The Protected Party has an extant financial interest in these proceedings (25% shareholding in Wellsford) which has not been transferred to him by the Claimants**. It is not known whether the settlement includes any undertaking to do so.

> 2. We have sought to agree a mechanism with the Claimants, to work simultaneous to the Settlement Agreement, to ensure this transfer of shares takes place, as part of an overall settlement and discontinuation of these proceedings, which were understood to be ongoing.
>
> **3. The Protected Party has been found to lack capacity to manage his finances, yet there is no agreement in place as to how his financial interests, recovered in these proceedings, shall be legally managed going forwards**.
>
> 4. If proceedings are discontinued, our client shall be discharged as Litigation Friend. Accordingly, she shall lose her standing to ensure the above mentioned transfer takes places and the Protected Party's interests are safeguarded. It is for this reason these issues need to be resolved now in these proceedings, as part of the settlement.
>
> 5. Our client must, pursuant to her responsibility to act fairly and competently under Part 21, seek her own advice as to the final disposal of the proceedings on the terms agreed. Our client would require 28 days after receipt of the Schedule in order to obtain this advice.
>
> 6. **Obtaining the approval of the Court under r.21.10 is a mandatory safeguard imposed to provide an external check on the propriety of any settlement**; however, the Claimants have lodged this order without disclosing to us either the Schedule to it or the Settlement Agreement Accordingly, we have not had any chance to consider its contents and take any appropriate steps as required by r.21.10.
>
> We would like to reassure the court that our client has no intention of interfering with the Settlement Agreement reached between the Claimants and the (other) Defendants, but if it intends to compromise the entirety of these proceedings, the above must be dealt with on behalf of the Protected Party, otherwise it shall leave significant issues outstanding.
>
> Please kindly confirm that the Tomlin Order will not be sealed until our client has been afforded the opportunity to consider the Schedule and the Settlement Agreement and take appropriate advice.
>
> It is very much hoped and expected that an agreement can be reached on **an overall settlement** that does not jeopardise the Protected Party's interests" (emphasis added).

27. Fletcher Day responded to Ms Bushby's letter to the Chief Master with their own letter to him on the same day. In it, they pointed out that Ms Bushby's approval of the draft Tomlin Order was not required, and CPR 21.10 did not apply, because no claim

by Mr Galazis, nor any counterclaim against him, was being settled. They also pointed out that Mr Galazis was "no longer party to any claim or counterclaim in these proceedings", and they explained why. They added that the Freezing Injunction was obtained to support the Claim and that the Claim had now settled, so that there was no basis for continuing the Freezing Injunction. They suggested that Ms Bushby was opposing the sealing of the draft Tomlin Order to have her fees paid.

28. On 21 May 2020, the Chief Master indicated that, if there was no agreement, he would have to determine whether to seal the draft Tomlin Order at a hearing.

29. The next day, Fletcher Day wrote to Ms Bushby in response to her 20 May 2020 letter to the court, warning that, in the face of opposition to the sealing of the draft Tomlin Order, they would have to make an application to court, in which event "we will seek wasted costs from you". It is important to note that this letter, and later ones which gave warnings that wasted costs orders would be sought, were formally written to Ms Bushby's firm. That firm was acting for her (as Mr Galazis' litigation friend) in the proceedings, as I have said. It may well be that the warnings that wasted costs orders (or costs orders more broadly) would be sought were intended to be warnings to Ms Bushby personally, whether as the solicitor at the firm with conduct of the case or as Mr Galazis' litigation friend, but they can also be read as warnings to her firm.[7]

30. Ms Bushby responded on 29 May 2020:

> "…**at no time has our client said she shall oppose the Tomlin Order if yours does not pay her costs**. Indeed, at the time of writing the letter dated 7 May, we had no knowledge that this matter had been settled. The letter was written in the context of global settlement discussions between our clients with a view to reaching settlement on all outstanding issues and we invited you to mediate. **It has always been fully appreciated that recovery of Ms Bushby's outstanding costs, absent payment, would necessitate separate proceedings against Maria Galazi and this remains the case**. This was set out in clear terms in our letter dated 17 April. To take our letter dated 7 May out of context and to extrapolate from it an allegation of impropriety against Ms Bushby is unacceptable and unprofessional" (emphasis added).

31. Ms Bushby wrote to Fletcher Day on 2 July 2020, as follows:

> "<u>Freezing Injunction</u>
>
> Miss Bushby's concern is solely to agree an arrangement which ensures the transfer of the legal title of 25% of the Wellsford

[7] Fletcher Day's letter, dated 26 June 2020, to Ms Bushby's firm, may be an exception to this. In that letter, they said that they would seek "a costs order against you and/or your legal representatives, on the indemnity basis."

> shares into [Mr Galazis'] name. The amendments she proposes to the Tomlin Order achieve this…
>
> [Mr Galazis] plainly still has an interest in these proceedings because (i) the transfer of 25% of the Wellsford Shares is outstanding and (ii) the existence of the freezing order affords him protection. These are the minimum issues to resolve for our client to agree to the Tomlin Order and discharge of the Freezing Injunction."

32. By 5 August 2020, Ms Bushby had received a copy of a stock transfer form, for the transfer of the Wellsford shares to Mr Galazis, which Mr Galazis had signed. Bearing in mind (i) the history of the case, including Mr Moss' trenchant criticisms of the Galazis "and/or their legal representatives", (ii) that those legal representatives had been replaced and (iii) Mr Galazis' functional age, that nevertheless Mr Galazis had been invited to execute, and had executed, the stock transfer form ("the 2020 stock transfer form") understandably troubled Ms Bushby. She emailed Fletcher Day on 5 August 2020:

> "…I note that the executed Deed of Transfer bears Christodoulos' signature. As you are aware, Christodoulos lacks capacity to manage his property and affairs and accordingly, lacks the requisite capacity to accept delivery of and sign for his shares in Wellsford. I am incredulous, following the judgment handed down on 25 July 2017, that once again, his lack of capacity has been totally ignored, and on this occasion, when he has a court appointed litigation friend in place. Further, 1 am concerned that your client appears to have obtained Christodoulos' signature when she knows him to lack capacity which highlights precisely what I have been saying, that is, he is at high risk of being financially exploited."

33. Ms Bushby then wrote the 10 September letter to Fletcher Day. She said:

> "It remains our firm view that the Tomlin Order and Schedule are **a compromise of the proceedings** pursuant to an agreement and therefore require the approval of the Court under Part 21…
>
> The Tomlin Order has been deliberately structured to obviate the scrutiny required under the prescribed procedure set out in Part 21.10 and the protection afforded by it. **To suggest that [Mr Galazis] has no interest in the outcome of the litigation, whilst at the same time agreeing to transfer the Wellsford shares** and now seeking our client's consent to the Tomlin Order, is nonsensical….
>
> <u>CPR 21.11</u>
>
> …The Court is required to consider as part of the approval whether [Mr Galazis] is also a Protected Beneficiary. It is plain

[that Mr Galazis] is also a Protected Beneficiary within the meaning of CPR 21.1(2)(e).

Accordingly, our client intends to make an application pursuant to CPR 21.11 and/or the High Court's Inherent Jurisdiction for the appointment of a deputy…Due to the secrecy of the Schedule, this will need to be dealt with before our client can agree the Tomlin Order and the lifting of the freezing injunction…

The indemnity

It is our intention to now issue a claim against your client Maria Galazi for all costs this firm and Miss Bushby have incurred to date. We shall be inviting Wilsons Solicitors to join us in that claim.

This is now necessary at this juncture because, subject to the court acceding to our application, there are no further resources available to our client and she cannot incur the further costs of making an application to the Court of Protection and the court fees this application shall entail. Furthermore, neither our firm nor another firm will be in a position to instruct and incur the further liability of lawyers in the BVI to carry out the necessary work in the BVI to complete the management of the Protected Party's recovered shareholdings.

We must reiterate that Maria Galazi has not paid any costs for over two years despite her promise to indemnify Miss Bushby…

We again invite your client to honour her obligations under the indemnity and, at a minimum, pay the invoices already submitted by this firm and place our client in funds to undertake the necessary work.

Next steps

Ultimately our client is now unable to discharge her role as Litigation Friend without Maria Galazi honouring her obligations under the indemnity and it is clear that we have now reached a position where it has become impossible to finalise this litigation without Mrs Galazi doing so.

In the circumstances set out above, the necessary arrangements (the appointment of a deputy and BVI receiver) shall need to be in place before our client is in a position to consent to the Tomlin Order and **seek the court's approval of it on behalf of the Protected Party**. Indeed, upon an application for approval under 21.11 **the Court must in any**

> **event consider if the Protected Party is a Protected Beneficiary**. Even if the Court were to determine that CPR 21.11 did not apply, which is highly unlikely, the High Court has an inherent jurisdiction to protect individuals who lack capacity.
>
> Accordingly:
>
> a. please confirm your clients agree, [Mr Galazis] is also a Protected Beneficiary within the meaning of CPR 21.1(2)(e);
>
> b. **we invite Mrs Galazi to pay the invoices sent by this firm**;
>
> c. **put us in funds to carry out the necessary work as identified in this letter, including to instruct BVI lawyers;**
>
> d. **alternatively, we shall have no option but to issue a claim to enforce the indemnity** and, in doing so, will invite the High Court to join this claim to the Galazi proceedings" (emphasis added).

34. Fletcher Day did not respond substantively to this letter. Instead, the Galazis' application was made on 21 October 2020. Ms Bushby had written, however, to the Christo Defendants' solicitors on 12 October 2020, copying in Fletcher Day, as follows:

> "Our client needs to be satisfied that [the transfer of the Wellsford shares to Mr Galazis] has been effected before the claim is compromised. It makes eminent sense for this transfer to take place now because it strips away one of the primary obstacles to the Tomlin Order in its current form.
>
> Our client's position is straightforward and reasonable: -
>
> (1) **The transfer of the Wellsford shares to Christodoulos needs to take place (in the same way the shares in Abbee were transferred to him) and it needs to take place before the Tomlin Order can be sealed so there can be no question of the transaction completing**, and
>
> (2) **a UK Deputy and BVI Receiver need to be appointed to manage both these shares and the Abbee shares** because Christodoulos is a protected beneficiary, i.e., he lacks capacity to manage the interests he has recovered in these proceedings. Our client cannot ignore [the expert's] conclusions that Christodoulos, in addition to lacking litigation capacity, also lacks capacity to manage his property and financial affairs, i.e., these shares.
>
> Our client is a litigation friend appointed under Part 21 of the CPR which, until she is discharged in the prescribed manner,

> requires her to act fairly and competently and she is firmly of the view that these two matters need resolving for her to meet her responsibilities. Both of the above matters are inextricably related to the claims: r.21.l0(1) requires approval by the court for the settlement to be binding and in order for our client to be discharged. If you disagree with this analysis please set out:
>
> (i) why it is alleged our client is not acting reasonably, fully particularising each and every allegation,
>
> (ii) the legal/procedural basis upon which it is asserted Part 21 does not apply notwithstanding that our client remains appointed under Part 21, Christodoulos remains a party to the proceedings and there has been no application to terminate our client's appointment" (emphasis added).

35. By the Galazis' application, they sought an order for the sealing of the draft Tomlin Order. They also sought "their costs of the application". Their application notice identified the respondents for service as including Mr Galazis. It did not identify Ms Bushby as a respondent.

36. On 25 October 2020, the Chief Master made an order by consent varying the Freezing Injunction (including the Non-Dealing order) to permit "the transfer of 25% of the issued share capital in Wellsford" to Mr Galazis. The variation allowed Ms Galazis to transfer Mr Galazis' shares held in her name to him.[8] Mr Galazis was registered as the holder of the Wellsford shares on about 21 January 2021, the day before the Master handed down judgment on the Galazis' application and on Ms Bushby's application, and determined the applications for costs against Ms Bushby.

37. The Galazis' application was listed for hearing on 14 January 2021. Shortly beforehand, on 6 January 2021 Ms Bushby's firm (which had been instructed to act for her, as I have said), made an application ("Ms Bushby's application"), for hearing at the same time as the Galazis' application, on behalf of "the litigation friend for D6" (that is, Ms Bushby), seeking the following relief:

> "[Mr Galazis] seeks, by his litigation friend, the following orders or where appropriate, declarations, that:
>
> …2. The transfer of 25% of the share capital in Wellsford Securities…by the [Galazis to Mr Galazis]…shall be completed forthwith and, in any event, before the Tomlin Order dated 19 May 2020 ("the Tomlin Order") is sealed.
>
> 3. The court shall determine:

---

[8] In fact, it appears, from his order, that Mr Spearman had observed that the Non-Dealing order had no effect on Ms Galazis, as a shareholder in Wellsford "save to the extent expressly stated" in the order. That suggests that, at the time of the hearing before Mr Spearman, the possibility of effecting a share transfer to Mr Galazis, without the need to vary the Freezing Injunction, had been raised.

> a. Whether the Tomlin Order is a settlement for the purposes of CPR r.21.10 that requires the court's approval before it can be sealed and, if the court's approval is required, to give directions as the court considers necessary.
>
> b. Whether the court is required by CPR r.21.11(3) to consider whether the [Mr Galazis] is a Protected Beneficiary within the meaning of CPR r.21.1(2)(e) and, if so, to give directions pursuant to CPR Rule 21.11(2) for the management of [his] shares in Wellsford…and Abbee...
>
> 4. Alternatively, in light of the evidence before the court…:
>
> a. the court should invoke its inherent jurisdiction and make directions as to the management and protection of [Mr Galazis'] shares pursuant to its inherent jurisdiction,
>
> b. including whether it should give directions to enable an application to be made to the Court of Protection for it to consider whether it is in [Mr Galazis'] best interests to appoint a deputy or trustee to manage his shares.
>
> 5. In the further alternative, if the court finds CPR 21.10 and 21.11 do not apply and the court declines to invoke its inherent jurisdiction:
>
> a. An order terminating Nicola Bushby's appointment as litigation friend.
>
> b. Pursuant to the Order of Chief Master Marsh dated 22 October 2019 the reasonable costs and expenses of [Ms Bushby] and those of her legal representatives, including her past costs and the past costs of her legal representatives, to be subject to a detailed assessment on the indemnity basis and paid out of the [Mr Galazis'] estate.
>
> 6. [Mr Galazis'] costs of and occasioned by the applications to be paid by the Claimants".

38. In a witness statement ("the 6 January witness statement"), dated 6 January 2021, Ms Bushby explained that she was opposed to the discharge of the Freezing Injunction because it stopped the Galazis dealing with the Wellsford shares or the Abbee shares when, according to Ms Bushby, there was a risk that they might "dissipate" those shares. In seeking to substantiate that claim, she pointed to the execution, by Mr Galazis, of the 2020 stock transfer form amongst other matters. In a similar vein, she said that she had "reasonable and proper concerns" about Mrs Galazi's continuing informal management of Mr Galazis' property and finances. She also made clear that she was not opposing the sealing of any draft Tomlin Order as a way of pressuring Mrs Galazi to pay her outstanding fees. She acknowledged that any fees dispute had to be resolved by separate litigation.

39. In his skeleton argument in relation to the hearing before the Master, counsel then instructed on Mr Galazis' (and Ms Bushby's) behalf explained why it was contended that the settlement which was the subject of the draft Tomlin Order engaged CPR 21.10 in this way:

> "[The Galazis and the Christo Defendants] assert CPR 21.10 does not apply to the Tomlin Order because [Mr Galazis] is not a party to the claims it seeks to settle. This is a narrow interpretation of r.21.10. There is, quite obviously, a connection between the settlement and to the claims brought by and made against [Mr Galazis] in the course of the litigation:
>
> i. [Mr Galazis] was transferred 25% of the share capital in Abbee…;
>
> ii. [He] successfully defended [the Christo Defendants'] counterclaim and recovered a 25% beneficial interest in the share capital in Wellsford, as opposed to 12.5%;
>
> iii. [the Galazis] have agreed to transfer the legal title to the Wellsford shares however, to date, they have failed to complete the transfer;
>
> iv. the Tomlin Order would have the effect of discharging the Freezing Injunction which prevents [the Galazis and the Christo Defendants] from dealing with the shareholdings in Abbee or Wellsford;…
>
> v. **whilst it is accepted that [Mr Galazis] is a mere shareholder, dealings with the assets of Abbee and Wellsford, or significant cash payments made by either company in settlement of the proceedings, would arguably "relate to" [Mr Galazis'] shareholdings and thus to a "claim" against [him]**" (emphasis added).

It was also asserted in the skeleton argument that the draft Tomlin Order "purports to settle the **entire** proceedings" (emphasis added).[9]

40. In his skeleton argument, served on 12 January 2021, Mr Sibbel said as follows on behalf of the Galazis:

> "Cs [(the Galazis)] will seek a costs order against Ms Bushby as litigation friend, rather than against D6 [(Mr Galazis)]. The power of the Court to make such an order derives from s.51 of

[9] Counsel did not seek, in his skeleton argument, to advance a legal basis for Ms Bushby's opposition to the sealing of the draft Tomlin Order, save perhaps by way of citation of some of the correspondence to which I have referred. He did point out that her fees dispute with Mrs Galazi was not relevant to the issues before the Master.

the Senior Courts Act 1981. The Court has a general discretion, the ultimate question being "whether it is in all the circumstances just to make the order" (see the CPR notes at 46.4.2, and *Glover v Barker* [2020] EWCA Civ 1112 at §§58-64). Factors which might, depending on the specific facts, be thought to justify such an order in the case of the litigation friend of a defendant include "unreasonable behaviour" (ibid).

In the present case Cs will, if their application succeeds, (i) rely on the general rule that the successful party should have its costs (CPR 44.2(a)); (ii) submit that it would be unfair to impose those costs on D6; and (iii) submit that Ms Bushby has acted unreasonably, including by:

(1) Interposing herself into a settlement to which D6 was plainly not a party, and wrongly obstructing that settlement for eight months pending the resolution of extraneous issues.

(2) Seeking indirectly and belatedly to obtain or continue freezing relief against Ms Galazi, on the basis of serious and unmerited allegations that she might otherwise exploit her **son** or dissipate his assets.

(3) Resiling on 10 September 2020 from her previously agreed position (of 29 May 2020) to keep the issues of her costs and of the appointment of a deputy separate from the issue of sealing the Tomlin Order.

(4) Failing since March 2018 (i) herself to bring an application for the appointment of a deputy for D6 in the correct jurisdiction, providing Cs with appropriate estimates and invoices for that work and/or (ii) to restore the application for the termination of her appointment.

(5) Filing her response evidence and counter-application very late, with no explanation" (emphasis added).[10]

Ms Bushby's response following the receipt of the draft Tomlin Order and the merits of that approach[11]

[10] The Christo Defendants' skeleton argument also indicated that they sought a costs order against Ms Bushby on the basis that (i) she did not have standing to oppose the sealing of the draft Tomlin Order, (ii) there was no ground for opposing the discharge of the Freezing Injunction and (iii) she was raising irrelevant issues as grounds for opposing the sealing of the draft order.

[11] I am satisfied that what I set out in this section of the judgment is Ms Bushby's response – rather than say that of her firm as her solicitors – as Mr Galazis' litigation friend, to the receipt of the draft Tomlin Order.

41. By the time of the 10 September letter until the hearing before the Master (or, at least, until shortly before), Ms Bushby was claiming to have standing to oppose the sealing of the draft Tomlin Order generally, and the discharge of the Freezing Injunction in particular.

42. She was also contending that the settlement in the draft Tomlin Order schedule ("the Settlement") was subject to CPR 21.10. Indeed, by her application, she sought a determination about whether CPR 21.10 applied to the Settlement.

43. Ms Bushby's principal purposes in opposing the sealing of the draft Tomlin Order were (i) to obtain, for Mr Galazis, the transfer of the Wellsford shares (and, to that end, she sought an order for their transfer by her application) and (ii) to obtain the appointment of a manager (a deputy or equivalent) of Mr Galazis' property.

44. To that latter end, she maintained that CPR 21.11 was engaged and allowed the court to give directions for the appointment of a manager. She also maintained that the court has an inherent jurisdiction to give such directions. By her application, she sought such directions.

45. However, Ms Bushby never opposed the sealing of the draft Tomlin order for the purpose of having her outstanding fees paid, and I reject the Respondents' contention to the contrary. Rather, when all the correspondence is considered, the only appropriate conclusion to reach is that Ms Bushby's position was that the recovery of unpaid fees was a separate matter.[12] The Respondents may point (as they apparently did before the Master) to Ms Bushby's 7 May 2020 letter as evidence in support of their contention, but that cannot be right. Ms Bushby was not aware of the draft Tomlin Order then. In any event, that letter cannot be taken in isolation and, when all the correspondence is considered, in particular the correspondence which followed, the conclusion that one of Ms Bushby's purposes in opposing the sealing of the draft Tomlin Order was to obtain a payment of fees cannot be right.

46. I deal separately with the question of Ms Bushby's standing to oppose the discharge of the Freezing Injunction. Other than in that respect, she had no standing to oppose the sealing of the draft Tomlin Order. The draft order, on its face, recited who were the parties to it. Mr Galazis was not so named. The draft order, also on its face, made clear that the contemplated stay extended only to the proceedings so far as they related to the parties to the draft order, so not including Mr Galazis. To be clear, the terms of the Settlement, whatever they were, and even if they purported to affect Mr Galazis, were irrelevant to whether Ms Bushby had standing to oppose the sealing of the draft order itself (because Mr Galazis was neither a party to the order, nor did the proposed stay apply to him), although CPR 21.10 would have made the Settlement

[12] Because of the conclusions I have reached in this section of the judgment, I reject, as reasons for upholding the Master's decision, the further reasons set out in para.15(1) of the Galazis' Grounds for upholding that decision ("the Grounds"). As it happens, I also reject what is set out in para.15(2)(i)-(ii) and in para.15(3) of the Grounds as reasons for upholding the Master's decision, because those matters, even if established, did not cause relevant costs to be incurred.

invalid to the extent that it related to a cause of action he had or which he was defending.[13]

47. Indeed, it was not suggested to me that Ms Bushby had standing to oppose the sealing of the Tomlin Order (other than in relation to the discharge of the Freezing Injunction), and it is perhaps notable that Mr Sachdeva said, in his skeleton argument:

> "…It is common ground that [Mr Galazis ("D6")] had no pending claims at that point, and that the claims settled by the Tomlin Order were not claims of D6, nor was D6 defending any of those claims…
>
> Thus all parties (and the court) were under a misapprehension about what constituted a permissible objection to the sealing of the Tomlin Order."

As to this, I make only three observations:

i) What is apparently common ground now was not obviously common ground before the Master;

ii) As I shall explain, the Master was under no misapprehension that Ms Bushby had no basis for opposing the sealing of the draft Tomlin Order, and the correspondence suggests that the Galazis were not under any misapprehension either;

iii) There would have been no need for the court to adjudicate about whether the draft Tomlin Order should be sealed had Ms Bushby not been under a misapprehension.

48. Ms Bushby did have standing to oppose the discharge of the Freezing Injunction, because Mr Galazis was one of its beneficiaries. However, there was no sound basis for her doing so. Following the Settlement, the Freezing Injunction no longer served the purpose for which it had been obtained and it could not be justifiably continued for an ulterior purpose, namely, to restrain the Galazis dealing with the Wellsford shares to Mr Galazis' disadvantage, even though that was something Ms Bushby feared. It was inevitable that, on a contested application to discharge the Freezing Injunction, a Judge would have discharged it. Gee on Commercial Injunctions (7th ed) provides a useful analogy at para.24-004:

> "Notwithstanding…settlement, an injunction until judgment or further order will continue until formally discharged by the court, but discharge would be granted as a matter of course because the claimant no longer has the cause of action to which the injunction was ancillary."

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[13] In the claim in which Wellsford and Abbee have been the claimants, there is technically a further reason why Ms Bushby did not have standing to oppose the sealing of the draft Tomlin Order. She has never been a litigation friend in that claim and Mr Galazis has never been a party.

As I have explained, the Freezing Injunction was not ancillary to any cause of action Mr Galazis had which entitled him to call for a transfer of the Wellsford shares.

49. Ms Bushby's reliance on CPR 21.10 was misconceived. CPR 21.10(1) provides that:

> "…no settlement [or] compromise…shall be valid, so far as it relates to the claim by, on behalf of or against the…protected party, without the approval of the court."

50. The effect of CPR 21.10 is that the settlement of any cause of action which a protected party has or of any cause of action against a protected party is invalid without the court's approval (see per Lady Hale in *Dunhill v. Burgin (Nos. 1 and 2)* [2014] 1 WLR 933 at [23]). As I have explained, by August 2018, any substantive claim Mr Galazis had in the proceedings had ended and, by October 2019, any substantive claim he was defending had also been finally disposed of. By April 2020, there was no existing cause of action in the proceedings relating to him which could be settled and which might engage CPR 21.10. In any event, CPR 21.10 did not compel the Galazis (or any other party to the draft Tomlin Order) to apply to court for CPR 21.10 approval, nor did the court have to consider whether CPR 21.10 approval was required before sealing the draft Tomlin Order, even if the Settlement did happen somehow to settle a cause of action in which Mr Galazis had an interest. CPR 21.10 does not compel a party to do anything. Nor does it compel the court to do anything in the absence of an application. Rather, it sets out the consequences of CPR 21.10 approval not being obtained when it ought to have been. In effect, CPR 21.10 places a burden on the parties applying for the sealing of a consent order embodying a settlement to decide whether also to seek CPR 21.10 approval. If they do not, they take the risk that the settlement, so far as it relates to causes of action it turns out a protected party is interested in, is not valid. Ms Bushby could not rely therefore on CPR 21.10 to justify her opposition to the sealing of the draft Tomlin Order. Nor was it ever appropriate for the court to determine, nor could it determine, whether CPR 21.10 applied to the Settlement (as Ms Bushby sought by her application). The court had no reason to read the Settlement simply because Ms Bushby had an unsubstantiated fear that it might deal with a cause of action in which Mr Galazis was interested. The court could not say, therefore, whether or not CPR 21.10 was engaged.

51. Ms Bushby's reliance on CPR 21.11 was misconceived. CPR 21.11 provides:

> "(1) Where in any proceedings –
>
> (a) money is recovered by or on behalf of or for the benefit of a child or protected party…
>
> the money will be dealt with in accordance with directions given by the court under this rule and not otherwise.
>
> (2) Directions given under this rule may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with."

52. No money was recovered in the proceedings by, or on behalf of, Mr Galazis. The language of CPR 21.11 is clear. The provision extends to those circumstances where

money is recovered in proceedings. It does not extend to cases where other assets are recovered in proceedings. To widen the ambit of the provision to all assets, as it seems Ms Bushby was inviting the court to do, would be to strain the language not only of CPR 21.11 but also of CPR 21.1(2)(e), which defines a protected beneficiary as "a protected party who lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings", and the related Practice Direction provisions. There is no good reason to strain the clear language of the CPR provisions in this way. To the contrary, there is a good reason why the Civil Procedure Rules make specific provision for money recovered. In order for money to retain its value, and to generate a return for the recipient, it needs to be invested. Shares, for example, such as the Wellsford shares, are not capable of investment in the same way. CPR 21.11 (and the related Practice Direction provisions) are the mechanism by which the court can control the investment of money and it is that they are intended to cover.

53. Mr Sachdeva did not seek to argue that the Chancery Division has an inherent jurisdiction to appoint a manager of a protected party's property.

54. Mr Sachdeva did argue that it was appropriate for Ms Bushby to oppose the sealing of the Tomlin Order as a means of obtaining the transfer of the Wellsford shares. I disagree. I have also concluded that it was not appropriate for Ms Bushby to seek an order for their transfer as part of her application.

55. In *R (Raqeeb) v. Barts Health NHS Trust* [2019] EWHC 2976 (Admin), MacDonald J had to consider an application by which the defendant NHS Trust sought to terminate the appointment of the claimant's litigation friend on the grounds that, it contended, she had a fixed view about what was in the claimant's best interest and so could not fairly and competently judge what was in fact in the claimant's best interests. In dismissing the application, the Judge considered the role of a litigation friend. The Judge held, at [19], that "it is tolerably clear that a litigation friend, including a litigation friend appointed by the court, must be able to fulfil two key requirements. First, they must be able fairly and competently to conduct proceedings and secondly they must have no interest adverse to that of the child."[14] As I read the judgment, and as the earlier cases referred to by the Judge support, a litigation friend has a duty to fairly and competently conduct the proceedings in question on the protected party's behalf. The Judge explained what that duty entails thus:

> "20. With respect to the first requirement to be fulfilled by a litigation friend, the meaning of the phrase "conduct proceedings on their behalf" is not elaborated in the rules. Such conduct will, however, no doubt include anything which, in the ordinary conduct of any proceedings, is required or authorised by a provision of the CPR to be done by a party to the proceedings. **Further, the authorities make clear that, in fairly and competently conducting the proceedings, the**

[14] The claimant was a child. That is why the Judge referred to children, rather than protected parties, in his judgment.

litigation friend is required to act for the benefit of the child and to safeguard his or her interests. With respect to this particular aspect of the role of the litigation friend in current context, some assistance may be drawn from the authorities.

21. In *Rhodes v. Swithenbank* (1889) 22 QBD 577 at 579 Bowen LJ described what was then termed the "next friend" of an infant as **"the officer of the court to take all measures for the benefit of the infant in the litigation"**. That articulation was cited by Brightman J *In re Whittall* [1973] 1 WLR 1027, a case concerning two persons who had agreed to act as what was then termed guardians ad litem for infant defendants to an application under the Variation of Trusts Act 1958. In articulating the **duties** of a guardian ad litem in light of the statement of Bowen LJ in *Rhodes v. Swithenbank*, Brightman J stated that the function of the guardian ad litem "is to guard or safeguard the interests of the infant who becomes his ward or protégé **for the purpose of the litigation**." As to how this to be is achieved by the litigation friend, in *In re Whittall* Brightman J went on to observe, in the context of the child as defendant to litigation, that:

> "**The discharge of this duty involves the assumption by the guardian ad litem of the obligation to acquaint himself of the nature of the action in which the infant features as a defendant, and the obligation to take all due steps to further the interests of the infant**."

And later in the context of the particular application with which Brightman J was concerned in *In Re Whittall*:

> "...the guardian ad litem of the infant has the **duty**, under proper legal advice, to apprise himself fully of the nature of the application, of the existing beneficial interest of the infant, and of the manner in which that interest is proposed to be affected, and to inform the solicitor whom he has retained in the matter, of the course of which he, the guardian, considers, in light of the legal advice given to him, should be taken on behalf of the infant"…

23. **Within the foregoing context, two matters emerge with respect to the duty of the litigation friend to fairly and competently conduct proceedings. The first is the central role of legal advice in the discharge of the duties of the litigation friend has been emphasised by the courts**…

24. **The second is that whilst the litigation friend is required to act on legal advice, he or she must be able to exercise some independent judgment on the legal advice she receives** (*Nottinghamshire CC v. Bottomley* [2010] EWCA Civ 756)…

> 25. Within this context, there is longstanding authority that a litigation friend who does not act on proper advice may (not must) be removed (see *Re Birchall* (1880) 16 ChD 41 at 42 per Sir George Jessel MR). The corollary of this latter position is articulated in the White Book at 21.7.1 which makes clear that:
>
> > "If a solicitor is acting for child or protected party, it is thought that they would be under an obligation to inform the court of any concern that the litigation friend was not acting properly."
>
> Thus, to adopt the words of Brightman J in a further passage in *In Re Whittall*, the litigation friend is not "a mere cypher"." (emphasis added).

56. There are a number of points which arise out of, or need to be made in the light of, *Raqeeb*.

57. First, the litigation friend's duty is to fairly and competently conduct the proceedings. The litigation friend's duty is not a broader one to act in the protected party's best interests (or for the protected party's benefit, or to safeguard their interests), so conferring on the litigation friend the rights and obligations of a property and financial affairs, or personal welfare, deputy, or of an attorney. If, for example, a litigation friend learns something about the protected party, unrelated to the proceedings in which the litigation friend is appointed, which might require a best interests decision, the litigation friend's appointment does not give them licence to take that decision. As MacDonald J explained, any step taken by the litigation friend to benefit the protected party, must be taken in the context of the litigation friend fairly and competently conducting the proceedings.

58. Secondly, it is difficult to think of a situation where a litigation-related step the litigation friend takes in fact benefits the protected party but breaches the litigation friend's duty to fairly and competently conduct the proceedings. It should in most, if not all, cases be in the protected party's best interests, and to their benefit, that the steps the litigation friend takes on their behalf in the conduct the proceedings are taken fairly and competently, so that, if the step in question breaches the duty, that it is to the protected party's benefit is called into question. However, if such a situation arises, the litigation friend ought not to take the step if it is one which is inconsistent with their duty to fairly and competently conduct the proceedings. As I have said, the litigation friend's duty is to conduct the proceedings, on the protected party's behalf, fairly and competently, and, as Brightman J said in *Re Whittall*, the litigation friend must take all "due" steps.

59. Thirdly, in my view, the litigation friend's duty to fairly and competently conduct the proceedings includes a duty to help the court further the overriding objective. Litigants are required to help the court in this way (see CPR 1.3). The competent conduct of proceedings on a protected party's behalf must require the litigation friend to satisfy that requirement on the protected party's behalf. In any event, it must surely benefit the protected party if the proceedings are dealt with justly and at proportionate cost.

60. Fourthly, the litigation friend ought to obtain legal advice and give that advice proper weight. The litigation friend is not obliged to follow that advice unthinkingly but, if they reject it, they must have a sufficient (and considered) reason for doing so.

61. Even though, I have no doubt, Ms Bushby's wish to bring about a transfer of the Wellsford shares to Mr Galazis was well-meaning (particularly against the background of the 2020 stock transfer form, which understandably troubled her), in the light of these points, it was not part of Ms Bushby's function as Mr Galazis' litigation friend to pursue that transfer, particularly because her appointment by the Chief Master was as Mr Galazis' litigation friend in the proceedings. In practice, had Ms Bushby and the Galazis agreed that the Settlement should be amended to include provisions for the share transfer, no-one would have objected that Ms Bushby was acting inappropriately, but, once the Galazis and the Christo Defendants made clear that the Settlement was not going to be reopened, Ms Bushby did not have a sound basis, as Mr Galazis' litigation friend, to press the point. As I have already explained, by April 2020, Mr Galazis was not pursuing any claim against the Christo Defendants and the counterclaim against him had ended. In reality, Mr Galazis had no further interest in the proceedings. More importantly, there was never any claim (any pleaded cause of action) by Mr Galazis against the Galazis which could be the basis for an order for a transfer of the Wellsford shares. Ms Bushby's pursuit of the share transfer (including by opposing the sealing of the draft Tomlin Order) was therefore not a step taken in the conduct of the proceedings, and so not part of her function. It follows, too, that Ms Bushby's application for an order for the transfer of the Wellsford shares was bound to fail.

The Master's order

62. The Master's order reflected his decision on costs but also dealt with the applications themselves. The order recites an undertaking by the Galazis that Mrs Galazi "will, providing that she has standing to do so, make an application to the Courts of Cyprus for the appointment of a deputy, or Cypriot equivalent, to manage [the Wellsford shares and the Abbee shares]". The order also recites that the parties had agreed to the discharge of the Freezing Injunction and that the Master had "approved and made" a Tomlin Order. The Master ordered:

> " 1. [The Galazis'] application is granted.
>
> 2. The Freezing Injunction shall be discharged.
>
> 3. The appointment of Ms Nicola Bushby as the Litigation Friend for [Mr Galazis] is terminated, save in relation to (i) all matters relating to the costs of and against [Mr Galazis], (ii) the costs order made against [Ms Bushby] herein and (iii) all matters relating to any appeal by [him and/or her].
>
> 4. For the avoidance of doubt, and save for those matters otherwise addressed in this order or in the Tomlin Order (as approved) and all matters relating to the costs of and against [Mr Galazis], all other matters in these proceedings are dismissed.

> 5. There shall be no other order on [Ms Bushby's] application.
>
> 6. Ms…Bushby will pay [the Galazis'] and the Christo Defendants' costs of and occasioned by [the Galazis'] application and [Ms Bushby's] application, pursuant to s 51 of the Senior Courts Act 1981, to be assessed if not agreed, on the standard basis.
>
> 7. Ms Bushby will by no later than 4pm on 19 February 2021:
>
> a. make a payment on account to [the Galazis] in the sum of £25,000; and
>
> b. make a payment on account to the Christo Defendants in the sum of £7,500."[15]

63. Although not obvious from the face of the order, the Master concluded that:

   i) Mr Galazis had "no extant claims";

   ii) the claim, made by Ms Bushby on Mr Galazis' behalf, for the transfer of the Wellsford shares to him was "not a claim which springs out from the pleadings" and so was not a claim the settlement of which required the court's approval;

   iii) CPR 21.10 was not engaged in relation to the Settlement, because it cannot have settled any claim in the proceedings by Mr Galazis;

   iv) if the settlement dealt with "the internal workings or assets" of Wellsford or Abbee, CPR 21.10 was still not engaged, because those matters were not the subject of any claim in the proceedings;

   v) CPR 21.11 was not engaged because Mr Galazis had not recovered any money in the proceedings;

   vi) the court does not have an inherent jurisdiction to direct how any of Mr Galazis' assets are to be managed. Any question in relation to the management of those assets might only be determined by the Court of Protection, to which Ms Bushby could make an application; that is, if the Court of Protection has any jurisdiction over those assets;

   vii) he did not have jurisdiction to discharge the Freezing Injunction, absent the parties' consent.[16]

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[15] Separately, the Master permitted to be sealed a Tomlin Order substantially in the terms of the draft filed for sealing, but with any reference to the discharging of the Freezing Injunction omitted.

[16] The judgment was not recorded. The parties have agreed a note of the judgment. This summary of the Master's decision is based on my reading of the note.

64. The Master did not adjudicate on Ms Bushby's concerns about the Galazis' conduct.

65. By the time the Master handed down judgment, all the parties had given their consent to the discharge of the Freezing Injunction. He therefore ordered the discharge of the Freezing Injunction by consent.

The Master's decision on costs

66. The Master delivered an extempore judgment on costs. In considering his decision, I remind myself that:

> "Reasons for judgment will always be capable of having been better expressed. A Judge's reasons should be read on the assumption that the Judge knew (unless they have demonstrated to the contrary) how they should perform their functions and which matters they should take into account (*Re C (A Child) (Adoption: Placement order)* (Practice Note) [2013] EWCA Civ 431; [2013] 1 WLR 3720, CA, at [39] per Sir James Munby P; *Piglowska v. Piglowski* [1999] 1 WLR 1360, HL, at 1372 per Lord Hoffmann)…"[17]

67. The Master began by acknowledging that he had been referred to *Glover v. Barker* [2020] Costs LR 1215. He said that the Court of Appeal had decided in *Glover* that, generally, a claimant's litigation friend will be ordered to personally pay the costs of unsuccessful proceedings, but that that general rule in the case of claimants' litigation friends does not apply to defendants' litigation friends. He quoted from [64] of the judgment of Newey LJ.

68. He continued, at [8]-[9]:

> "…This application has been brought and defended on the basis that a costs order against the litigation friend is something which requires and warrants a high degree of opprobrium or is some form of sanction against the litigation friend. Reading 64(iii) [of *Glover*] it is clear to me that, particularly when it is a claimant litigation friend, that is not so, that it is far more an events based outcome…
>
> [A]t 64(iv) it is said:
>
> > "There is no presumption that a defendant's litigation friend should bear costs which the defendant would have been ordered to pay if not a child or protected party. That the litigation friend controlled the defence of a claim which succeeded will not of itself generally make it just to make an adverse costs order against the litigation friend. Factors

[17] See note 52.21.5 in the 2021 White Book.

> that might, depending on the specific facts, be thought to justify such an order include bad faith, improper or unreasonable behaviour and prospect of personal benefit. If a director causes his company to litigate "solely or substantially for his own benefit" (to quote Lord Brown in *Dymocks*), that may point towards a costs order against him. The fact that a litigation friend stands to gain a substantial personal benefit must also, I think, be capable of weighing in favour of a costs order against him."
>
> I take that last part, the fourth point in paragraph 64, as describing in general terms and not limiting the factors that I can take into account on an application for an order against a litigation friend and I also take into account what is said at 64(ii), that in cases of both claimant and defendant litigation friends that the ultimate question is whether in all the circumstances it is just to make the order and it is against that background then that I consider whether or not it is just to make an order against a litigation friend for a defendant in proceedings."

69. On the basis of this analysis of *Glover*, the Master then gave his reasons for his decision. He said, at [10]-[17]:

> "The first and I think most important consideration here is that when the litigation friend was appointed, [Mr Galazis] was a claimant. It was in the context of somebody who was bringing a claim, not defending one. Part of the policy reasons that Newey LJ refers to at paragraph 63 of his decision relate to the difference between actively bringing a claim and having a claim thrust upon you and the desirability of having somebody represent defendants regardless of the merits of the case. That does not seem to me the position here when the litigation friend was appointed, because at that point in time [Mr Galazis] was the Third Claimant.
>
> Likewise, it seems clear that throughout the course of these proceedings [Mr Galazis], although defendant, was never, in reality, a defendant to anything. At all times the third claimant [(i.e. Mr Galazis)] was asserting a claim to beneficial interest in shares in a company which held property in the UK. It was a claim that he was making positively and the difference between claimant and defendant litigation friends really is of much less, if any, importance in this case. The litigation friend ought to be considered more as a claimant litigation friend rather than a defendant litigation friend.
>
> Against that context, I need to consider what the order ought to be in this application, or these applications. There is no doubt that had [Mr Galazis] not acted through a litigation friend, then I would have made a costs order against him; having been

unsuccessful in both applications. That is one factor that I rely on in making the finding or making the decision that Ms Bushby will pay the costs of these applications personally in that regard.

Another factor I am concerned with is that issues regarding the Tomlin order and the approval of the Tomlin order were used to leverage other benefits in a manner which it was inappropriate. I have regard to the letter of 7th May 2020 where it was said by Ms Bushby, that any agreement must include an agreement to transfer 25 percent of the shareholding in Wellsford...That was a matter that had already been agreed and was not really between the parties. Further, in that letter, another condition of consent was the "payment of our clients' fees that she has incurred". I do not think it was suitable for a Tomlin order, which had been arrived at and between other parties, to be used to procure payment of those fees.

Mr Katz sought to rely on the fact that the Tomlin order could not have been sealed because it contained a discharge of a freezing order and that without agreement of all the parties it was not possible for a master to have discharged that. Whilst I do think that is correct, there are two points to make on that.

Firstly, it was only the intransigence of the litigation friend that prevented that agreement from being provided. Secondly, that was not really a proper obstacle as the matter could have been referred to a High Court Judge who could have made that discharge; and I believe would have made that discharge on the facts. At the last hearing it was conceded by Mr Katz, that the freezing order served no utility.

Therefore, it was clear that the Tomlin order should have been agreed. It did not involve [Mr Galazis]. It was between the other parties and had the freezing order element not been there and had this matter not been prevented by the litigation friend communicating with the court and objecting to the sealing of the Tomlin order, I suspect that it would have gone through without the necessity for, what is coming up to now, two days of hearing.

For those reasons, I am satisfied that this is a suitable case to make an order against the litigation friend for the costs of these applications. In summary, that the appointment started when the [Mr Galazis] was a claimant, that the cost of the applications would have been borne by [him] had he not been assisted by a litigation friend and that it was the conduct of the litigation friend that brought about these applications in which [Mr Galazis] was unsuccessful. In that regard, it is Ms Bushby's actions which has led to these costs being incurred

> and in all the circumstances it is just to make an order against her."

70. When refusing permission to appeal, the Master made the following additional points:

> "My view is that whilst an undertaking had not been given [by Ms Bushby] and there was an order that no costs orders against the third claimant [(i.e. Mr Galazis)] could be enforced by any other party, that was not the same as an order that no adverse costs could be awarded against the litigation friend…They are very different. The impact of not providing the undertaking, was to remove the automatic consequences of a costs order against [Mr Galazis]. By doing so, it meant that it became a matter of consideration for the court, whether to make such an order. It did not remove that ability entirely. It was that exercise that I carried out…
>
> The ultimate test for both claimant and defendant litigation friends is what order should be made in all the circumstances..."

71. As I read the Master's judgment, he reached the following conclusions:

i) In deciding whether to make a costs order against a litigation friend, the "ultimate question" is whether it is just to make such an order;

ii) Where a litigation friend is a claimant's litigation friend, in deciding whether to make a costs order against the litigation friend the court has to have particular regard to the outcome of the substantive application before it, so that, if the protected party is the unsuccessful party, so that the general rule is that they have to pay their successful opponent's costs, that should weigh significantly in favour of making a costs order against the litigation friend. In the case of a defendant's litigation friend, the outcome of the application is not inevitably to be weighed in the balance against the litigation friend, at least to the same extent;

iii) Where a litigation friend is a defendant's litigation friend, the court can take into account the litigation friend's bad faith, or improper or unreasonable behaviour, and any personal benefit the litigation friend might derive if their protected party succeeds, but those matters are not the only matters the court can take into account. Rather, they are some (non-limiting) circumstances to which the court can have regard;

iv) A particularly weighty matter in favour of making a costs order against Ms Bushby was that, when she was appointed Mr Galazis' litigation friend, he was a claimant, and the Galazis had won (and Mr Galazis had lost) in front of the Master;

v) Although, by the time of the Master's decision, Mr Galazis was a defendant, that did not weigh heavily against making a costs order against Ms Bushby,

because, in reality, Mr Galazis only ever advanced, and never defended, a claim;

vi) There was no sound basis for Ms Bushby to oppose the sealing of the draft Tomlin Order;

vii) Ms Bushby opposed the sealing of the draft Tomlin Order to inappropriately "leverage" certain benefits; namely:

a) a transfer of the Wellsford shares to Mr Galazis. To try to "leverage" this benefit was inappropriate because a transfer of the shares had already been agreed;

b) the payment of her outstanding fees.

It is clear to me that the Master made a qualitative assessment of Ms Bushby's conduct. He thought, for example, that she had misconducted herself by opposing the sealing of the draft Tomlin Order to achieve a personal benefit;[18]

viii) The only reason the Freezing Injunction was not discharged by consent was because of Ms Bushby's "intransigence";

ix) Ms Bushby's conduct necessitated a two day hearing;[19]

x) That Ms Bushby had been freed from giving a litigation friend's undertaking (which most other claimants' litigation friends are required to provide), to pay any costs which Mr Galazis was ordered to pay in relation to the proceedings, was a neutral factor, neither weighing in favour of, or against, a costs order against Ms Bushby.

The grounds of appeal

72. By the grounds of appeal, Ms Bushby contends that the Master's decision is wrong and unjust because she was not made a party to the proceedings on the question of costs and "therefore" did not have a reasonable opportunity to respond to the applications for costs against her. Ms Bushby relies, in this context, on CPR 46.1, which provides:

> "(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –
>
> (a) be added as a party to the proceedings for the purposes of costs only; and

[18] I use the word "misconducted" here in a non-technical sense.
[19] In fact, as I understand it, the second day was largely taken up with the Galazis' costs application.

(b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

73. By the grounds of appeal, Ms Bushby also contends that the Master's decision is wrong because he did not correctly apply the guidance given by the Court of Appeal in *Glover*; in particular, because:

    i) he treated her as being a claimant's litigation friend, so satisfying a "threshold requirement" identified in *Glover*, when, in fact, she was a defendant's litigation friend;

    ii) he did not take into account sufficiently that she was seeking to act in Mr Galazis' best interests;

    iii) he did not find that she had acted in bad faith, improperly, or unreasonably and such a finding is a minimum requirement for making a costs order against a litigation friend;

    iv) he did not weigh in the balance that Ms Bushby was not given sufficient information to be able to decide on the merits of the Settlement, and she was "compelled" to seek the court's guidance about whether CPR 21.10 was engaged;

    v) he did not take into account sufficiently that she had not been required to give a costs undertaking on her appointment (when this is normally a requirement of claimants' litigation friends), that she had sought, and obtained, an indemnity from Mrs Galazi, and that she had obtained orders to protect her from a costs liability.

74. She also contends that the Master's decision was wrong because he found that she had acted "inappropriately" in "seeking some security for her costs", but that was not inappropriate.

<u>The cross-appeal</u>

75. By a respondent's notice, the Respondents seek to uphold the Master's decisions for the reasons he gave and for additional reasons.[20]

76. They also contend, by way of cross-appeal, that:

    i) the Master was wrong not to order that their costs to be paid by Ms Bushby should be assessed, if not agreed, on the indemnity basis rather than the standard basis, because he applied the wrong test for an indemnity basis order. He wrongly concluded, they say, that, for an indemnity basis order, an applicant has to establish that the respondent's conduct "warrants…a high degree of opprobrium or sanction";

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[20] I have already dealt above with those additional reasons.

ii) the Master was wrong to award them only £25,000 as the reasonable sum on account of costs under CPR 44.2(8), amongst other reasons because he wrongly assumed that Mrs Galazi was liable to indemnify Ms Bushby her costs when that has been a matter of dispute.

Irregularity

77. Mr Sachdeva contended that the Master made an error of law in making a costs order against Ms Bushby without having joined her as a party to the proceedings as required by CPR 46.2. Mr Sachdeva did not explain why any such error of law might make the Master's decision wrong.

78. In reaching his decision on costs, the Master was not asked to, and so did not, consider whether or not Ms Bushby should be added as a party to the proceedings. I cannot see, therefore, how he made an error of law in reaching his decision, or, to put it another way, how his decision was wrong, given the broad terms of s.51 of the Senior Courts Act 1981 (which, as the parties agree, and as I shall explain, is the basis for the costs jurisdiction against litigation friends).

79. The failure to add Ms Bushby as a party to the proceedings was an error of procedure, but it was error of procedure which did not make the Master's decision unjust (and so was not a material error), because, as I shall now explain, the consequence which, it has been argued on Ms Bushby's behalf, flows, from that error, namely that Ms Bushby did not have sufficient notice of the costs applications against her, is not made out.[21]

80. The Master heard the Galazis' application and Ms Bushby's application on 14 January 2021, and it was not until 22 January 2021 that he heard submissions on costs. Mr Sachdeva accepted that counsel then acting for Ms Bushby did not object that the costs hearing took place only 8 days after the applications were heard. Mr Sachdeva also accepted that no-one had suggested that the Galazis (or, presumably, the Christo Defendants) should be required to serve Points of Claim, particularising the grounds for their applications for costs against Ms Bushby.

81. When I asked Mr Sachdeva to identify how the Master's decision was unjust, he said that Ms Bushby was not able to place "the relevant jurisprudence" before the Master. That submission is undermined somewhat by his submission, at a different point in the hearing, that how the court's jurisdiction to make a costs order against a litigation friend should be exercised is to be derived from *Glover*.

82. From 12 January 2021, Ms Bushby knew that costs orders were being sought against her as Mr Galazis' litigation friend. She knew that *Glover* was being relied on in support of the applications and she also knew what, in summary, were the grounds for the applications. Ms Bushby had ten days to gather together the authorities on which

[21] It has not apparently been a ground of appeal, and Mr Sachdeva (who, in fairness, did not draft those grounds) did not contend, that the hearing before the Master was procedurally unfair because Ms Bushby did not have sufficient opportunity to file evidence in response to the applications for costs against her.

she wished to rely (and to prepare her response). Mr Sachdeva did not explain why Ms Bushby needed more than ten days to gather together those authorities or otherwise to prepare adequately for the hearing of the costs applications against her.

83. I am therefore not satisfied that Ms Bushby was not given sufficient notice of the applications for costs against her and I have concluded that the Master's decision was not unjust because of a serious procedural, or other, irregularity.

Costs order against litigation friends

84. In *Glover*, Newey LJ, with whom Patten and Moylan LJJ agreed, explained that the jurisdiction to make a costs order against a litigation friend is derived from s.51 of the Senior Courts Act 1981 ("s.51"), which provides that:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in – …
>
> (b) the High Court;…
>
> shall be in the discretion of the court…
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

The Judge noted that, in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] AC 965, Lord Goff of Chieveley said that s.51(1) was "expressed in wide terms" and that it was for the appellate courts to "establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised". The Judge also concluded (at [60]) that the case before the court was a suitable opportunity to provide "specific principles" in relation to costs orders against litigation friends.

85. The Judge held (e.g. at [64(ii)]), as had been held over many years in the broader context of applications under s.51 for costs orders against non-parties, that the "ultimate question" is "whether in all the circumstances it is just to make the order".

86. The Judge concluded that there is a presumption (see [64(iii)]), or that it is typically (or usually) just (see [62], [64(ii)]), that a claimant's litigation friend pays the defendant's costs where an order would have been made against a claimant had they not been a protected party. He emphasised, however, "the important caveat that, when deciding whether to make such an order, the court is exercising a discretion and entitled to have regard to the particular circumstances of [the] case" (see [62]).

87. Under CPR Part 21, whilst most claimants' litigation friends are required to give an undertaking to pay any costs which the protected party may be ordered to pay in relation to the proceedings (subject to any right they may have to be repaid from the protected party's assets) ("the undertaking"), there is a class of claimants' litigation friends, deputies appointed by the Court of Protection with power to conduct the proceedings, who are not required to give the undertaking. I am not certain whether the Judge concluded that the presumption that an unsuccessful claimant's litigation

friend should pay costs ("the presumption") extends to deputies who are claimants' litigation friends. If it does, the fact that a deputy has not given an undertaking would be no reason to not apply the presumption. On the other hand, if the presumption does not apply to deputies (because they have not given the undertaking), the basis for concluding that a costs order should be made against a deputy, when they are a claimant's litigation friend, must be found elsewhere. I am not certain whether claimants' litigation friends who are deputies are subject to the presumption because, in reaching his conclusion, on the one hand, the Judge referred to pre-CPR authority which, it seems from the judgment, applied a similar rule to all litigation friends (without any distinction being made for court-appointed receivers for example) and, implicitly at least, to the more limited public interest that all claimants' litigation friends serve in contradistinction to the public interest served by defendants' litigation friends (see [63(iii)]). However, on the other hand, the Judge also referred to the undertaking in [61], [62] and [63(ii)], which, as I have explained, is not a CPR requirement for claimants' litigation friends who are deputies. As it happens, I do not need to resolve this uncertainty.

88. In the case of defendants' litigation friends, who do not give the undertaking, (and, perhaps, claimants' litigation friends who are deputies (see above)), the presumption does not apply and there must be something else before a Judge can make a costs order against the litigation friend. In [63], the Judge focused on litigation friend "gross misconduct", "impropriety" and "bad faith", and on litigation friends acting for their own benefit, as grounds which entitle a Judge to conclude that it is just to make a costs order against a litigation friend. However, in [64], the Judge took a more expansive view of the grounds which may make just a costs order against a defendant's litigation friend. As the Master recorded, the Judge said, at [64(iv)]:

> "There is no presumption that a defendant's litigation friend should bear costs which the defendant would have been ordered to pay if not a child or protected party. That the litigation friend controlled the defence of a claim which succeeded will not of itself generally make it just to make an adverse costs order against the litigation friend. Factors that might, depending on the specific facts, be thought to justify such an order include bad faith, improper or unreasonable behaviour and prospect of personal benefit."

The Judge continued, at [66], in relation to the application made by the litigation friend in the case before the Court:

> "…As for improper or unreasonable behaviour, the respondents argued that the Twins' Application had poor to non-existent prospects of success and was speculative at best. In this connection, Mr Cloherty drew attention to para.81 of [Morgan J's] Costs Judgment, in which the Judge said that, by the time the Twins' Application was initiated, Ms Glover "knew or ought to have known of the difficulties she would have to overcome" but "none the less went ahead". He further relied on Lord Brown's reference in *Dymocks* to "the pursuit of speculative litigation" being capable of supporting the making of an order against a non-party. To my mind, however, the

> Twins' Application was not so obviously flawed as to justify a costs order against Ms Glover. A key element in the Judge's analysis in the Principal Judgment was that section 28 of the IHTA was to be construed in the way that the Court of Appeal thought was probably correct in the Negligence Claim, but the Court of Appeal's judgments were not available until December 2017, by which time the Twins' Application had not only been issued but had its first hearing day. Beyond that, the matter was the subject of sustained argument by leading counsel at a hearing extending over, in all, several days and the Judge spoke of the Twins' Application having to overcome "difficulties" rather than of its being hopeless."

It seems to me that the Judge was prepared to accept that the pursuit of an obviously flawed, or hopeless, application by a litigation friend might entitle the court to make a costs order against them.

89. Mr Sachdeva drew my attention to *Ridehalgh v. Horsefield* [1994] Ch 205, a case on wasted costs orders. He argued that the jurisdiction to make a wasted costs order was an analogous jurisdiction. In that case, Sir Thomas Bingham MR said, at p.233:

> "A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail."

In my view, the wasted costs jurisdiction is not a complete analogy and is not a basis for concluding that the Court in *Glover* rejected the pursuit of hopeless litigation as a potential ground for making a costs order against a litigation friend. The Master of the Rolls explained in *Ridehalgh*, at p.234, why legal representatives are not to be held accountable for the wasted costs of hopeless litigation:

> "Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the Judge and not the lawyers to Judge it."

It is far safer to assume that a hopeless case is being pursued at the litigation friend's behest, because, unlike their legal representative, they are the ultimate decision-maker. That is not to say that, in every case, the pursuit of a hopeless case will result in a costs order against the litigation friend, first, because, as I have said, the ultimate question is whether such an order is just, and, secondly, because reliance by the litigation friend on legal advice is capable of acting as a shield (or defence) to an application for costs against them, as I shall explain.

90. It is clear that the factors the Judge identified as being grounds when it might be just to make a costs order against a defendant's litigation friend do not make up a closed

list. There is, however, a clear connection between those grounds. They are all instances where a litigation friend has breached their duty to fairly and competently conduct the proceedings. Indeed, it might be thought surprising, bearing in mind the broad discretion conferred by s.51, if a court could not make a costs order against a litigation friend who has conducted the proceedings unfairly or incompetently, and has thereby caused costs to be incurred, if the circumstances make such an order just.

91. There may be some support for the conclusion that the unfair or incompetent conduct of proceedings by a litigation friend can make a costs order against a litigation friend just. Although the wasted costs jurisdiction does not provide a complete analogy, in *Ridehalgh* Sir Thomas Bingham MR explained, at p.227, that:

> "The court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice."

So, in the case of litigation friends, a breach of their duty, in that case to fairly and competently conduct the proceedings in issue, ought, by analogy, to be a basis, if the circumstances justify it, for making a costs order against them.

92. If breaches of a litigation friend's duty to fairly and competently conduct the proceedings in question can be a sufficient ground for making a costs order against them, then steps taken by a litigation friend for a purpose unrelated to the proceedings in which they have been appointed can also be capable of being the basis for a costs order (as, in fact, I understood Mr Sachdeva to accept). Such steps (a) would include steps taken by the litigation friend for their personal benefit and (b) could result in a costs order on the ground that the litigation friend's duty is to conduct the proceedings, or on the ground that, by taking steps unrelated to the proceedings in question, they have not acted fairly or competently. On this approach, the circumstances in which the court may make a costs order against litigation friends aligns with circumstances when the court may make a costs order against other non-parties involved in litigation; namely, lawyers. Mr Sachdeva drew my attention to the decision of Rose LJ in *Willers v. Joyce* [2019] Costs LR 1351, where the Judge explained, at [54]:

> "In my judgment the principle that emerges clearly from the decisions of this court in *Tolstoy*, *Floods* and *Hamilton v. Al Fayed* is that there is a strong public interest in ensuring that impecunious claimants can have access to justice even if that means that successful defendants are left substantially out of pocket. Because of this, legal representatives should not be at risk of a third party costs order unless they are acting in some way outside the role of legal representative…"

93. I would therefore hold that the unfair or incompetent conduct of proceedings by a litigation friend can, depending on all the circumstances, be the basis for making a costs order against a defendant's litigation friend.

94. It may also perhaps be instructive to note that, in *Ridehalgh*, the Court of Appeal thought that unreasonable conduct and incompetent conduct cover much of the same

territory. The Master of the Rolls said this, at pp.232-233, when discussing the question of negligence in the context of ss.51(6)-(7)[22]:

> "The term "negligent" was the most controversial of the three. It was argued that the Act of 1990 [which introduced s.51 in its then current form], in this context as in others, used "negligent" as a term of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Ord.62, r.11 made reference to "reasonable competence." That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.
>
> We…are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.
>
> In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do;" an error "such as no reasonably well-informed and competent member of that profession could have made:" see *Saif Ali v. Sydney Mitchell & Co.* [1980] AC 198, 218, 220, per Lord Diplock.

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[22] These sub-sections provide:
"(6) …the court may…order the legal…representative to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.
(7) In subsection (6), "wasted costs" means any costs incurred by a party –
(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal…representative…"

> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and **conduct which is negligent will very frequently be (if it is not by definition) unreasonable**. We do not think any sharp differentiation between these expressions is useful or necessary or intended" (emphasis added).

Discussion

95. I have found it helpful to remind myself of what the Supreme Court said in *Re B (a child)* [2013] 1 WLR 1911. I have in mind, in particular, what Lord Kerr said, at [112]:

> "Where what is under review by an appellate court is a decision based on the exercise of discretion, provided the decision-maker has not failed to take into account relevant matters and has not had regard to irrelevant factors and has not reached a decision that is plainly irrational, the review by an appellate court is at its most benign. Truly, in that instance, an appellate court which disagrees with the challenged decision of the Judge will be constrained to say, even though we would have reached a different conclusion, we cannot interfere."[23]

96. Referring to the grounds of appeal as I have summarised them above, in the light of the conclusions I have already reached:

    i) I cannot say that it was irrational for the Master to take into account that, on her appointment, Ms Bushby became a claimant's litigation friend. Nor can I say that it was irrational for the Master to attach no weight to the fact that, by April 2020, Mr Galazis was a defendant to the claim. To conclude otherwise would be to elevate form over substance;

    ii) It was not irrational for the Master not to place more weight on the fact that Ms Bushby believed that she was acting in Mr Galazis' best interests. Whilst the Master was entitled to take into account that Ms Bushby believed that she was acting in Mr Galazis' best interests, the weight to attach to that fact was for him, unless the weight he did attach to that fact resulted in an irrational decision, and there is no material before me which leads to that conclusion;

    iii) As it happens, I think that the Master did conclude that Ms Bushby had acted unreasonably. He described her as intransigent. In any event, as I have explained, a finding of bad faith, or improper or unreasonable conduct was not

[23] See also *R (R) v. Greater Manchester Police* [2018] 1 WLR 4079.

a minimum requirement before the Master could make a costs order against her;

iv) The Master was not wrong to attach no weight to the fact that Ms Bushby was not told the terms of the Settlement and she was not compelled to invite the court to consider whether CPR 21.10 was engaged;

v) There is no material before me from which I can conclude that the weight attached by the Master to the costs protection Ms Bushby had secured for herself resulted in his decision being irrational.

97. However, the Master did fall into material error, so that his decision is wrong. The Master concluded that Ms Bushby opposed the sealing of the draft Tomlin Order, and then proceeded to act as she did, in part for the purpose of getting paid. The Master relied on Ms Bushby's 7 May 2020 letter to support that conclusion. As I have explained, he was wrong on both counts. He therefore took into account an irrelevant factor in reaching his decision. That he did so is understandable. The history of this case is so complex, and the correspondence from April 2020 is so lengthy, that the true picture of Ms Bushby's approach in 2020 and January 2021 has only become clear following the longer time I have had to consider my decision than the Master had to consider his decision.

98. It follows, therefore, that the appeal must be allowed and the order requiring Ms Bushby to pay the costs of the Galazis and the Christo Defendants (Northwest excepted, as I have explained) must be set aside. In consequence, the question of whether or not Ms Bushby should pay those parties' costs needs to be re-determined.

99. As I have indicated, counsel accepted that I can re-determine the applications for costs against Ms Bushby, at least as between her and the Galazis. It seems to me that I am in as good a position as the Master to do so, and that is what I propose to do, because that is most consistent with the overriding objective. I will need to consider separately, once I have decided how to deal with the application as between Ms Bushby and the Galazis, how the application, as between Ms Bushby and the Christo Defendants (Northwest excepted) ought to be dealt with.

100. It occurred to me, after the hearing, that, in the situation now facing me, I am not compelled only to order that Ms Bushby should, or should not, pay the Galazis' costs of and occasioned by the Galazis' application and Ms Bushby's application. I have the power to make a proportionate costs order or make a different order on the two applications for example. I therefore invited Mr Sachdeva and Mr Sibbel to make brief written submissions on alternative orders in the event, which has happened, that I have to re-determine the costs applications against Ms Bushby. Mr Sibbel did make brief written submissions. Mr Sachdeva declined to make written submissions on alternative orders, arguing instead that, because that possibility was not raised by the Galazis in their respondent's notice, I do not have the power (or, perhaps, it might not be appropriate) to make an alternative order. I disagree with Mr Sachdeva, because the issue now before me is not whether the Master's decision should be upheld for the reasons he gave or for other reasons. Rather, as I have explained, what I now have to do is to re-determine the costs applications and, in that regard, I have all the powers the Master had.

101. It cannot be doubted that, on an application for a non-party costs order, save perhaps in exceptional circumstances, the respondent should be permitted to file evidence in opposition to the application. As Nourse LJ said in *Re Land and Property Trust Co plc (No.4)* [1994] 1 BCLC 232, 244:

> "This case provides a good illustration of the dangers inherent in treating an application for costs against a third party in the same manner as one against a party to the proceedings. It demonstrates that such an application will often raise entirely different issues from those which the court has so far considered and to which the evidence has so far been directed. Every judge of first instance will wish to ensure that the procedures of his court allow such applications to be justly determined."

102. Ms Bushby never filed any evidence after 12 January 2021 (when the Galazis set out in Mr Sibbel's skeleton argument their case for a non-party costs order). It is probable that neither the parties nor the Master turned their minds to the possibility of further evidence because the applications for costs against Ms Bushby were not made by an application notice.

103. In the 6 January witness statement, Ms Bushby made the following points; namely, that:

i) throughout the proceedings, she sought, and obtained, legal advice. She did not say in terms that she had sought legal advice in relation to her response to the draft Tomlin Order. Nor, if she did receive legal advice on the topic, did she identify who advised her, what instructions they were given, or what their advice was;

ii) prior to her appointment as Mr Galazis' litigation friend, she made clear to Mrs Galazi's solicitors and Mrs Galazi's attorney that she "could not expose [herself] to the risk of an adverse costs order in [her] own personal/professional capacity" and that she was unwilling and unable to take such a risk. The Indemnity contains a more limited recital; namely, that Ms Bushby agreed to act as Mr Galazis' litigation friend on condition that the Christo Defendants agreed "not to pursue her personally in respect of any costs order made against" Mr Galazis. Ms Bushby's evidence may, however, support a broader agreement between her and Mrs Galazi's agents which may be recorded in correspondence or attendance notes;

iii) she had been repeatedly threatened with wasted costs orders by the Galazis, whose solicitors were aware that she had recently joined her current firm and, she believed, also knew that the threat of a wasted costs order "would likely place [her] internally in great personal/professional difficulty". Mr Sachdeva also said, during the course of his reply, that, if the appeal is not allowed, Ms Bushby would face serious professional consequences and that she is "fighting" for her career. There may also be significant financial consequences for Ms Bushby if she is ordered to personally pay the costs of the Galazis' application and her application.

Although Ms Bushby (and Mr Sachdeva in his reply) has made some or all of these points, none of them have been particularised. Justice, and the overriding objective, demand that Ms Bushby should have a further short opportunity to file evidence dealing with, and substantiating, these points (and, it seems to me at present, these points alone), if she wishes to do so. Some of the material Ms Bushby may wish to adduce may be privileged. Nothing I have said (or will order) is to be taken as sanctioning the breach of any privilege. If the question of privilege does arise, Ms Bushby will have to consider whose privilege it is, who can waive that privilege and whether that privilege should be waived, and, if not, how she might deal with privileged information.

104. The Galazis should also have a short opportunity to file evidence in response to any further evidence from Ms Bushby, with Ms Bushby given a short opportunity to reply.

105. There ought then to be a further short hearing before me at which the parties can make further submissions on the points I have identified and their relevance to the re-determination of the costs application against Ms Bushby.

106. The further hearing will not be an opportunity for Mr Sachdeva to make further submissions that, if I make a costs order against Ms Bushby at all, it should be a proportionate costs order, or some order other than that she should pay the costs of both the Galazis' application and her application, because, on Ms Bushby's behalf, he declined to make further written submissions on the question of such alternative costs orders.

107. How then should I re-determine the application by the Christo Defendants (Northwest excepted) for a costs order against Ms Bushby?

108. They should clearly have the same opportunity to respond to Ms Bushby's further evidence as the Galazis (and, equally, Ms Bushby should have the opportunity to file reply evidence). They are also entitled to attend, and be represented at, the further short hearing to make further submissions on the points I have identified.

109. As between them and Ms Bushby, a further complication arises. I have indicated that they elected not to participate in the appeal (save for the written submissions sent to me by their solicitors after the hearing). It follows therefore that the focus of the appeal was entirely on the dispute between the Respondents and Ms Bushby, and, understandably, no emphasis was placed on material relating to the Christo Defendants. Had the Christo Defendants participated in the appeal, there may have been material already in the appeal bundle which Ms Bushby would have prayed in aid of her response solely to the re-determination of their costs application against her (and not also in response to the re-determination of the Galazis' application). Ms Bushby should have an opportunity to draw that material relating solely to the Christo Defendants which is already in the appeal bundle to my attention by Mr Sachdeva's oral submissions and the Christo Defendants (Northwest excepted) should have an opportunity to respond. This is a further matter to be dealt with at the further short hearing I have in mind.

110. Developing a point I have already touched on, the opportunity the parties have to file further evidence does not extend to filing further evidence other than on the three matters I have identified above. Had I not concluded that further evidence on the three

matters I have identified should be permitted, and had I not also concluded that, because the Christo Defendants elected not to attend the hearing, Mr Sachdeva may not have drawn to my attention material already in the appeal bundle relating solely to them, I could have re-determined both the Galazis' and the Christo Defendants' costs applications against Ms Bushby without the need for any further evidence or submissions. It seems to me, therefore, that further court, and party, time and resources should be limited to what is strictly necessary; namely the issues I have identified.

The cross-appeal

111. I can deal with the cross-appeal briefly.

112. The Master gave the following reasons for not making an indemnity basis order and for the fixing the payment on account of costs as he did:

> "I am also asked to make them on an indemnity basis. As I have said, I do not think that the test for making an order against a litigation friend is one that warrants necessarily a high degree of opprobrium or sanction and I do not think that the conduct of the litigation friend in these proceedings or in these applications is such that warrants an indemnity costs order, so I will not be making that order on an indemnity basis but on the standard basis to be assessed if not agreed…
>
> I have now to determine whether or not to make payments on account in respect of the Claimants and the Christo Defendants' costs. I am going to make payments on account in respect of both.
>
> In respect of the Claimants, I am going to make a payment on account in the sum of £25,000. I have reduced that considerably from what has been asked for, primarily for two reasons. I think the costs are high and I have doubts whether the 50% would be an accurate reflection of those on a summary assessment. Secondly, because there is an indemnity between the First Claimant and the litigation friend in respect of costs. I appreciate that the indemnity does not apply to the Second Claimant, but it is a significant factor that there is some circularity here in terms of payment."

113. The threshold for making an indemnity basis order is summarised thus in note 44.3.8-44.3.9 of the 2021 White Book:

> "In *Excelsior Commercial and Industrial Holdings Ltd.* [2002] EWCA Civ 879; [2002] CP Rep 67, CA, the Court of Appeal…held that the making of a costs order on the indemnity basis would be appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) was such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs (at

> para.31 per Lord Woolf LCJ and para.39 per Waller LJ). The Court noted that there was an infinite variety of situations that might go before a court justifying the making of such an order, stressed that the right starting point is the rules themselves, in particular rr.44.3 and 44.4, and drew attention to the width of the discretion conferred on the court by those provisions.
>
> In *Esure Services Ltd. v. Quarcoo* [2009] EWCA Civ 595, where further clarification was provided, the Court stated…that the word "norm" was not intended to reflect whether what occurred was something that happened often, so that in one sense it might be seen as "normal", but was intended to reflect "something outside the ordinary and reasonable conduct of proceedings"…
>
> The discretion to award indemnity basis costs is ultimately to be exercised so as to deal with the case justly…"

114. I have found the decision about whether the Master set too high a threshold for the making of an indemnity basis order a difficult one. I remind myself that reasons for judgment will always be capable of better expression and that the Master's reasons should be read on the assumption that he knew where to set the threshold, unless his reasons shows otherwise.

115. One reading of the Master's reasons suggests that he did not identify what the threshold for an indemnity basis order is. Another reading of his reasons suggests that the court has to be satisfied that a paying party's conduct "warrants…a high degree of opprobrium or sanction" before an indemnity costs order is made.

116. On the latter reading, the Master did fall into error and set the threshold for an indemnity basis order too high. Conduct does not have to merit a high degree of opprobrium or sanction before an indemnity basis order is made.

117. After careful reflection, I have concluded that the latter reading of the Master's decision is the correct one, so that his decision about the appropriate basis for assessment of the Respondents' costs has to be set aside and is liable to be re-determined. However, it is not appropriate for me to re-determine the appropriate basis for assessment of the Respondents' costs until after I have re-determined whether Ms Bushby should in principle pay the Galazis' costs and, if so, why. It follows therefore that I will, if appropriate, re-determine the basis on which the Respondents' costs will be assessed immediately after I have re-determined the Galazis' application for costs against Ms Bushby.

118. To be clear, it is only in relation to the Respondents' costs that an indemnity basis order may be appropriate, because the Christo Defendants have not sought to cross-appeal the Master's decision on the appropriate basis for the assessment of their costs.

119. I should also make the point that the short further hearing I have in mind will not be an opportunity for Mr Sachdeva or Mr Sibbel to make further submissions on this issue. They had an opportunity to do so at the hearing.

120. Because I have not yet re-determined the appropriate basis, if any, for the assessment of the Galazis' costs, I cannot determine the part of the cross-appeal relating to the amount of the payment on account of costs. I will do so once I have determined all other outstanding issues.

121. I understood the Respondents to have indicated at the hearing that, if I do not make an indemnity basis order against Ms Bushby, they will not pursue their cross-appeal on the amount of the payment on account of costs ordered by the Master. In response to the draft judgment, Mr Sachdeva indicated that my understanding was correct, but the Respondents said that no such concession had been made. Before I determine the part of the cross-appeal relating to the amount of the payment on account of costs, I will need to determine whether the Respondents did make the concession and, if so, whether they should be permitted to resile from it (if they wish to do so). The short further hearing I have in mind is the appropriate time for brief submissions to be made on those two issues. The Respondents will need to request a transcript of the hearing on an expedited basis, limited to the time during the hearing when Mr Sibbel made submissions about the payment on account of costs ordered by the Master, which, according to my notes of the hearing, was approximately between 12:45 p.m. and 3 p.m. on the second day of the hearing.

122. In response to the draft judgment, the Respondents also sought permission (i) to file the costs schedules they filed in advance of the hearings before the Master, so that they can rely on those costs schedules in the event that I re-determine the amount of any payment on account of costs Ms Bushby is ordered to pay and (ii) to make further submissions on the amount of that payment. I do not give them permission to file the costs schedules or to make further submissions, for the following reasons:

   i) They should have filed the costs schedules shortly after they filed their respondent's notice. They did not do so;

   ii) They should have ensured that the costs schedules were in the appeal bundle prepared for the hearing. They did not do so;

   iii) They had an opportunity to make submissions on the amount of any payment on account of costs in their skeleton argument and at the hearing;

   iv) As I have explained, the short further hearing I have in mind is only needed for limited purposes, to avoid the potential injustices I have already identified. But for that, there would have been no need for a further hearing;

   v) I have already made clear that certain matters may not be addressed at the further hearing, even though the it might otherwise have provided an opportunity for those matters to be addressed;

   vi) It is therefore not consistent with the overriding objective to give the Respondents the permission they have sought.

<u>Disposal</u>

123. In the light of what I have concluded:

i) the appeal against the Master's decision that Ms Bushby should pay the costs of the Galazis, and of Christopher Christoforou, C. Christo & Co. Ltd. and Anglo Properties Ltd., of and occasioned by the Galazis' application and Ms Bushby's application is allowed and, to that extent, the Costs Order is set aside;

ii) the Respondents' cross-appeal against the Master's decision that any of their costs which Ms Bushby is liable to pay in relation to the Galazis' application and her application are to be assessed on the standard basis if not agreed is also allowed and, to that further extent, the Master's order is also set aside;

iii) there will be a short further hearing, which may be attended by all the parties, at which submissions may be made on the particular matters I have identified above; that is, broadly:

a) any relevant legal advice Ms Bushby has received;

b) any informal agreement between Ms Bushby and Mrs Galazi's agents which gave Ms Bushby broader costs protection than that given by court orders, the Indemnity or any retainer letter signed by, or on behalf, of Mrs Galazi;

c) the personal, professional and financial difficulties facing Ms Bushby if a costs order is made against her;

and how those matters should affect the re-determination of the costs applications against Ms Bushby;

iv) at the further hearing, Mr Sachdeva will have an opportunity to draw to my attention material already in the appeal bundle relating solely to the Christo Defendants and which might be relevant to whether or not Ms Bushby should pay the relevant costs of Mr Christoforou, C. Christo & Co. Ltd. and Anglo Properties Ltd., and they will have an opportunity to respond;

v) at the further hearing, I will also hear submissions about whether the Respondents conceded at the hearing that, if I do not make an indemnity basis order against Ms Bushby, they will not pursue their cross-appeal on the amount of the payment on account of costs ordered by the Master, and, if they did make such a concession, whether they ought to be permitted to resile from it;

vi) following the further hearing, I will re-determine the applications for costs, by the Galazis, and by Mr Christoforou, C. Christo & Co. Ltd. and Anglo Properties Ltd., against Ms Bushby, and, if appropriate, I will also re-determine the basis for any assessment of those costs and I will decide whether to allow the cross-appeal from the Master's decision on the amount of the payment on account of the Respondents' costs;

vii) in preparation for the further hearing, the parties will be permitted to file further evidence covering the matters I have identified in this judgment;

viii) in advance of the further hearing, the Respondents will need to request a transcript, prepared on an expedited basis, of that part of the hearing when Mr Sibbel made submissions about the payment on account of costs ordered by the Master.

124. I will need to hear further from the parties on the form of order giving effect to this judgment and the practicalities of the further hearing.