Neutral Citation Number: [2020] EWCA Civ 1112

Case No: A3/2019/1513

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
Mr Justice Morgan
[2019] EWHC 1401 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2020

Before:

LORD JUSTICE PATTEN
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

- -

Between:

SUSAN GLOVER	**Appellant**
- and -	
(1) IAIN PAUL BARKER	**Respondents**
(2) CONFIANCE LIMITED	
(3) EUAN BARKER	
(a child by his litigation friend Deborah Barker)	

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Mr Daniel Saoul QC and Mr Stephen Hackett (instructed by **Candey Ltd**) for the **Appellant**
Mr Adam Cloherty (instructed by **Memery Crystal LLP**) for the **First Respondent**
Mrs Elspeth Talbot Rice QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second Respondent**
Miss Constance McDonnell QC (instructed by **Withers LLP**) for the **Third Respondent**

Hearing date: 7 July 2020

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Approved Judgment

Lord Justice Newey:

1. This appeal raises important issues as to the circumstances in which litigation friends should be ordered to pay other parties' costs. In a judgment dated 5 June 2019 ("the Costs Judgment") ([2019] EWHC 1401 (Ch), [2019] 1 WLR 5737), Morgan J ("the Judge") concluded that costs orders should be made against the appellant, Ms Susan Glover, who had acted as litigation friend to her children Tom and Freya Barker ("Tom" and "Freya"). Ms Glover appeals against that decision.

Basic facts

2. The first respondent, Mr Iain Barker, has five children. The oldest of them are Tom and Freya, twins born on 23 July 2001 whose mother is Ms Glover. Euan Barker ("Euan"), the third respondent, is Mr Barker's third child. He was born in 2004 and now has as his litigation friend his mother, Ms Deborah Barker, who is also the mother of Mr Barker's youngest child, Rowan, born in 2006. Finally, Mr Barker is the father of Lauren Chadwick, who was born in 2005 and whose mother is Ms Julie Chadwick. Ms Barker was formerly married to Mr Barker.

3. In the 1990s, Mr Barker set up a business which developed into a group of companies of which Team 121 Holdings Limited ("Team 121") was the parent. By 1998, Mr Barker wished to sell his shares and sought tax planning advice from Baxendale Walker Solicitors, of which a Mr Paul Baxendale-Walker was the principal partner. On the basis of advice from Baxendale Walker Solicitors, Team 121 established an employee benefit trust ("the Trust") whose beneficiaries were given as present, past and future employees of the group and their families but not "Excluded Persons", the definition of which term was based on section 28(4) of the Inheritance Act 1984 ("the IHTA"). On 15 October 1998, Mr Barker executed a deed of gift ("the Deed of Gift") declaring that he held his shares in Team 121 on trust for the Trust, subject, however, to a clause providing for the shares to be held on trust for him if HM Revenue and Customs ("HMRC") determined that the Trust did not satisfy the conditions laid down in section 28 of the IHTA and section 239 of the Taxation of Chargeable Gains Act 1992 ("the TCGA"). On 23 March 1999, the then trustee of the Trust declared a sub-trust ("the Sub-Trust") for "the widow, children and remoter descendants and the mother and sisters of Iain Paul Barker who shall be living after his death", collectively termed the "Principal Beneficiaries". In June 1999, the shares in Team 121 which Mr Barker had formerly held were sold and their proceeds were credited to the Sub-Trust.

4. In 2010, HMRC raised assessments on the basis that Mr Barker had failed to give away his shares effectively and so could be taxed on income and gains arising via the Trust and Sub-Trust. HMRC maintained that the requirements of section 28(4) of the IHTA were not met because the Trust did not exclude Mr Barker's family members as beneficiaries after his death. Mr Barker appealed to the First-tier Tribunal, but in 2013 Mr Barker entered into a settlement under which he paid HMRC about £11.3 million.

5. Thereafter, Mr Barker sought to recover the assets held by the Trust and Sub-Trust. On 14 July 2014, he issued proceedings ("the Main Proceedings") claiming, first, that the proceeds of the shares he had given to the Trust were held on trust for him because the proviso to the Deed of Gift applied and, secondly, that the Deed of Gift should be set aside for mistake. The Judge explained Mr Barker's contentions as

follows in the judgment which he gave in these proceedings on 8 November 2018 ("the Principal Judgment", [2018] EWHC 2965 (Ch)):

> "33. In his Particulars of Claim in these proceedings, Mr Barker put forward two contentions. The first contention relied upon the condition expressed in the Deed of Gift. The Particulars of Claim explained Mr Barker's case as to how that condition was to be construed. In effect, he contended that the condition required the gift to be an exempt transfer for inheritance tax purposes pursuant to IHTA 1984, section 28 and a disposal which would be treated for capital gains tax purposes as having been made for a consideration which involved neither a gain nor a loss pursuant to TCGA 1992, section 239. The pleading then contended that this condition was not satisfied at the date of the Deed of Gift because the terms of the EBT [i.e. the Trust] did not satisfy IHTA section 28(4). In this respect, the pleading stated that the trust did allow benefits to be conferred on persons connected with Mr Barker and the pleading also relied upon the powers contained in clause 11 of and paragraph 1.2.18 of schedule 1 to the Deed. The pleaded result of the foregoing was said to be that the gift contemplated by the Deed of Gift failed so that the proceeds of sale of the Shares were held by Confiànce on a bare trust for Mr Barker.
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> 34. The second contention put forward in the Particulars of Claim in the trust proceedings was that the Deed of Gift had been made by Mr Barker in the mistaken belief that members of his family would be capable of benefitting from the trusts of the EBT after his death. He sought an order from the court setting aside the Deed of Gift on the ground of mistake."

6. The defendants to the Main Proceedings were the second respondent to the present appeal, Confiance Limited ("Confiance"), which had become the trustee of the Trust; Euan, who was joined to represent Mr Barker's children; Mr Stuart Brown, who was joined to represent former employees of the Team 121 group and their families; and Mr Barker's mother and sisters. Since Euan was a minor, Ms Alison Meek of Harcus Sinclair LLP, solicitors, was appointed as his litigation friend.

7. On 25 July 2014, an application for the Court to approve a compromise of the Main Proceedings came before Asplin J. It was proposed that £1 million should be settled on discretionary trusts for the benefit of Euan and "Principal Beneficiaries" of the Sub-Trust who were not parties to the proceedings, that £500,000 should be settled for the benefit of employee beneficiaries of the Trust and that Mr Barker should be entitled to the balance of the funds held by the Trust and Sub-Trust. It was further proposed that Euan should be appointed to represent the interests of all living, unborn and unascertained persons who may be or become members of the class defined as the "Principal Beneficiaries" in the Sub-Trust and who were not parties to the proceedings. After hearing submissions from counsel for Mr Barker, for Confiance, for Euan and for Mr Brown, Asplin J said that she was satisfied both with the proposed representation orders and that the compromise was for the benefit of the represented classes and, accordingly, made an order approving the settlement.

8. As yet, Tom, Freya and Ms Glover knew nothing about the Main Proceedings or the proposed compromise. Moreover, Asplin J was asked to appoint Euan to represent, among others, Tom and Freya without being informed that they and their mother were unaware of the claim. Morgan J said this in the Costs Judgment about how matters were handled:

> "69. What happened in this case resulted in Ms Meek as the litigation friend for Euan, as a representative defendant, and leading and junior counsel advising Ms Meek, deliberately not informing Tom and Freya and Ms Glover of a proposed compromise so as to prevent them expressing their views upon that compromise. The decision not to inform Tom and Freya and Ms Glover was because it was foreseen that Ms Glover would be likely to raise objections to the compromise and would not agree to it. Ms Meek and counsel may or may not have thought that Ms Glover might be influenced by collateral considerations and might not act in the best interests of Tom and Freya. On the material before me, Ms Meek and counsel appear to have readily acquiesced in Mr Barker's wishes and opinions on the matter; they do not appear to have thought it necessary to form their own opinion on that matter. It might have been open to Ms Meek and to counsel to come to a reasoned and well-informed conclusion that it was not in the best interests of Tom and Freya for Ms Glover to be told of the proceedings but simply acquiescing in Mr Barker's wishes did not amount to reaching a reasoned and well-informed conclusion on the matter.
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> 70. In any event, even if Ms Meek and counsel had properly considered the matter and had decided that Ms Glover should not be told of the proceedings, I consider that it was completely unacceptable for the court not to have been given a fair account of the position in that respect when the court was asked to appoint Euan as a representative for Tom and Freya and was further asked to approve a settlement on behalf of Tom and Freya. The information which was deliberately withheld from the court would have been relevant to the decision which the court had the responsibility for making, even if the court took the view that from a legal standpoint the interests of the five children were the same. However, it was not alleged, and I do not find, that Ms Meek (or the leading and junior counsel who were advising her) acted in bad faith.
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> 71. If the court had been given a fair account of the position in relation to Tom and Freya, the court would then have had to decide what to do. The court might well have taken the view that it should not make a representation order in relation to Tom and Freya. The court might have taken the view that there was no difficulty in joining all five children as defendants to Mr Barker's claim so that there was no real need for a

> representation order. The court might also have thought that it was inappropriate to make a representation order where two of the parties being represented were likely to have a different attitude to the proceedings from that of the proposed representative defendant. In addition, the court might have been very concerned at the strategy being adopted which was to use a representation order as a means of keeping Tom and Freya (and Ms Glover) in the dark as to what was happening. If the court had declined to make a representation order then it seems likely that Tom and Freya would have been joined as parties. The question would then have arisen as to whether they should have a litigation friend and, if so, should their litigation friend be Ms Glover or someone else.
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> 72. When the court was asked to approve the settlement it was asked to make a decision on behalf of Tom and Freya without being aware of the fact that the proceedings had been deliberately concealed from them. On the facts of this case, if the court had been told the true position, it may well have thought that it would be unfair to proceed in that way. If Ms Meek and counsel had reached a reasoned and well-informed decision as to why Ms Glover (and hence Tom and Freya) should not be informed of the proceedings, then that matter should have been fairly explained to the court so that the court could decide what to do. The court may have thought that it was simply unfair to consider whether to approve the settlement without hearing from someone on behalf of Tom and Freya. The court might also have welcomed relevant adversarial argument so that the court would have before it the full range of relevant considerations. Conversely, the court would not have welcomed adversarial argument put forward for collateral purposes although the court would have been wary of shutting out such argument without even hearing it.
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> 73. In these circumstances, I disapprove of the course which was adopted in this case when the court was asked to make a representation order and to approve a settlement involving children where information relevant to the court's decision was deliberately withheld from the court."

9. In fairness to Confiance, I should record that the Judge did not consider it to be responsible for the conduct which he criticised (see paragraph 83 of the Costs Judgment).

10. On 11 January 2016, Mr Baxendale-Walker issued proceedings against Mr Barker and Confiance ("the Twin Benefits Proceedings"), but a company called Twin Benefits Limited ("Twin Benefits") was later substituted as the claimant. Mr Baxendale-Walker and Twin Benefits each brought the claim as assignee of Tom and Freya and it was explained that Twin Benefits "holds any proceeds of the causes of action pleaded herein upon trust absolutely for Ms Glover and her children Tom and Freya". The relief sought included an order "setting aside Mrs Justice Asplin's order of 25

July 2014 and/or providing that it does not bind Tom and Freya". In that regard, Marcus Smith J summarised what was alleged as follows in paragraph 48 of a judgment he gave on 19 June 2017 ([2017] EWHC 1412 (Ch)):

> "i) The terms of the Confiance Settlement were negotiated before the Court had made any order that Euan Barker could represent Tom and Freya. No effort was made to consult Tom or Freya (or their mother, Ms. Glover) or make them aware of the Confiance Proceedings.
>
> ii) At the time of the Confiance Settlement, Mr. Barker's relationship with Ms. Glover was very poor, whereas his relationship with his ex-wife Deborah Barker (and her son Euan) was good.
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> iii) Mr. Barker chose to issue the Confiance Proceedings against only Principal Beneficiaries with whom he was on good terms and whom he anticipated would be amenable to a settlement favourable to him.
>
> iv) Asplin J. had before her little or no evidence as to Tom and Freya or Ms. Glover's knowledge of or views on the Confiance Settlement or whether it was appropriate for Euan Barker to represent the twins …."

11. The Twin Benefits Proceedings were struck out as against Confiance in February 2017 following Twin Benefits' failure to comply with an order for security for costs. The claim against Mr Barker came to nothing when on 19 June 2017 Marcus Smith J set aside an order that had been made for service on Mr Barker out of the jurisdiction. Marcus Smith J concluded that the particulars of claim disclosed no serious issue to be tried on the merits. In particular, he considered that any application in respect of Asplin J's order of 25 July 2014 could be made only in the proceedings in which it was made, viz. the Main Proceedings.

12. Marcus Smith J ordered Twin Benefits to pay Mr Barker's costs of the Twin Benefits Proceedings, but it did not do so and was subsequently wound up. Mr Barker, however, applied for an order for costs to be made against Mr Baxendale-Walker. That application came before Birss J and was successful. In the course of the judgment he gave on 25 October 2017, Birss J observed that Twin Benefits had been "used as a vehicle for this action, as opposed to Mr Baxendale-Walker bringing the action himself, in order to insulate Mr Baxendale-Walker from a potential costs liability in these proceedings". Birss J also said:

> "Not only did [Mr Baxendale-Walker] set up the company and provide all the litigation funding, but he also provides the majority of the instructions to the solicitors …. Ms Glover does have some input, both she and Mr Baxendale-Walker are directors of [Twin Benefits]. But it is plain that the solicitors take the bulk of their instructions from Mr Baxendale-Walker and that he exercises substance control."

13. In the event, the costs which Birss J ordered Mr Baxendale-Walker to pay remain outstanding. Mr Baxendale-Walker was adjudged bankrupt on 11 July 2018. By then, the Court of Appeal had given judgment against Mr Baxendale-Walker and his firm on a claim ("the Negligence Claim") which Mr Barker had brought for negligence in 2013: see [2017] EWCA Civ 2056, [2018] 1 WLR 1905. Mr Barker had been unsuccessful at first instance (see [2016] EWHC 664 (Ch)), but on 8 December 2017 the Court of Appeal allowed an appeal, concluding that a reasonably competent solicitor would have warned Mr Barker that there was a significant risk that the employee benefit trust (or "EBT") arrangement into which he was to enter would not work because section 28(4) of the IHTA was to be construed in the manner for which HMRC later contended in the First-tier Tribunal proceedings. The Court further said that that construction of section 28(4) was probably correct: in other words, that a transfer of shares to an EBT was probably excluded from being an exempt transfer within section 28(4) if the trust permitted any of the settled property to be applied for the benefit of a person who, at the date of the transfer, fell within any of paragraphs (a) to (d) of section 28(4), regardless of whether that person would still fall within the relevant paragraph at the time when the settled property came to be applied for his benefit.

14. Some months earlier, on 27 June 2017, Tom and Freya, with Ms Glover as their litigation friend, had issued the application from which the present appeal stems ("the Twins' Application"). As framed, the application notice asked for Tom and Freya to be added as defendants to the Main Proceedings and for an order that:

> "The order of Asplin J dated 25 July 2014 be revoked or varied or alternatively is not binding on the Proposed Seventh and Eighth Defendants [i.e. Tom and Freya] pursuant to CPR 19.7(7) and/or 3.1(7)."

However, on the first day of the hearing of the application, 3 October 2017, Mr Jonathan Seitler QC, who was appearing for Tom and Freya, explained that it was sufficient for his purposes that the Court declared that the order of 25 July 2014 was not binding on Tom and Freya. The Judge summarised Mr Seitler's approach as follows in paragraph 65 of the Principal Judgment:

> "Mr Seitler QC seeks a direction pursuant to rule 19.7 (7)(a) [of the CPR] that part of the Order of 25 July 2014 should not be binding on Tom and Freya. The relevant part of the Order was the approval of the settlement of the proceedings. Mr Seitler explained that if the approval of the settlement was not binding on Tom and Freya then they would not be bound by the release (contained in the settlement) of all claims against Confiànce. Tom and Freya would then be able to bring claims against Confiànce. Tom and Freya recognise that the settlement between Mr Barker and Confiànce has happened and they do not seek to have that settlement rescinded; accordingly, the result would remain that the Trust and the Sub-Trust no longer have effect. However, Mr Seitler submits that Tom and Freya would be able to pursue claims against Confiànce under two principal heads. The first head would be a claim for breach of trust as a result of Confiànce making loans to Mr Barker prior

> to the order of 25 July 2014. The second head of claim would be that Confiànce acted in breach of trust in agreeing the compromise with Mr Barker and, more particularly, allowing the compromise to go before the court for approval without the interests of Tom and Freya being properly protected. If Tom and Freya established that Confiànce had committed a breach of trust in parting with the trust assets to Mr Barker, then Tom and Freya would seek to follow or trace those trust assets and/or claim against Mr Barker by reason of his receipt of those assets."

15. Although the hearing of the Twins' Application began, as I have said, on 3 October 2017 (at which stage Ms Barker replaced Ms Meek as Euan's litigation friend), it was adjourned until July of the following year and finally concluded in October 2018. The Judge was therefore able to take account of the Court of Appeal's decision on the Negligence Claim. He said this about it in paragraph 73 of the Principal Judgment:

> "I consider that, in the light of the clarity and cogency of the reasoning of the Court of Appeal judgment, a future court will apply that reasoning and decide that section 28 [of the IHTA] is to be construed in the way which the Court of Appeal considered was the most likely way. Further, for the purposes of the application before me, it is open to me to make my own decision as to the meaning of section 28. My decision is that section 28 is to be construed in the way identified by the Court of Appeal."

16. Approaching matters on that basis, the Judge concluded that "Mr Barker was entitled to rescission of the Trust Deed and the Deed of Gift" (paragraph 77 of the Principal Judgment); that, in consequence, "Tom and Freya would not be able to show that they were beneficiaries under a trust binding Confiànce" (paragraph 80); and that "a claim by Tom and Freya against Confiànce would fail" (paragraph 81). The Judge explained his thinking in these terms in paragraph 76 of the Principal Judgment:

> "I therefore need to consider whether Mr Barker would have succeeded in claiming that the Trust or the Deed of Gift should be set aside for mistake. This point arises on the assumed basis that the Trust and the Deed of Gift were otherwise effective. If so, what was their effect? There are only two possibilities. Either, the family beneficiaries were excluded from benefitting at any time and the Trust complied with section 28 or the family beneficiaries were not excluded from benefitting with the consequence that the Trust did not comply with section 28 and Mr Barker did not gain the intended tax advantages. In view of the Court of Appeal's views as to the correct interpretation of section 28, Mr Barker had failed to achieve what he wanted to achieve which was that the Trust did comply with section 28 and he obtained the various tax advantages and the family beneficiaries were capable of benefitting after his death. It is therefore plain that Mr Barker had made a mistake as to the effect of what he had done. The nature of the mistake

> would have entitled him to an order rescinding the Trust Deed and Deed of Gift ab initio. There were no identified defences to such a claim. I consider that the position in that respect is clear beyond argument."

17. The Judge went on to consider what he would do if he were hearing an application for approval of the settlement which was the subject of Asplin J's order. As to that, the Judge said in paragraph 82 of the Principal Judgment that he had "no hesitation in reaching the view that the settlement which had been proposed prior to 25 July 2014 was in the best interests of Tom and Freya". He explained that he would "certainly" take that view if he took account of everything that had by then emerged, the "principal such matter" being the Court of Appeal decision. Even without that, he said in paragraph 83, "there were still powerful reasons why it would probably have been right for the court to approve the settlement" since Mr Barker "undoubtedly had a very strong case overall" and, "[i]f his case prevailed, the beneficiaries under the Trust would get nothing". In the circumstances, the Judge considered that he would "probably" have approved the settlement even if he had held that Euan should not represent Tom and Freya and even if he had heard on behalf of Tom and Freya all of the arguments which were put on their behalf at the hearing of the application before him.

18. The Judge summarised his conclusions in paragraph 84 of the Principal Judgment:

> "I have now reached three conclusions, as follows:
>
> (1) if I made the order sought by Tom and Freya, I would not thereby give them anything of value as they would still have no arguable claim for breach of trust against Confiànce and Mr Barker;
>
> (2) the settlement was in the best interests of Tom and Freya; and
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> (3) if I had been asked to approve the settlement in the light of all of the arguments I have now heard, I would have done so.
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> In the light of the first of these conclusions, I do not see how it could be appropriate or fair or just to anyone to declare that the Order of 25 July 2014 is not binding on Tom and Freya. This view is powerfully supported by the other two conclusions set out above."

That being so, the Judge thought it inevitable that he should not accede to Tom and Freya's application under CPR 19.7(7)(a) (paragraph 86). He further observed that, had he been prepared to give a direction under CPR 19.7(7)(a), he "would have imposed the condition that the direction should only take effect if Tom and Freya paid the costs incurred by Confiànce and Mr Barker of successfully resisting the Twin Benefits proceedings" (paragraph 90).

19. Mr Barker, Confiance and Euan all applied for Ms Glover to be added as a party to the Main Proceedings for the purposes of costs and for her to be ordered to pay their costs of the Twins' Application. Confiance and Euan also sought costs orders against Tom and Freya. The Judge ruled on those applications in the Costs Judgment, which was handed down on 5 June 2019. He ordered Ms Glover to pay all of Mr Barker's and Confiance's costs of the Twins' Application and 90% of Euan's. He declined, however, to make any order for costs against Tom or Freya.

20. Ms Glover now challenges the Costs Judgment in this Court.

The Costs Judgment

21. Citing authorities ranging in date from 1727 to 1921, the Judge concluded in paragraph 26 of the Costs Judgment that there is "a long line of cases which establish the practice that in the case of an unsuccessful claim by a child claimant acting by a litigation friend, the usual order is that the litigation friend will be ordered to pay the successful defendant's costs". "In effect," he observed in paragraph 28, "the courts treated the litigation friend as being responsible for the costs which would otherwise be ordered against the child if that party had been an adult". The Judge considered, moreover, that "the reasoning in the earlier cases remains valid at the present time" (paragraph 30) and that "[t]he reasoning in those cases can readily be applied whether the litigation friend acts for a claimant or for a defendant" (paragraph 43). "If," the Judge said in paragraph 46, "a distinction between a child claimant acting by a litigation friend and a child defendant so acting is considered to be a relevant distinction in a particular case then the court will have regard to that distinction when it considers all the circumstances of the case", but "that does not mean that the court must apply an inflexible general rule". The Judge accordingly arrived at this conclusion in paragraph 53:

> "When considering whether to make an order for costs against a litigation friend, who has acted for an unsuccessful child party, the court should apply the general approach that, as regards costs, the litigation friend is expected to be liable for such costs as the relevant party (if they had been an adult) would normally be required to pay. The governing rule is that the court has regard to all the circumstances of the case and it is open to the litigation friend to point to any circumstance as to their involvement in the litigation which might justify making a different order for costs from that which would normally be made against an adult party."

22. Addressing the possibility that, contrary to his view, there is "a special rule to the effect that the court will not make an order for costs against a litigation friend for an unsuccessful child 'defendant' in the absence of gross misconduct", the Judge said that "it would be necessary to establish how one is to distinguish between a 'claimant' and a 'defendant' for the purposes of this special rule" and that one would achieve that by "ask[ing] whether, in a particular case, the party acting by a litigation friend had started the process which led to the costs being incurred" (paragraph 47). In answering that question, the Judge commented, "the court should have regard to the substance of the matter and not merely the form of the proceedings" (paragraph 48). As regards the case before him, the Judge said in paragraph 50:

> "Having regard to the substance of the [Twins' Application], I consider that Tom and Freya acting by their litigation friend started the legal process which led to the costs being incurred. By the time they made that application, having regard to what had happened on 25 July 2014, they were not merely defending proceedings that had been brought against them but they were initiating a challenge to the pre-existing state of affairs based on new allegations which they were advancing. On this basis, even if there is a special rule that the court will not order a litigation friend of a defendant to pay the costs of a successful claimant, in the absence of gross misconduct, I conclude that such a rule would not apply to the circumstances of the [Twins' Application]."

23. The Judge proceeded to address submissions on behalf of Ms Glover to the effect that there were in any event good reasons why the Court should not make any order for costs against her, including, as was explained in paragraph 56, these:

> "i) the conduct of the other parties in relation to the exclusion of Tom, Freya and Ms Glover from the main proceedings brought by Mr Barker and from the hearing before Asplin J was such that the court should not order Ms Glover to pay any of the costs of any of the other parties;
>
> ii) when the [Twins' Application] was made it was initially 'legally sound' and it was not until 30 July 2018, when the Supreme Court refused permission to appeal against the decision of the Court of Appeal dated 8 December 2017 (in the negligence proceedings which Mr Barker had brought against Mr Baxendale-Walker), which reversed the decision of Roth J dated 23 March 2016, that the position changed in a way adverse to the success of the application".

24. With regard to the former, the Judge observed that he had "power to deprive a party of all or part of its costs if [he] considered that was a just result" (paragraph 77) and that the "natural consequence of the proceedings being concealed from Ms Glover was that she has harboured a strong sense of injustice and a belief that Tom and Freya have been unfairly treated" (paragraph 76). The Court "would often attach decisive weight to the consideration that the defendant's costs were all incurred in relation to a claim against it which has failed" (paragraph 80), but "this could be an appropriate case in which to mark the court's disapproval of the earlier conduct in connection with the main proceedings and the hearing on 25 July 2014 by depriving Mr Barker of a part of his costs of responding to the [Twins' Application]" (paragraph 81) but for "the fact that Mr Barker has already suffered a substantial penalty as a result of incurring substantial irrecoverable costs in successfully defending the Twin Benefits proceedings" (paragraph 82). In those circumstances, the Judge did "not consider it appropriate to impose on [Mr Barker] a second penalty by way of withholding part of his costs of successfully resisting the [Twins' Application]" (paragraph 82). Neither could the Judge see any "reason (based on Mr Barker's conduct) why I should not give Confiànce its costs against Ms Glover if it is otherwise entitled to them" (paragraph 83). With regard to Euan, whose costs of the Twin Benefits Proceedings

had been paid, the Judge considered that he should mark the Court's disapproval of the conduct complained of by disallowing 10% of any costs to which he might otherwise be entitled in relation to the Twins' Application (paragraph 88).

25. Turning to the suggestion that the Twins' Application was legally sound when it was made, the Judge accepted in paragraph 93 that "some at least" of his reasoning in the Principal Judgment might have been different if the Court of Appeal had dismissed the appeal in the Negligence Claim, but said that Ms Glover "knew when she made her application that the decision of Roth J was the subject of a pending appeal" and, "more fundamentally, the allocation of costs in this case principally depends on which party is the successful party and does not involve an assessment of whether the losing party was reasonable to make the application" (paragraph 93).

26. Arriving at his conclusions as regards Ms Glover, the Judge said that he would "apply the ordinary rules as to the costs payable by an unsuccessful party, treating a litigation friend for such a party in the same way as the party" (paragraph 96) and that Ms Glover should be ordered to pay the costs of Mr Barker, Confiance and Euan, subject, in Euan's case, to a 10% deduction in respect of the conduct of which complaint was made.

27. The Judge next explained, in paragraph 104, that "[t]he applicants for costs orders against Ms Glover initially presented their applications by reference to the body of case law which has developed in relation to claims for costs orders against non-parties". The Judge said that he did not regard those principles as the relevant ones, but made these findings of fact in case they became material:

    i) "in view of her role as the litigation friend for Tom and Freya, with its attendant duties to conduct the proceedings, and notwithstanding that she may have 'delegated' many matters to Mr Baxendale-Walker, she controlled these proceedings" (paragraph 106);

    ii) "Ms Glover has not funded these proceedings" (paragraph 107); and

    iii) "if Tom and Freya did make a financial recovery as a result of these proceedings (and further proceedings) then there could be an element of an indirect benefit to Ms Glover" (paragraph 108). In that connection, the Judge explained:

> "If the proceedings had succeeded, it was apparently intended that Tom and Freya would bring proceedings against Confiànce for equitable compensation for breach of trust and there might have been a tracing claim made against Mr Barker. Those proceedings would have been for the benefit of Tom and Freya and not directly for the benefit of Ms Glover. In her witness statement, Ms Glover stated that she wished to obtain funds to provide for the needs of Tom and Freya and she gave information as to what those needs were. She accepted that a financial recovery by Tom and Freya would have alleviated the financial burden on her. I was also shown an email dated 15 July 2017 from Ms Glover to Mr Barker which referred to the possibility of reconstituting the original sub-trust and she

> explained that this would enable Tom and Freya to pay back the debts she had incurred. Accordingly, if Tom and Freya did make a financial recovery as a result of these proceedings (and further proceedings) then there could be an element of an indirect benefit to Ms Glover."

28. Finally, the Judge addressed applications for costs which Confiance and Euan (but not Mr Barker) made against Tom and Freya. The Judge considered that "there is no general rule that the court will not make an order for costs against a child unless they have been guilty of fraud or gross misconduct" and that, "as always, the general rule is that the court must consider all of the circumstances of the case" (paragraph 121). He concluded in paragraph 128:

> "I consider that the risk of injustice is greater if I make orders for costs against Tom and Freya than it is if I leave Confiànce and Euan to the benefit of the orders for costs which I will make against Ms Glover. On the material before me, it seems likely that the [Twins' Application] was brought by Ms Glover of her own initiative in circumstances where Tom and Freya had no ability to control or influence the course of that application. Tom and Freya have gained nothing from the application. Accordingly, I will not make orders for costs against Tom and Freya personally."

The issues

29. The appellant's notice and respondents' notices appear to me to give rise to the following principal issues:

    i) Was the Judge wrong in his conclusions on the law as to the presumed general liability of litigation friends for costs, and in particular the liability of a defendant's litigation friend?

    ii) Should the Judge have concluded that Tom and Freya were (or should be treated as) "claimants" for the purposes of CPR 21.4(3) and so have proceeded on the basis that Ms Glover had given an undertaking in respect of the respondents' costs?

    iii) Was the Judge wrong to conclude that Tom and Freya should properly be treated as claimants so as to engage a principle that their litigation friend should be liable for costs?

    iv) Was the Judge wrong to rely on unpaid costs orders in other proceedings when reaching his conclusions on costs?

    v) Should the Judge anyway have held Ms Glover liable to pay the respondents' costs under the general discretion as to costs conferred by section 51 of the Senior Courts Act 1981 ("the 1981 Act")?

30. I shall take these issues in turn.

31. It is to be noted that no one challenges the Judge's decision not to make costs orders against Tom and Freya and that neither Confiance nor Euan has suggested that Mr Barker should be responsible for their costs.

Issue (i): Was the Judge wrong in his conclusions on the law as to the presumed general liability of litigation friends for costs, and in particular the liability of a defendant's litigation friend?

32. As I have said, the Judge concluded that, "When considering whether to make an order for costs against a litigation friend, who has acted for an unsuccessful child party, the court should apply the general approach that, as regards costs, the litigation friend is expected to be liable for such costs as the relevant party (if they had been an adult) would normally be required to pay". The Judge accordingly applied "the ordinary rules as to the costs payable by an unsuccessful party, treating a litigation friend for such a party in the same way as the party".

33. Mr Daniel Saoul QC, who appeared for Ms Glover with Mr Stephen Hackett, took issue with the Judge's approach. A defendant's litigation friend, he argued, will not generally be ordered to pay costs. The true position, he submitted, is that an order will not be made against such a litigation friend unless there has been misconduct on his part. That conclusion is supported by both pre-CPR authorities and policy considerations. If defendants' litigation friends were usually vulnerable to adverse costs orders, that would have a chilling effect on the willingness of suitable individuals to take on the responsibility of acting as such a litigation friend and so both compromise the protection of the rights of children and protected parties who are sued and create significant difficulties for the administration of justice. That litigation friends of defendants are in a significantly different position to those of claimants is, moreover, apparent from CPR 21.4(3)(c), which requires a claimant's litigation friend, but not a defendant's, to undertake to pay any costs which the child or protected party might be ordered to pay in relation to the proceedings.

34. In contrast, Mr Adam Cloherty, appearing for Mr Barker, Mrs Elspeth Talbot Rice QC, appearing for Confiance, and Miss Constance McDonnell QC, appearing for Euan, all supported the Judge. Among the points advanced were these. The proposition that a defendant's litigation friend is not liable to pay costs in the absence of misconduct is not supported by the old case law and, in any event, is inconsistent with the broad discretion as to costs now conferred on the Court by section 51 of the 1981 Act. That a defendant's litigation friend should generally be liable for costs where the defence has failed is sound in principle. A person becoming a litigation friend must appreciate that his conduct will directly impact on other parties and the costs they incur. Should no one be able and willing to act for a defendant, the Official Solicitor will step in and, further, the Court has a discretion to permit a child to conduct proceedings without a litigation friend. CPR 21.4(3)(c) is simply akin to requiring some security for costs where a claim is brought by a litigation friend, and CPR 21.9(6) points to a defendant's litigation friend being liable for costs.

Section 51 of the Senior Courts Act 1981

35. Power to make costs orders in civil proceedings is nowadays conferred by section 51 of the 1981 Act, which replaced the comparably worded section 5 of the Supreme Court of Judicature Act 1890. Section 51 of the 1981 Act provides:

> "(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—
>
> (a) the civil division of the Court of Appeal;
>
> (b) the High Court;
>
> (ba) the family court; and
>
> (c) the county court,
>
> shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings ….
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid …."

36. In *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965, the House of Lords held that there was no basis for implying into section 51 of the 1981 Act a limitation to the effect that a costs order could only be made against a party. Lord Goff said at 975 that it was "not surprising to find the jurisdiction conferred under section 51(1), like its predecessors, to be expressed in wide terms". He continued:

> "The subsection simply provides that 'the court shall have full power to determine by whom . . . the costs are to be paid.' Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to a establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised. Such a policy appears to me, I must confess, to be entirely sensible. It comes therefore as something of a surprise to discover that it has been suggested that any limitation should be held to be implied into the statutory provision which confers the relevant jurisdiction."

37. The Privy Council considered the circumstances in which a costs order should be made against a non-party in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807. Lord Brown, giving the judgment of the Board, said this:

> "25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would

seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against 'pure funders', described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as 'those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course'. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence …. (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. Since this particular difficulty may be thought to lie at the heart of the present case, it would be helpful to examine it in the light of a number of statements taken from the authorities ….

29. In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests….

33. … The authorities establish that, whilst any impropriety or the pursuit of speculative litigation may of itself support the

> making of an order against a non-party, its absence does not preclude the making of such an order."

38. With regard to the position of a company director, Lord Brown cited *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613. In *Metalloy*, Millett LJ said at 1620:

> "[An costs order against a non-party] may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit …. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified."

39. *Dymocks* was taken to contain "an authoritative statement of the modern law" in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, [2016] 4 WLR 17, at paragraph 62. However, "the appellate courts have struggled to identify principles applicable across the board to the exercise of the jurisdiction to make a costs order against a non-party, save at the very highest level of generality" (to quote Lord Briggs in *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48, [2019] 1 WLR 6075, at paragraph 28). In *XYZ v Travelers Insurance Co Ltd*, Lord Briggs did not attempt a comprehensive reassessment of the generally applicable principles. The case was rather "an occasion to consider, in more granular detail, the principles which ought to apply to that distinct part of the broad spectrum of non-parties occupied by liability insurers" (paragraph 30).

CPR provisions

40. The Civil Procedure Rules introduced the term "litigation friend".

41. CPR 21.2 states that a "protected party" (i.e. a party, or intended party, who lacks capacity to conduct the proceedings) must have a litigation friend to conduct proceedings on his behalf and that a child must have one unless the Court makes an order under CPR 21.2(3) permitting the child to conduct proceedings without a litigation friend. Absent an order under CPR 21.2(3), the only steps which a person can take in proceedings against a child or protected party who does not yet have a litigation friend are issuing and serving a claim form and applying for the appointment of a litigation friend (see CPR 21.3) and, by CPR 21.3(4), "Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise".

42. Assuming that a litigation friend has not been appointed by the Court, a person may become a litigation friend without any Court order by, among other things, filing and serving "a certificate of suitability stating that he satisfies the conditions specified in

rule 21.4(3)" (see CPR 21.5). CPR 21.4, headed "Who may be a litigation friend without a court order", provides:

> "(1) This rule does not apply if the court has appointed a person to be a litigation friend.
>
> (2) A deputy appointed by the Court of Protection under the 2005 Act with power to conduct proceedings on the protected party's behalf is entitled to be the litigation friend of the protected party in any proceedings to which his power extends.
>
> (3) If nobody has been appointed by the court or, in the case of a protected party, has been appointed as a deputy as set out in paragraph (2), a person may act as a litigation friend if he—
>
> (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
>
> (b) has no interest adverse to that of the child or protected party; and
>
> (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party."

43. CPR 21.6 deals with the appointment of a litigation friend by the Court. An application for such an appointment may be made either by a person wishing to be so appointed or by a party (see CPR 21.6(2)) and, where no one has become a litigation friend for a child or protected party who is a defendant, the claimant is generally obliged to make such an application if he wishes to take a step in the proceedings (see CPR 21.6(3)). CPR 21.6(5) stipulates that the Court "may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3)".

44. CPR 21.9 explains that, where a child who is not a protected party has a litigation friend, the litigation friend's appointment ceases when the child reaches the age of 18. By CPR 21.9(4), the child in respect of whom the appointment to act has ceased must serve notice on the other parties stating, among other things, whether or not he intends to carry on the proceedings. CPR 21.9(6) provides:

> "The liability of a litigation friend for costs continues until—
>
> (a) the person in respect of whom his appointment to act has ceased serves the notice referred to in paragraph (4); or
>
> (b) the litigation friend serves notice on the parties that his appointment to act has ceased."

45. CPR Part 44 contains, as its heading indicates, "General Rules about Costs". CPR 44.2(2) states that, if the Court decides to make an order about costs, "the general rule is that an unsuccessful party will be ordered to pay the costs of the successful party".

Family Procedure Rules provisions

46. The Family Procedure Rules 2010 ("the FPR") contain comparable provisions.

47. FPR 15.2 imposes a requirement for a protected party to have a litigation friend to conduct proceedings on that party's behalf and allows a person to become a litigation friend either pursuant to a Court order or without one. There are, however, noteworthy distinctions between CPR 21.4 and FPR 15.4, to which CPR 21.4 corresponds. FPR 15.4 is in these terms:

> "(1) This rule does not apply if the court has appointed a person to be a litigation friend.
>
> (2) A person with authority as a deputy to conduct the proceedings in the name of a protected party or on that party's behalf is entitled to be the litigation friend of the protected party in any proceedings to which that person's authority extends.
>
> (3) If there is no person with authority as a deputy to conduct the proceedings in the name of a protected party or on that party's behalf, a person may act as a litigation friend if that person—
>
> (a) can fairly and competently conduct proceedings on behalf of the protected party;
>
> (b) has no interest adverse to that of the protected party; and
>
> (c) subject to paragraph (4), undertakes to pay any costs which the protected party may be ordered to pay in relation to the proceedings, subject to any right that person may have to be repaid from the assets of the protected party.
>
> (4) Paragraph (3)(c) does not apply to the Official Solicitor. (*'deputy'* is defined in rule 2.3)."

Whereas, therefore, CPR 21.4(3)(c) provides for a litigation friend to give an undertaking as to costs if acting for a claimant, FPR 15.4(3)(c) is not so qualified: an undertaking is required whatever the status in the proceedings of the protected party. Further, FPR 15.4, unlike CPR 21.4, specifically exempts the Official Solicitor from the requirement to give such an undertaking (see FPR 15.4(4)).

48. Likewise, there are circumstances in which a child must have a litigation friend (see FPR 16.5) and, in such a case, a person may act as a litigation friend only if he "undertakes to pay any costs which the child may be ordered to pay in relation to the proceedings, subject to any right that person may have to be repaid from the assets of the child" (FPR 16.9(2)(c)). Here, "the Official Solicitor, an officer of the [Children

and Family Court Advisory and Support] Service or a Welsh family proceedings officer" is excused from the need to give an undertaking by FPR 16.9(3).

49. While FPR 28.2 provides for parts of CPR Part 44 to apply to costs in proceedings governed by the FPR, FPR 28.3(2) specifically disapplies CPR 44.2(2) (embodying the principle that costs follow the event). Further, FPR 28.3(5) states that "the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party".

Authorities on the position of a next friend or guardian ad litem

50. Before the advent of the CPR, a child could bring proceedings by a "next friend" (or, in the law French of earlier cases, a "prochein amy" or "prochein amie") or, sometimes, a guardian and could defend by a "guardian ad litem".

51. Where a claim by a child failed, the next friend or guardian would commonly have to bear the defendant's costs. In *Slaughter v Talbot* (1739) Barnes 128, the Court considered that "by the uniform practice of all the Courts the prochein amie is liable to costs". In *Beavan v Beavan* (1862) 31 LJNS 166, a guardian who had instituted divorce proceedings on behalf of a 16 year old who had married a rather older prostitute was ordered to give security for the wife's costs, the Judge Ordinary, Sir Cresswell Cresswell, holding at 166 that "the guardian, as she had instituted the suit, was liable for the wife's costs". In *Dyke v Stephens* (1885) 30 Ch D 189, Pearson J observed at 190 that a next friend "is not a party to the action, he is put there simply to protect the interest of the infant, and to shew that the interest is of such nature that he is willing to guarantee costs, and in making himself liable for costs he is in no way a party to the action". In *Slingsby v Attorney-General* (1916) 32 TLR 364, an order for costs was made against the guardian of an infant petitioner, counsel for the guardian recognising in submissions at 367 that "it was usual where an action was brought by an infant plaintiff to order the next friend personally to pay the costs". In *Rutter v Rutter* [1921] P 136, it was "not disputed that by the practice of the King's Bench and Chancery Divisions the next friend of an infant plaintiff is liable for the costs of the suit", but it was argued on behalf of the guardian of the infant husband whose petition had failed that "no such status as that of next friend is known in the Divorce Division where the rules provide that an infant must sue by his guardian" (see 140). Having, however, referred to *Beavan v Beavan* and *Slingsby v Attorney-General*, Horridge J said at 142:

> "These two decisions are direct decisions that the person who acts as guardian to an infant petitioner is liable for the respondent's costs of the proceedings. I am glad that the cases so decide, because I think that is the right rule. In my opinion the same rule that applies in the Chancery and King's Bench Divisions ought to apply in the Divorce Division and for the same reasons."

A note in the then current edition of the Annual Practice stated at 249, "The object of having a next friend is to give security for costs to the defendant".

52. The position in relation to the guardian ad litem of a defendant was significantly different. In *Morgan v Morgan* (1865) 11 Jur NS 233, where a widow had succeeded

in a dower claim, Kindersley V-C declined to make an order for costs against the guardian ad litem of the infant defendant. Kindersley V-C noted that "the question is, whether a guardian ad litem becomes liable to costs by raising such a defence as would, upon the authority of *Bamford v. Bamford*, make an adult defendant so liable" and, having looked into that question, held:

> "I think it is impossible in this case to order the guardian ad litem to pay these costs. I do not mean to say there could not be such a case of gross misconduct as to render him liable to do so, but that is not the case here; and your client, Mr Chitty, is much in the same position as a plaintiff suing a pauper defendant."

53. *Bamford v Bamford* (1845) 5 Hare 203, to which Kindersley V-C referred, was another dower case in which no order for costs was made. Wigram V-C said at 205 that, on a bill to assign dower, "the rule is that no costs shall be given on either side", but that:

> "If the defence in this case had been made without any just ground, or had been founded upon a statement which the Defendants knew, or with reasonable diligence could have known, was untrue, I should have thought the Plaintiff entitled to the costs occasioned by such defence."

54. The Judge considered the relationship between *Bamford v Bamford* and *Morgan v Morgan* in the Costs Judgment. He said this in paragraph 39:

> "In his first judgment, the Vice-Chancellor [in *Morgan v Morgan*] was not in any doubt as to the authority of *Bamford v Bamford*. He indicated that if the child defendant in *Morgan v Morgan* had been an adult, the Vice-Chancellor would have made an order for costs against him. The only matter he needed to inquire into was as to the position of the litigation friend. His subsequent ruling is to be understood as a finding that he would not make an order for costs against the litigation friend of a child defendant even where he would have made an order for costs against an adult defendant. He referred to an exception for a case of gross misconduct but that exception is much more narrowly expressed than the test in *Bamford v Bamford* as to when costs could be ordered against an unsuccessful defendant in a dower suit. Although the Vice-Chancellor concluded his judgment by saying that there would be no order for costs 'according to the ordinary rule in dower suits', I do not take him to be reversing his earlier statement that, applying *Bamford v Bamford*, he would have made an order for costs against an adult defendant in that case."

I agree.

55. In *Vivian v Kennelly* (1890) 63 LT 778, Hannen P made an order for costs in favour of a successful plaintiff against both an infant defendant and her guardian ad litem.

However, in *Reynolds v Mead*, The Times, 5, 6 and 10 December 1895, where there was extensive citation of authority, counsel for the successful plaintiff agreed with Gorell Barnes J that the order in *Vivian v Kennelly* was made "on the ground of the guardian's misconduct" (see 6 December) and Gorell Barnes J subsequently decided that there should be no order as to costs in the case before him (see 10 December). Gorell Barnes J similarly declined to make an order for costs against the guardian ad litem of an unsuccessful defendant in *Hooper v Mackenzie*, The Times, 23 January 1901, the report of which records him as saying:

> "The question was argued at length in *Reynolds v Mead* …. In the course of argument, … *Morgan v Morgan* was cited as authority for the proposition that a guardian *ad litem* was not liable in costs unless there had been gross misconduct on his part. I shall make no order as to costs …."

56. Specific consideration was given to the position of the Official Solicitor. In *Eady v Elsdon* [1901] 2 KB 460, where the Official Solicitor had been assigned guardian ad litem to the defendant on the application of the plaintiff, the plaintiff was ordered to pay the Official Solicitor's costs even though he had won. In *Re PC (An Infant)* [1961] Ch 312, Buckley J considered the principle indicated by such cases as *Eady v Elsdon* to be applicable notwithstanding the fact that "the suggestion that the Official Solicitor should act as guardian ad litem of the infant originated not from the applicant, but from the court": "[i]t was necessary that the infant should be represented by a guardian ad litem for the purpose of these proceedings and it appeared that the only person suitable and available was the Official Solicitor" so "[t]he appointment of the Official Solicitor as guardian ad litem was … a sine qua non to the proceedings going on and being effectively disposed of" (see 317-318). In *Re G (Minors)* [1982] 1 WLR 438, Ormrod LJ, giving the judgment of the Court of Appeal, distinguished between custody cases, where the Official Solicitor "is much more than a mere guardian ad litem", and cases where the Official Solicitor "was acting as guardian ad litem to an infant who was made a defendant in ordinary litigation in which the infant had to be made a defendant to enable the plaintiff to proceed with his action" (see 442). In the latter class of case, Ormrod LJ explained at 442, "a plaintiff is obliged by R.S.C., Ord. 80, r. 6, to apply to the court for the appointment of a guardian ad litem and may not proceed with his action until a guardian ad litem is appointed", but "[n]o such provision applies to either wardship proceedings or proceedings concerning children under the Matrimonial Causes Act 1973" where "[t]he child is not a necessary party and the case can, and usually does, proceed without making the child a party to the proceedings". These authorities, therefore, had no application to the case before the Court and decisions such as *Eady v Elsdon* did not apply. There is, Ormrod LJ said at 443, "no rule of practice in wardship and custody cases which requires the court to order a plaintiff in wardship proceedings to pay the Official Solicitor's costs, unless there are special reasons to the contrary", but neither is there any rule of practice in such cases that the parties should pay their own costs, unless there are special reasons to the contrary: section 51 of the 1981 Act "gives the trial judge an unfettered discretion over costs". In *Northampton Health Authority v Official Solicitor* [1994] 1 FLR 162, Bingham MR endorsed a passage from an unreported judgment of Sheldon J in which he had summarised the law as follows:

> "In my judgment, however, when a decision has to be made whether or to what extent a local authority or any other party should be ordered to pay the Official Solicitor's costs, it matters not whether the proceedings in which the question arises are matrimonial proceedings, wardship cases or adoption applications; whether his intervention is invited by the court, requested by the parties, or prescribed by regulation. In each case, in my opinion, the decision lies in the unfettered discretion of the trial judge, to be exercised in accordance with similar general principles. One of these, in my view, is that, as the parties, in whatever circumstances, have become involved in a situation in which it has become necessary to seek the assistance of the Official Solicitor, it is not unreasonable for him to ask that they should meet or contribute towards the cost of his intervention. In some cases there may be factors or considerations which will lead the court to refuse such a request."

The Official Solicitor as litigation friend post-CPR

57. Guidance endorsed by the Official Solicitor and the President of the Family Division was issued in 2010 in respect of cases involving protected parties in which the Official Solicitor is invited to act as guardian ad litem or litigation friend. While "[t]he guidance is primarily concerned with proceedings relating to children, including welfare cases", it "also has a general application" (White Book, paragraph 21.5.1). As regard public and private law children's cases, the guidance refers to the "severe budgetary constraints" to which the Official Solicitor is subject and explains that, before accepting a case, the Official Solicitor will need "confirmation that there is security for the costs of legal representation". In a similar vein, paragraph 3.4 of PD 21 states that, where it is sought to appoint the Official Solicitor as a litigation friend, "provision must be made for payment of his charges". "Charges" must in this context be understood to refer to costs of legal representation (White Book, paragraph 21.7.2).

Discussion

58. The jurisdiction to make a costs order against a non-party, whether a litigation friend or any other third party, nowadays derives from section 51 of the 1981 Act. This proved to be common ground. Mr Saoul submitted that the question whether Ms Glover should be ordered to pay costs has to be seen through the lens of section 51, and the other counsel agreed.

59. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*, Lord Brown spoke of the "ultimate question" being "whether in all the circumstances it is just to make the order". In a similar vein, Moore-Bick LJ observed in *Deutsche Bank AG v Sebastian Holdings Inc* at paragraph 62 that the "only immutable principle" which applies in relation to the exercise of the power to order a non-party to pay costs is that "the discretion must be exercised justly".

60. As, however, *XYZ v Travelers Insurance Co Ltd* shows, more specific principles may be applicable to a "distinct part of the broad spectrum of non-parties". That, to my mind, is the case with the "part of the broad spectrum" occupied by litigation friends.

The guidance given "at the very highest level of generality" (to quote Lord Briggs in *XYZ* at paragraph 28) in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* as to the circumstances in which a costs order should be made against a non-party is not obviously apt for litigation friends. The *Dymocks* case did not involve a litigation friend and so Lord Brown had no reason to consider the position of litigation friends or factors that might be special to them.

61. In practice, the Court may not often need to consider whether to make an order under section 51 of the 1981 Act against a litigation friend of a claimant. By virtue of CPR 21.4(3)(c) and 21.5, a person must give an undertaking as to costs to become a litigation friend without a Court order. Likewise, CPR 21.6(5) bars the Court from appointing anyone as a litigation friend who does not satisfy "the conditions in rule 21.4(3)", and one such condition, in the case of a litigation friend of a claimant, is that an undertaking as to costs is given. A claimant's litigation friend will commonly, therefore, be answerable for costs as a result of having given an undertaking without the Court making an order for costs against him pursuant to section 51.

62. Supposing, however, that a question arises as to whether to order a claimant's litigation friend to pay a defendant's costs of an unsuccessful claim (say, because no order for costs is thought appropriate against the claimant himself with the result that an undertaking to pay "any costs which the child or protected party may be ordered to pay", as required by CPR 21.4(3)(c), does not bite), it seems to me that it will usually be appropriate to make such an order if an order would have been made against the claimant himself had he not been a child or protected party. That would reflect both the sense of CPR 21.4(3)(c) and pre-CPR authority. As long ago as 1739, a "prochain amie" was liable to costs by "the uniform practice of all the Courts" and subsequent cases show that the practice endured. The Judge considered that nothing in the 1981 Act or the CPR undermined the reasoning in the earlier cases or called for it to be reconsidered (see paragraph 31 of the Costs Judgment). In my view, it remains the case that liability for costs should typically be imposed on a claimant's litigation friend, but with 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.

63. Unlike the Judge, however, I do not consider there to be a general principle to the effect that a defendant's litigation friend should be liable for such costs as the child or protected party would normally be required to pay. My reasons include these:

    i) The pre-CPR authorities indicate that a defendant's guardian ad litem was not treated in the same way as a plaintiff's next friend or guardian for costs purposes. On the basis of the cases of which he was aware, the Judge observed in paragraph 43 of the Costs Judgment that there was "really only one case (*Morgan v Morgan*) which provides any support for the proposition that the court will not make an order for costs against the litigation friend of a child defendant in the absence of gross misconduct". The Judge was unaware, however, of *Reynolds v Mead* and *Hooper v Mackenzie*. Those decisions seem to me to confirm that a defendant's guardian ad litem would not be required to bear costs unless he had been guilty of gross misconduct;

    ii) Distinctions between a defendant's litigation friend and a claimant's also emerge from the CPR. While a claimant's litigation friend must supply an

undertaking as to costs in accordance with CPR 21.4(3)(c), the CPR, unlike the FPR, impose no such requirement on a defendant's litigation friend. Mr Cloherty sought to dismiss CPR 21.4(3)(c) as "simply akin to requiring some security for costs where a claim is brought by a litigation friend", but an undertaking in compliance with CPR 21.4(3)(c) creates only a personal obligation and, even if security were conferred, the fact would remain that it had been thought right to differentiate between a claimant's litigation friend (who has to give an undertaking) and a defendant's (who need not). It is significant, too, that, by virtue of CPR 21.2 and 21.3, the general rule is that a claim simply cannot proceed against a child or protected party unless a litigation friend is appointed. A step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise, CPR 21.3(4) explains;

iii) There is force in Mr Saoul's policy argument. Children and protected parties who are being sued need litigation friends both so that their rights are protected and because the litigation cannot otherwise proceed. Yet there must be a risk that, if a defendant's litigation friend were usually vulnerable to an adverse costs order, that would deter suitable individuals from taking on the role. Mrs Talbot Rice downplayed the potential difficulties on the footing that, if no one else is able and willing to act for a child or protected party, the Official Solicitor will step in, but the Official Solicitor is not willing to accept a case unless there is adequate provision for payment of her own costs. More than that, a general principle that a defendant's litigation friend should bear the claimant's costs of a successful claim would, on the face of it, expose the Official Solicitor to the prospect of a costs order against her if the claim succeeded, yet it seems most unlikely that the Official Solicitor would wish to run that risk. Mrs Talbot Rice also pointed out that CPR 21.2(3) gives the Court a discretion to permit a child to conduct proceedings without a litigation friend, but exercise of that power would only rarely provide an adequate solution in the case of a child and could never do so with a protected party;

iv) Where a director causes a company to defend a claim unsuccessfully, he is unlikely to be ordered to pay costs personally in the absence of "some impropriety or bad faith on his part" even if he provided the company with funding, unless at least he can be seen to have acted for his own benefit, notably through a shareholding. It is not easy to see why a defendant's litigation friend should be in a worse position. While the litigation friend might be said to have controlled the defendant's participation in the litigation, the same might be said of the company director. That tends to suggest that a defendant's litigation friend who does not stand to benefit substantially should generally escape liability for a claimant's costs unless guilty of impropriety or bad faith;

v) Authorities addressing the position of the Official Solicitor also provide support for the view that there is no general principle to the effect that a defendant's litigation friend should be liable for such costs as the child or protected party would normally be required to pay. Far from the Official Solicitor being ordered to pay a claimant's costs where a defendant on whose behalf she has acted has failed, the cases show that a claimant (or other

applicant) may be ordered to pay the Official Solicitor's own costs, and that even where the claimant/applicant has not asked the Official Solicitor to become involved. In *Re PC (An Infant)*, Buckley J drew attention to the fact that the Official Solicitor's appointment was "a sine qua non to the proceedings going on and being effectively disposed of" and, in *Northampton Health Authority v Official Solicitor*, Bingham MR agreed that there was a general principle that, where parties have become involved in a situation in which it has become necessary to seek the assistance of the Official Solicitor, it is not unreasonable for him to ask that they should meet or contribute towards the cost of his intervention. Such points find an echo to an extent in Mr Saoul's policy argument. Of course, the Official Solicitor might be thought to be in a somewhat different position from, say, a parent acting as litigation friend for a child, but there is also a distinction in terms of the relief at issue. The question in the Official Solicitor cases is whether a successful claimant/applicant should be ordered to pay the costs of the litigation friend of a defendant/respondent. The question where someone other than the Official Solicitor has acted as litigation friend will be whether the litigation friend should have to bear the claimant's costs;

vi) CPR 21.9(6) does not imply that a defendant's litigation friend should be held liable for costs. That provides for the liability of a litigation friend for costs to continue until a notice stating that the appointment has ceased has been served. As, however, the Judge said in paragraph 32 of the Costs Judgment, the rule "shows that there can be cases in which a litigation friend is liable for costs but the rule itself does not define what those circumstances are". I agree;

vii) CPR 44.2(2) is not in point because that deals with costs as between parties, not with when costs orders should be made against non-parties.

64. Drawing the threads together, it seems to me that the position in relation to costs orders against litigation friends in civil litigation can be summarised as follows:

i) At any rate where a litigation friend has not previously given an undertaking to pay the costs at issue, the power to make an order for costs against a litigation friend derives exclusively from section 51 of the 1981 Act;

ii) When deciding whether an order should be made against a litigation friend under section 51, the "ultimate question" is "whether in all the circumstances it is just to make the order";

iii) It will typically be just to order a claimant's litigation friend to pay costs if such an order would have been made against the claimant himself had he not been a child or protected party, but it remains the case that the Court is exercising a discretion and entitled have regard to the particular circumstances;

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. 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.

65. It follows that, in my view, the Judge was mistaken in thinking that, "the court should apply the general approach that, as regards costs, the litigation friend is expected to be liable for such costs as the relevant party (if they had been an adult) would normally be required to pay" and so erred in principle.

66. In the present case, it is not suggested that Ms Glover acted in bad faith and she did not stand to gain a substantial personal benefit from the Twins' Application. The Judge noted that "if Tom and Freya did make a financial recovery as a result of these proceedings (and further proceedings) then there could be an element of an indirect benefit to Ms Glover", since such a recovery would have alleviated the financial burden on her and perhaps enabled Tom and Freya to pay back debts she had incurred. He also, however, observed that the proceedings against Confiance which were contemplated "would have been for the benefit of Tom and Freya and not directly for the benefit of Ms Glover" and, as Mr Saoul pointed out, the period over which the financial burden on Ms Glover could have been eased would have been attenuated by the fact that Tom and Freya were already turning 16 when the Twins' Application was issued. 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 paragraph 81 of the 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 "nonetheless 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. Nor do I consider that the fact that costs orders made in favour of Mr Barker and Confiance in the Twin Benefits Proceedings have not been satisfied provides a sufficient reason to impose liability for costs on Ms Glover in the present context. Ms Glover was never herself a party to the Twin Benefits Proceedings or under any liability in respect of their costs. While, moreover, Ms Glover may have been a director and shareholder of Twin Benefits, the company was "used as a vehicle … in order to insulate Mr Baxendale-Walker from a potential costs liability" and it was he who provided the funding and "the bulk of the instructions" and who exercised substantial control (see Birss J's judgment of 25 October 2017, quoted in paragraph 12 above). An order for costs was,

accordingly, made against Mr Baxendale-Walker. No such order was either made or sought against Ms Glover.

67. In all the circumstances, it seems to me that, should Tom and Freya be viewed as defendants, costs orders against Ms Glover would not be appropriate.

Issue (ii): Should the Judge have concluded that Tom and Freya were (or should be treated as) "claimants" for the purposes of CPR 21.4(3) and so have proceeded on the basis that Ms Glover had given an undertaking in respect of the respondents' costs?

68. This issue arises from a respondent's notice served on behalf of Mr Barker, but it was not the subject of significant elaboration either in Mr Cloherty's skeleton argument or in his oral submissions. I can dispose of it shortly.

69. While the Twins' Application was pending, Ms Glover was repeatedly pressed to provide an undertaking pursuant to CPR 21.4(3)(c) on the basis that Tom and Freya were "claimants" for the purposes of the rule. Ms Glover denied that Tom and Freya were "claimants" and refused to give an undertaking. She has explained in a witness statement that, had the Court imposed a requirement for an undertaking as a pre-condition of her being Tom and Freya's litigation friend, she would have had no choice but to decline to give the undertaking and therefore not act as their litigation friend, since she could not afford to meet an adverse costs order.

70. Mr Barker's respondent's notice proceeds on the basis that Tom and Freya should be seen as "claimants" for the purposes of CPR 21.4(3)(c). That being so, the argument goes, Ms Glover should be treated as if she had given an undertaking in accordance with CPR 21.4(3)(c).

71. However, the simple fact is that Ms Glover never entered into any undertaking. She cannot be held liable on an undertaking that was not given.

72. A further point is that CPR 21.4(3)(c) contemplates an undertaking to pay "any costs which the child or protected party may be ordered to pay". In the present case, no costs order was made against the parties for whom Ms Glover acted, Tom and Freya. An undertaking of the kind envisaged in CPR 21.4(3)(c) could not, therefore, have served to impose any liability on her.

Issue (iii): Was the Judge wrong to conclude that Tom and Freya should properly be treated as claimants so as to engage a principle that their litigation friend should be liable for costs?

73. The Judge concluded that, even if there were a "special rule that the court will not order a litigation friend of a defendant to pay the costs of a successful claimant, in the absence of gross misconduct", it would not apply because "Tom and Freya acting by their litigation friend started the legal process which led to the costs being incurred" and "they were not merely defending proceedings that had been brought against them but they were initiating a challenge to the pre-existing state of affairs based on new allegations which they were advancing" (see paragraph 22 above).

74. Mr Saoul challenged the Judge's analysis. He argued that, although the Twins' Application had been initiated by Tom and Freya, they had done so only because they

had been wrongly deprived of the opportunity to participate in the proceedings as defendants in the first place. They were essentially seeking to be placed in the position they would have been in had they been joined at the outset, as they should have been. To treat them as claimants in circumstances where they had issued an application to vindicate their rights as defendants would be artificial and fail to reflect the substance of their position. It would be perverse, Mr Saoul said, if Mr Barker's misconduct enabled him to obtain a costs order against Ms Glover.

75. Mr Cloherty, Mrs Talbot Rice and Miss McDonnell likewise argued for substance over form, but to contrary effect. Tom and Freya, they submitted, were in substance in the position of claimants. By issuing the Twins' Application, they instigated the process that led to the costs at issue being incurred. More than that, although they originally asked to be added as defendants to the Main Proceedings, that head of relief was abandoned at an early stage.

76. We were referred in this context to *GFN SA v Bancredit Cayman Ltd* [2009] UKPC 39, [2010] Bus LR 587. The question there was whether liquidators could obtain security for costs against companies appealing against decisions on proofs of debt. The Privy Council concluded that it was proper to award security for costs. Lord Neuberger said in paragraph 31 that "it must be right, at least as a general rule, that, when deciding whether a particular application is an 'action, suit, or other … proceeding' or an 'action or other proceedings', the court must look at the substance of the application as opposed to its strict form". He went on in paragraph 32:

> "In my judgment, viewed in the light of these principles, the applications in the present case were originating applications falling within the expressions I have just quoted. They brought before the court issues which were not previously before the court, and which would not otherwise have been before the court; and, although brought in the context of a winding up ordered by, and under the ultimate supervision of, the court, these applications were essentially free-standing."

Lord Scott similarly considered, at paragraph 22, that "it is the substance of the 'proceedings' rather than their form that is important" and said in paragraph 27 that the applications with which the Board was concerned were "unquestionably … in substance originating applications".

77. The respondents to the present appeal stressed paragraph 24 of Lord Scott's judgment, in which he said this:

> "Another possible example of the necessity of having regard to substance rather than form might arise in the case of an application to set aside a compromise of an action on the ground of misrepresentation or concealment of material facts. Such an application would usually be made in a new action and there could be no question but that the new action would constitute 'proceedings' for the purposes both of section 74 [of the Cayman Islands Joint Stock Companies Act 1857 (as revised)] and of Order 23 [of the Grand Court Rules 1995]. But, if the original action were technically still on foot, the

> application to set aside the compromise could be made by interlocutory motion in the still existing action: see *Gilbert v Endean* (1878) 9 Ch D 259 and the remark of Jessel MR, at p 266, that the object of the motion was to decide 'a substantial question between the parties'. In such a case the applicant would be in the position of a plaintiff and the respondent in the position of a defendant whatever their respective roles in the existing action. The ability of the court to entertain an application by the respondent for security for costs of the applicant's application to set aside the compromise could surely not be denied on the ground that the application was not in form an originating process and so did not constitute 'proceedings' for section 74 or Order 23 purposes."

The Twins' Application, it was argued, was closely analogous to the "application to set aside a compromise of an action on the ground of misrepresentation or concealment of material facts" postulated by Lord Scott and Tom and Freya should similarly be treated as claimants.

78. However, Lord Neuberger, with whom Lord Rodger, Baroness Hale and Sir Jonathan Parker concurred, specifically stated, in paragraph 34, that he would prefer to leave entirely open questions such as whether and if so when it is possible or appropriate to order security for costs in connection with an application to set aside a compromise of an action. Moreover, the issue on this appeal differs significantly from that before the Privy Council in *GFN SA v Bancredit Cayman Ltd*. In *GFN*, the Privy Council was concerned with whether a particular type of application was an "action, suit, or other … proceeding" or an "action or other proceeding". In the present case, what ultimately matters is what impact Tom and Freya's role should have on the exercise by the Court of its discretion under section 51 of the 1981 Act. It will be apparent from what I have already said that, in my view, a litigation friend for an ordinary claimant should typically bear the costs of a successful defendant while costs liability should be imposed on an ordinary defendant's litigation friend much less often. Where, however, a party for whom a litigation friend acts is neither a conventional claimant nor a conventional defendant, the Court's decision on the litigation friend's liability for costs need not be governed by simple characterisation of the party as claimant or defendant. The Court should consider whether the nature and circumstances of the party's participation point to application of, on the one hand, the approach adopted in relation to claimants' litigation friends or, on the other hand, that adopted in relation to defendants' litigation friends before arriving at an overall conclusion as to how it should exercise its discretion on the particular facts.

79. In the present case, the Judge did not approach matters in quite that way but rather asked himself whether Tom and Freya were "claimants" on the one hand or "defendants" on the other by considering "whether … the party acting by a litigation friend had started the process which led to the costs being incurred". That being so, we must, I think, consider the position for ourselves.

80. On balance, it seems to me that the nature and circumstances of Tom and Freya's participation make it appropriate to apply the approach adopted in relation to defendants' litigation friends rather than that adopted in relation to claimants' litigation friends. Although it was Tom and Freya who made the Twins' Application,

the "foundation" for the application was "conduct of Mr Barker (and others)" of which the Judge disapproved (paragraph 79 of the Costs Judgment). Mr Barker "adopted an approach to the litigation which he considered was in his best interests" and "the other parties and their advisers went along with that approach" (paragraph 66). The result was that the Main Proceedings were "deliberately concealed" from Tom, Freya and Ms Glover (paragraph 72), they were "deliberately not inform[ed] … of a proposed compromise so as to prevent them expressing their views upon that compromise" (paragraph 69), "information relevant to the court's decision was deliberately withheld from the court" (paragraph 73) and a representation order was used "as a means of keeping Tom and Freya (and Ms Glover) in the dark as to what was happening" (paragraph 71). The "natural consequence" was that Ms Glover "has harboured a strong sense of injustice and a belief that Tom and Freya have been unfairly treated" (paragraph 76). The Twins' Application represented an attempt to remedy what had gone wrong. Initially, Tom and Freya specifically asked to be joined as defendants. That head of relief was not pursued beyond the first hearing of the application, but it remains the case that Tom and Freya were responding to the Main Proceedings and their exclusion from them. If, as was hoped, success in the Twins' Application had enabled them to mount a claim against Confiance for breach of trust, they would clearly have been claimants in that context. What was at issue in the Twins' Application itself, however, was whether Tom and Freya were bound by a compromise of which they had not been informed in order to prevent them expressing views on it. In the circumstances, whether or not Tom and Freya would have been regarded as "claimants" for security for costs purposes in accordance with *GFN SA v Bancredit Cayman Ltd*, it appears to me that it is the approach governing costs orders against litigation friends of *defendants* that ought to be applied; and I have already said that, on that basis, I would not consider costs orders against Ms Glover to be appropriate.

81. All in all, there is no sufficient justification for costs orders against Ms Glover.

Issue (iv): Was the Judge wrong to rely on unpaid costs orders in other proceedings when reaching his conclusions on costs?

82. The conclusions I have arrived thus far mean that this issue falls away. It was raised in the appellant's notice as an alternative to Ms Glover's other grounds of appeal. Since Ms Glover succeeds, in my view, on those other grounds (see issues (i) and (iii)), I do not need to address this point. Further, I have considered the unpaid costs orders in paragraph 66 above.

Issue (v): Should the Judge anyway have held Ms Glover liable to pay the respondents' costs under the general discretion as to costs conferred by section 51 of the Senior Courts Act 1981?

83. The respondents each contended by way of respondent's notice that, were the Judge to have been mistaken in thinking that a child's litigation friend should generally be liable for the costs which the child would have been required to pay if adult, costs orders should have been made against Ms Glover anyway under section 51 of the 1981 Act. By the time of the hearing, however, it was common ground that section 51 does not provide an *independent* basis for imposing liability on Ms Glover: the position is rather that *any* order against Ms Glover would be made pursuant to section 51. It follows that this issue does not require separate consideration.

Conclusion

84. I would allow the appeal and set aside the costs orders which the Judge made against Ms Glover.

Lord Justice Moylan:

85. I agree.

Lord Justice Patten:

86. I also agree.