

ENGLAND AND WALES / JUDGMENT

Arkin v Borchard Lines Ltd

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NEUTRAL CITATION NO. [2003] EWHC 2844 (Comm) IN THE HIGH COURT OF JUSTICE QUEENS BENCH DIVISION COMMERCIAL COURT Case No: 1997 Folio No. 956 Royal Courts of Justice Strand, London, WC2A 2LL Date: 27 November 2003 Before : THE HONOURABLE MR JUSTICE COLMAN

- ----- Between : Yeshekel Arkin
- and - Borchard Lines Limited and Zim Israel Navigation Company Ltd & Ors
- and - Managers and Processors of Claims (NO.2) Claimant 1 st , 2 nd to 4 th Defendants rd and and 3 5 th Part 20 Defendants 11 th Part 20 Defendants
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- ----- Peter Irvin and Sarah Lee (instructed by Messrs Constant and Constant) for the 1st Defendant Steven Gee QC and Hugh Mercer (instructed by Messrs Davies Arnold Cooper) for the 2nd, 3rd and 4th Defendants and the 3rd, 5th, 8th and 10th Part 20 Defendants Vasanti Selvaratnam QC and Fergus Randolph (instructed by Messrs Berwin Leighton Paisner) For the 1st and 6th Part 20 Defendant Mr Guy Mansfield QC and Ms Sarah Lambert (instructed by Messrs Gordon Dadds) for the 11th Part 20 Defendants
Hearing dates: 16 May 2003, 25 July 2003, 1-2 October 2003
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Judgment

Colman J. Approved Judgment Mr Justice Colman:

Introduction

- v - This is an application by the 1st and 2nd to 4th defendants and the 3rd and 5th Part 20 1. defendants by which they ask for orders for costs against the 11th Part 20 defendants, Managers and Processors of Claims (“MPC”). Zim claims such an order is necessary contingently upon any decision on the issues as to the incidence of costs as between the 1st defendants and the Part 20 defendants other than MPC. The application is based on the fact that MPC, a professional funding company, entered into a funding agreement with the Claimant, Mr Arkin, whereby it funded the employment of expert witnesses, the preparation of their evidence and the organisation of the enormous quantities of documents which

became necessary to investigate before the trial. 2. In advancing this application, the defendants have laid stress on the very substantial proportion of any recoverable damages or settlement payments (25% of the first £5 million and 23% of any excess) which MPC was to receive under its funding agreement. They have also drawn attention to the absence of any undertaking by MPC to pay the defendants' recoverable costs or to take out after the event (ATE) insurance cover in respect of such costs. They submit that, in principle, professional funders as distinct from pure funders who are maintaining litigation for their profit, should be liable for the costs of the defendants if their claim fails, which in this case it did: see my judgment of 10 April 2003. In resisting this application MPC submits that conditional fee agreements with 3. professional funders which have the purpose of enabling impecunious claimants to pursue claims of real substance which, but for such funding, they could not have done, should not be visited with costs orders against the funders if the claim fails. MPC submits that recent decisions of the Court of Appeal in *Hamilton v. AL Fayed* (No.2) [2003] 3 All ER 641 and *R (Factortame Ltd) v. Transport Secretary* (No.8) [2003] QB 381 have clarified the main principles relevant to the exercise of the court's discretion to make a costs order against a non-party funder. In particular, the objective of providing access to the courts to impecunious claimants has now been given much greater weight than previously relative to other countervailing aspects of public policy. On the facts of the present case that objective should prevail so rendering a costs order inappropriate. Before setting out the facts in the present case, I propose to consider the decisions in 4. *Factortame* and *Hamilton* to see how far against the background of earlier authorities they provide relevant principles in a case such as this. The Relevance of *R (Factortame Ltd and others) v. Secretary of State for Transport* The issue was whether the claimants were entitled to recover as part of their costs a 5. fee paid to the accountants, Grant Thornton (GT), which was to be calculated on the basis of 8 per cent of the amount of damages recovered from the Department. It was argued on behalf of the Department that the conditional fee agreement entered into between the claimants and GT was champertous and, because it was contrary to public policy, the claimant should not recover the contingent fee paid to GT. At the time when the agreement was entered into the latter were owed a substantial amount of fees by the claimants. The claimants could not have paid for the services to be provided by GT out of any other resources than damages recovered in the action. Expert evidence involving forensic accountancy and expertise in the fishing industry was necessary, as advised by the claimants' legal advisers. GT therefore provided and paid the two experts on an ordinary fee basis and 2 Colman J. Approved Judgment

- v - not on a contingency fee basis. GT also agreed to provide services ancillary to those provided by the claimants' solicitors, such as the accumulation and organisation of documentary evidence, liaising with the claimant in Spain and advising on offers to settle. In identifying the relevant public policy considerations the Court of Appeal relied 6. heavily on the judgments of Steyn LJ. in the Court of Appeal and Lord Mustill in the House of Lords in *Giles v. Thompson* [1993] 3 All ER 321 CA and [1994], AC 142, HL. The policy identified which rendered champertous agreements illegal rested "on the perceived need to protect the

integrity of public justice". With reference to section 58 of the Courts and Legal Services Act 1990 by which solicitors were first permitted in specified circumstances to enter into conditional fee agreements with their clients, Steyn LJ. at page 331, explained that conditional fee agreements were, but for that Act, illegal "because such agreements allowed the duty and interest of solicitors to conflict with a resultant risk of abuse of legal procedure". He continued at p333: "Ultimately, it is necessary to consider the questions posed in this case in the light of contemporary public policy. The correct approach is not to ask whether, in accordance with contemporary public policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. And this question requires the closest attention to the nature and surrounding circumstances of a particular agreement." 7. The Court of Appeal in *Factortame* at p401 made reference to Lord Mustill's consideration of the degree to which the contract between the hire contract gave to the hire companies, which were the funders, control of the litigation. There being two hire contracts, under the first one the hire company was not entitled to and did not control whereas under the second contract the hire company had the right to appoint its own solicitor to bring an action for damages in the hirer's name and did so. However, as the Court of Appeal in *Factortame* observed, at p402, Lord Mustill concluded that if there were any conflict between the hire company and the plaintiff, the wishes of the plaintiff were likely to prevail. Having directed himself by reference to the description of the policy underlying maintenance given by Fletcher Moulton LJ. in *British Cash and Parcel Conveyors Ltd v. Lanson Store Services Co Ltd* [1908] 1 KB 1006 @ 1014, Lord Mustill addressed the following question at p165: "Returning to the company, is it wantonly or officiously interfering in the litigation; is it doing so in order to share in the profits? I think not. The company makes its profits from the hiring, not from the litigation. It does not divide the spoils, but relies upon the fruits of the litigation as a source from which the motorist can satisfy his or her liability for the provision of a genuine service, external to the litigation. I can see no convincing reason for saying that, as between the parties to the hiring agreement, the whole transaction is so unbalanced, or so fraught with risk, that it ought to be stamped out. The agreement is one which in my opinion the law should recognise and enforce." 8. The Court of Appeal in *Factortame* at p402 then observed: "This decision abundantly supports the proposition that, in any individual case, it is necessary to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant. This is a question that we have to address." 3 Colman J.

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- v - Having concluded that section 58 of the 1990 Act, originally and as amended by 9. section 27 of the Access to Justice Act 1999, applied only to agreements concluded by those conducting litigation or providing advocacy services, the Court of Appeal observed at p407-408. "These then, are the reasons that have led us to conclude that section 58 of the 1990 Act, both as originally enacted and as amended by the 1999 Act, applies only to agreements

concluded by those conducting litigation or providing advocacy services. The effect of the section extends more widely, however, for it reflects Parliament's assessment of the present state of public policy in this area. Thus, in *Awwad v. Geraghty & Co* [2001] QB 570, 600, the Court of Appeal held that there was no scope for the court to hold that the common law permitted conditional fee agreements that did not conform to the requirements imposed by section 58 and in *Bevan Ashford*

- v. *Geoff Yeandle (Contractors) Ltd* [1999] Ch 239 Sir Richard Scott VC held that the provisions of section 58, which applied only to litigation, should be applied by analogy to solicitors who were conducting arbitration. More generally, however, section 58 evidences a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees will be contingent upon success. Whereas before this practice was outlawed, it is now permissible – subject to the requirements imposed by the section. These requirements do not appear designed to mitigate the mischief that had led to the banning of contingency fees – the undesirability of the interests of officers of the court conflicting with their duties to the court. Rather the requirements appear designed to protect the litigants concluding conditional fee agreements who, when the section was first enacted, were required to pay any “uplift” out of their recoveries. Conditional fees are now permitted in order to give effect to another facet of public policy – the desirability of access to justice. Conditional fees are designed to ensure that those who do not have the resources to fund advocacy or litigation services should none the less be able to obtain these in support of claims which appear to have merit.” Then at p411 the judgment said this, referring to the test identified by Fletcher 10. Moulton LJ. in *British Cash and Parcel Conveyors*, supra: “That test is appropriate when considering those who, in one way or another, support litigation in which they are not concerned. It is not, however, really in point when considering agreements under which those who are playing a legitimate part in the process of litigation provide their services on a contingency fee basis. A solicitor who charges a contingency fee which does not satisfy the requirements of section 58 can hardly be said to be guilty of “wanton and officious intermeddling with the disputes of others .. where the assistance he renders to the one or other party is without justification or excuse”. The public policy in play in the present case is that which weighs against a person who is in a position to influence the outcome of litigation having an interest in that outcome.” 11. In relation to the fact that GT had an interest in the result of the litigation the Court of Appeal rejected an argument that public policy was affronted by that interest in the following observations at p412: “In *Hamilton v. Fayed (No.2)* [2003] 2 WLR 128 both Chadwick and Hale LLJ emphasised the importance that public policy attached to access to justice. This had 4 Colman J. Approved Judgment
- v - *Overbourne* the previous absolute prohibition on lawyers agreeing to act for contingency fees. The same public policy considerations mitigate the criticism that there might otherwise have been of the agreements under which Grant Thornton provided their own services, and funded the services of the expert witnesses, on a contingency basis. There is another matter which greatly reduces the significance of the fact that Grant Thornton were

acting on a contingency fee basis. By the time that the 1998 agreements were concluded, the claims had succeeded on the issue of liability. While it is possible that their victory might be reversed by the House of Lords, this was no more than a possibility. Mr Davies, with the benefit of legal advice, believed that, after the final decision of the European Court, recovery of damages by the claimants was inevitable. The advice which he had received proved sound. Thus the contingency that the claims might fail was not great. Furthermore, and this is also highly material, Grant Thornton had no role at all to play in the final battle before the House of Lords on the issue of liability. The fact that they had an interest in its outcome posed no threat of any kind to the manner in which the battle was conducted.” (emphasis added) As to the argument that the agreement to share the spoils was contrary to public policy, the Court of Appeal at page 413 considered it necessary “to consider the role played by Grant Thornton in order to see whether the nature of their interest in the outcome of the litigation carried with it any tendency to sully the purity of justice”. In the course of this investigation the Court of Appeal made the following points at p413-414. The greater the share of the spoils that the provider of legal services will (i) receive, the greater the temptation to stray from the path of rectitude. The 8 per cent was not extravagant and was agreed to at the request of the claimants. (ii) The 8 per cent was likely to have been attractive to the defendant Department because it represented an effective cap on the claimant’s costs for which it would be liable if it lost. Although the prospect of receiving 8 per cent of recoveries would have (iii) provided a motive for GT to inflate the damages “though not to the extent that a larger proportion would have done”, the likelihood of GT yielding to that temptation should be discounted: they were reputable members of a respectable profession who were subject to regulation. Even if they could be tempted there would have been little opportunity to (iv) influence the outcome of the assessment of damages. That firm’s input into the preparation of the computer model was in conjunction with the Ministry of Agriculture’s experts as a joint exercise in a manner that was transparent so that lack of objectivity on the part of GT was unlikely to have any impact on the assessment of damages. Although GT liaised with counsel and advised on the settlement, since there (v) were nine counsel and a well known and highly experienced firm of commercial solicitors involved, it was unrealistic to suggest that GT might have attempted to procure a settlement on terms which were at odds with their appreciation of the merits. 5 Colman J. Approved Judgment

- v - For those reasons the claimants were held entitled to recover as costs their payment to 13. GT of the 8 per cent contingency fee. 14. It is important to note the following considerations arising from that judgment. (i) A key underlying public policy factor relevant to deciding whether fees payable under a funding agreement providing for conditional fees for the benefit of a funder of a successful party should be reflected in a costs order in favour of that party is whether the agreement may lead or does lead to interference by the funder adverse to the proper administration of justice. Whether the conditional funding agreement is thus objectionable is to be (ii) tested both at the time when it is entered into and in the course of its performance. (iii) Whether such an agreement is materially objectionable at the time when it is entered into is to be tested by reference to the magnitude of the risk

suggested by its terms that the funder may interfere adversely to the proper administration of justice. For the purposes of (iii) it is relevant to consider (a) whether the size of the (iv) fee contingent upon the outcome of the litigation is such that there is a real risk that it will tempt the funder to influence the conduct of the litigation otherwise than in accordance with prudent legal or other professional advice and (b) whether the terms of the funding agreement are such as to give the funder some measure of control over decision-taking as to how the litigation should be conducted.

- (v) Whether such agreement has been operated by the parties to it in a manner adverse to the proper administration of justice may depend, amongst other considerations, on whether the funder has caused the claim to be exaggerated or has procured unreliable or fabricated evidence or has influenced settlement negotiations adversely to an objective analysis of the funded party's prospects of success. (vii) Another public policy objective very relevant to the exercise of the court's powers to award such costs against a funder is the facilitation of access to justice, as exemplified by *Hamilton v. Al Fayed*. (No.2), supra, a judgment of the Court of Appeal delivered six weeks earlier. I shall have to consider later in this judgment the relationship between this factor and that whose purpose is to protect the due administration of justice. Before doing so, however, it is necessary to investigate the effect of that decision. Access to Justice: *Hamilton v. Al Fayed* (No. 2) The issue in *Hamilton* was whether the successful defendant in defamation 15. proceedings should be entitled to recover from a group of funders by means of a section 51(3) order such part of his costs as he could not recover from the losing claimant. The funders had contributed various amounts towards Mr. Hamilton's costs of bringing his defamation action on the basis that, if his claim were successful their contributions would be returned to them. In effect, therefore, they provided an interest-free loan repayment of which was conditional on the outcome of the litigation. The funders proceeded out of feelings of sympathy with the Claimant and exercised no control over the management of the litigation. 16. In concluding that the public policy of access to justice superseded the public policy reflected in the principle that in general costs should follow the event and that a successful 6 Colman J. Approved Judgment

- v - defendant should be able to recover his costs the Court of Appeal identified a number of matters directly material to the present application. They can be summarised as follows.
- (i) Legislation in respect of conditional fee agreements up to the Access to Justice Act 1999 demonstrated a trend in public policy towards funding access to the courts, even to the extent of entitling a successful party to pass on his lawyer's conditional fee uplift. Chadwick L. J observed: "It may be said that a defendant does not choose to be sued. It may be said that, if he is obliged to incur costs in the successful defence of a claim brought against him he should not suffer financially because he is unable to recover those costs from an impecunious claimant. It may be said that it is unjust that a defendant should have to face a claim brought by a claimant who, if unsuccessful, will not be in a position to meet an order for costs made against him. But the courts have had to balance the risk of injustice to the

defendant in those circumstances against the risk of injustice to a claimant who is denied access to the courts to pursue a genuine claim; and the scales have come down in favour of the latter.” (ii) The purpose of permitting CFAs was not only to provide impecunious parties with access to the courts but to enable them to have the benefit of equality of arms (see Chadwick L. J. at p. 664.) (iii) As regards third party costs orders against funders, the underlying public policy of the provision of access to the courts by outside funders for those who could not otherwise afford it ought not to be imperilled by such orders, which would tend to discourage the availability of such outside funding: see Simon Brown L. J. at p.660, Chadwick L. J. at pages 664, 665, Hale L. J. at p.669. (iv) At paragraph 70 Chadwick L. J. observed at p.666: “For my part I can see no difference in principle, in the context of facilitating access to justice, between the lawyer who provides his services pro bono or under a conditional fee arrangement, the expert (say an accountant, a valuer or a medical practitioner) who provides his services on a no-win/no-fee basis, and the supporter who- having no skill which he can offer in kind- provides support in the form of funding to meet the fees of those who have. In each case the provision of support-whether in kind or cash- facilitates access to justice by enabling the impecunious claimant to meet the defendant on an equal footing. It follows that I would hold that- in the interests of justice generally- fairness to the successful defendant does not, as a general rule, require that where a pure funder provides financial support towards the litigation costs of an impecunious claimant, he should contribute to the costs which that defendant will (by reason of the claimant’s impecuniosity) be unable to recover under an order for costs against the claimant alone. In that context I use the expression ‘pure funder’ to denote a person who provides funds to meet the litigation costs of a claimant in circumstances in which he, himself, has no collateral interest in the outcome of the claim- other than as a source of reimbursement of the funds which he has provided.” 7 Colman J. Approved Judgment

- v - All the members of the court addressed the position of the “pure funder”, that (v) is to say the funder who was not entitled to a fee over and above repayment of his loan, as well as the position of those remunerated under a conditional fee agreement. Only Chadwick L. J., in the passage cited above at p.666, considered the position of an expert witness so remunerated. To that extent his remarks were obiter. The Underlying Principles Although Factortame and Hamilton did not have to resolve precisely the issue which 17. arises on this application, namely the circumstances, if any, in which an order for costs should be made against a professional funder which carries on business for the purpose of litigation support in consideration of contingent fees and where the share in the proceeds, if the claims are successful, is agreed to be very substantial indeed, those two decisions do identify important principles of public policy which are clearly very relevant as to how to exercise the wide discretion as to such costs orders. There are three objectives of public policy which are shown to be material. These are 18. as follows. The purpose of discouraging ill-founded claims or defences and of (i) compensating those who have been obliged successfully to protect their rights in the course of litigation underlies the rule that in general a successful party is entitled to recover his costs. The purpose of facilitating access to justice, including

the achievement of (ii) equality of arms, for impecunious claimants in the absence of public funding or insurance or trade union membership needs to be supported. Costs orders against funders of unsuccessful claimants will tend to discourage the availability of such funding. The purpose of protecting the due administration of justice requires that the (iii) courts should discourage the interference by funders in the proper and responsible management and conduct of litigation in any manner adverse to that purpose. In order to achieve this purpose the courts will take into account in the exercise of their discretion as to the making of costs orders against funders who are parties to conditional fee agreements whether the terms of such an agreement give rise to a material risk of conduct adverse to that purpose and whether the actual conduct of the funder in the course of the litigation has been consistent with that purpose. It will at once be seen that all three aspects of public policy may be in tension. Just as 19. in *Hamilton* it was recognised by the Court of Appeal that, in the case of pure funders, objective (i) had to yield to objective (ii), so also it is necessary for the courts to resolve the countervailing considerations presented by objective (ii) and objective (iii). In *Factortame*, the court, although not concerned with an application for an order that a funder under a conditional fee agreement should pay the costs of a successful defendant, but whether the costs order in favour of the successful claimant should extend to the funder's contingent fee, did have to consider how to resolve the relationship and potential conflict between objective (ii) and objective (iii). It did so by evaluating the magnitude of the risk of prejudice to objective (iii) represented by the terms of the conditional fee agreement with the funder (GT) and by the conduct of GT in the course of the litigation. Having concluded that the risk was very small, the court was able to conclude that objective (ii) should be reflected in an order for costs in the claimant's favour covering the funder's contingent fee. While it is true that 8 Colman J. Approved Judgment

- v - the court included in its reasoning the fact that the claimants were almost inevitably going to succeed on liability on appeal to the House of Lords, it is extremely improbable if, against all expectations, the claimants had lost and the defendant Department had applied for a costs order against GT such application would have succeeded. That would have been so because full effect could be given to the public policy objective of access to justice without materially prejudicing the objective of protection of the due administration of justice. It is with these principles in mind that it is necessary to approach the judgment of 20. Morland J. at first instance in *Hamilton*. Much weight was placed on this statement of approach in support of this application. The relevant part is quoted by Simon Brown L. J. at p.645 as follows: "The respondents to Mr Al Fayed's application are pure funders. Their donations towards Mr Hamilton's costs were not made as the result of any obligation owed to him but as an act of charity through sympathy with his predicament and in some instances affinity to the Conservative Party. They have no control over how their donation is spent. They have no part in the management of the litigation up to and including the trial. Their only hope was that Mr Hamilton would achieve sufficient success in trial to enable their donations to be repaid to them. Why would a pure donor be in any more vulnerable position than a solicitor or counsel acting on a contingency fee? (See the observations of Rose L. J. in *Count Tolstoy*-

Miloslavsky v. Lord Aldington [1996] 2 All ER 556 at p.565-566, [1996] 1 WLR 736 at p.746) The position of the professional funder is very different. Almost always the funding arises out of a contractual obligation, for example where the funder is a trade union, an insurer or a professional or trade association. Normally such a funder exercises considerable control, management and supervision of the litigation. It would be very exceptional that a situation would arise where it would not be just and reasonable to make a section 51 order against a professional funder. The reverse is the position in the case of a pure funder. It will be rare or very rare that it will be just and reasonable to make an order against him.” It is, in my judgment, a misunderstanding of this passage and seriously inconsistent 21. with the relevant principles to suggest that a third party costs order will necessarily be appropriate against a professional funder given that he is by definition not a pure funder. Whether such an order is appropriate in any given case must depend primarily on whether on the evidence before it on the application the court is satisfied that such an order is appropriate to reflect (i) the defendant’s success and (ii) the risk of prejudice to the objective of protection of the due administration of justice. Specifically, I am unable to accept that the mere fact of a contract for a share in the proceeds of the litigation necessarily involves such material prejudice. Whether it does will depend on the legal and practical relationship between the professional funder and the claimant. If that relationship by reason of the terms of the funding agreement is such as not to give rise to any material opportunity to the funder to influence the conduct of the litigation to serve his own interests as distinct from the proper running of the trial and the funder does not in the event intervene or attempt to do so, there will be strong grounds for declining to make an order for costs against him where, but for such funding, access to the court would have been impossible. It may well be that Morland J. is correct in suggesting that “normally a professional funder exercises considerable control, management and supervision of the litigation”. However, this is not necessarily so, as this passage contemplates. 9 Colman J. Approved Judgment

- v - In the course of her judgment in *Hamilton v. Al Fayed*, supra, at page 668, paras 80 22. and 81, Hale LJ. drew attention to the recent approval by Parliament of the provision of legal services under CFAs and in particular, to the entitlement of a successful party to recover any uplift from the other side and to the fact that these developments evidenced a trend in public policy towards funding access to the courts supportive of the principles of Article 6(1) of the European Convention on Human Rights. However, I would add that, in as much as this means of funding is confined to the provision of legal services, the legislation reflects a policy which is based on a willingness to rely on the professional objectivity of legal advisers to overcome any tendency to be influenced by the contingent nature of their rewards and so to act adversely to the due administration of justice. The risk of abuse of their ability to control the conduct of litigation is perceived to be so reduced by the fact of their consciousness of their professional duty as to justify the availability of the CFA as a means of providing access to the courts. This underlying concept is, in my judgment, of fundamental importance in the context of the present case because it identifies a key consideration relevant to deciding whether the funder’s relationship with the prosecution of the claim is

such as to justify a costs order against him, namely whether the risk of intervention by the funder adverse to the due administration of justice is likely to be or has been effectively removed or reduced to insignificance by the interposition of independent and objective legal advice.

23. With these principles in mind, it is now necessary to consider the relevant facts. The Relevant Facts: the Background to the Agreement between Mr. Arkin and MPC
24. Mr Arkin has at all material times since the collapse of Multifleet lived on his state pension and was originally granted legal aid which covered the commencement of these proceedings and the service of points of claim. The issue of that certificate was strongly opposed by the 1st and 2nd to 4th defendants. However, legal aid was subsequently withdrawn on 29 August 1997. Mr Arkin's solicitor, Susan Singleton, is a sole specialist practitioner who had insufficient resources to take on litigation of this size on a pro bono basis. Attempts were made by Susan Singleton and counsel to find a large City firm prepared to take on Mr Arkin's case on a pro bono basis, but without success. As from 30 July 1998 conditional fee agreements in civil litigation, in addition to personal injuries cases, became lawful. In consequence, Miss Singleton and counsel entered into such agreements in the course of 1998, in the case of Susan Singleton with effect from 30 July 1998.
25. Mr Arkin's financial position was bleak. Although he continued to live in his family home in London, that had been charged to his bank. He has been in default on repayments of capital and interest due to the bank for many years and it is estimated that his equity in the house has long been negative. The bank has been persuaded to hold its hand until the outcome of this litigation is known. The evidence is absolutely clear that at all material times from the commencement of these proceedings in 1997 until today Mr Arkin has had no available funds for paying for any aspect of this litigation. Nor has he had the means of borrowing any. 26. The only way in which the prosecution of these proceedings has ever been financially possible for Mr Arkin has been to deploy the prospect of the ultimate recovery of substantial damages as a means of payment to his solicitor and counsel and to any expert witnesses who might be required. Although insurance against liability to pay the defendants' cost would have been available for it is normally taken out where conditional fee agreements are used to fund personal injuries litigation, this has at no time been an available option for Mr Arkin personally, who would have had no means of paying the premium. 10 Colman J. Approved Judgment
- v - The position by the latter half of 1999 was therefore that Mr Arkin was pursuing 27. these proceedings with the assistance of conditional fee agreements to which his solicitor and his counsel were parties. Although I do not know with exactly what degree of confidence Mr Arkin was advised as to his prospects of success at this stage, I infer that leading counsel advised that on the evidence and the materials then available he had a much better than 50 per cent chance of success. 28. By November/December 1999, over two years after the commencement of proceedings, it was necessary for Mr Arkin's legal team to decide what to do about expert evidence. On the face of it, the main area of expertise was going to be proof

of causation and extent of loss. For this purpose, it was going to be necessary either to procure the evidence of an accountant or to dispense with calling any expert evidence and to rely, instead on cross-examination of the defendants' expert. The latter was, not surprisingly, seen as a high risk strategy and extremely dangerous, given that Mr Arkin had the burden of proof. Another possibility was to attempt to find an expert prepared to give evidence on the basis of a conditional fee. Alternatively, it might be possible to insure against inability to recover as legal costs the amount of the expert's fees. Miss Singleton approached a well-known firm of accountants, but they declined to act on a conditional fee agreement. I would interpose that it is well-established that although a contingent fee does not render an expert's evidence inadmissible, the existence of his interest in the outcome of the proceedings is relevant to the weight which the court gives to his objectivity as an expert. That is why, at least in the Commercial Court, expert witnesses are expected to indicate, when called to give evidence, whether they are acting under a conditional fee arrangement or one which gives them some financial interest in the result of the proceedings. In consequence of that approach the Academy of Experts had amended its Code of Practice to prohibit conditional fee agreements. Susan Singleton investigated the cost of taking out insurance to cover experts' fees and was informed by insurers of whom she enquired that the normal premium was 15% of the sum assured. On the assumption then made that those fees were likely to be in the order of £30,000, the probable premium was beyond Mr Arkin's means. In view of these funding problems, it was suggested by his legal advisers to Mr Arkin 29. that he should approach MPC. Mr Arkin's Counsel and solicitor were hopeful that Ernst & Young ("E&Y") could be retained as experts. Mr Dyson, a partner in that firm declined to act as expert on a conditional fee basis. He suggested that MPC might be able to help. Although Mr Arkin appears first to have approached MPC on 21 December 1999, the first serious contacts with MPC seem to have been made in February 2000 by Mr Dyson who discussed the case with Mr Gerard Walsh, Managing Director of MPC. The latter had been involved in providing case preparation and funding services in the Factortame Case, to which I have already referred. It was explained in the course of the negotiations between MPC and Mr Arkin and his advisers that Mr Arkin was not eligible for legal aid and that the claim could not proceed without the provision of disbursement funding. It was also said that Mr Arkin would not be able to obtain ATE insurance because of the complex nature of the case and the fact that he had no funds to pay the premium. At that time MPC's business was just over three years old, having been formed by the 30. amalgamation of three other firms which specialised in the quantification and/or management of complex consequential loss claims on insurers, including litigation support services. For that purpose MPC would sometimes have to employ experts, such as forensic accountants. An increasing part of MPC's business involved funding by means of conditional fee agreements. 11 Colman J. Approved Judgment

- v - In the course of the period up to the entering into of its agreement with Mr Arkin 31. MPC carried out such due diligence on the claim as was possible. It had to rely heavily on leading counsel's advice as to both liability and quantum. On that basis, although it received advice that Mr Arkin had a very strong claim, it had great difficulty in arriving at any

reasonably confident assessment of the quantum of recoverable loss or therefore the amount for which a settlement might be achieved. The evidence suggests that MPC representatives had by August 2000 formed the view that the probable settlement range was likely to be of the order of US\$5 million (£3.42 million) to US\$10 million (£6.85 million). They were also of the view that, if E&Y were to be employed to provide expert forensic accountancy services, their fee was likely to be about £250,000. In addition MPC considered that it would be necessary for it to employ a Mr. Merrill as an additional assistant in order to provide litigation support services to inspect and sort out documentation relevant to the expert's work and to act in a liaison capacity between the experts and the solicitors. The intention was that it would be more cost effective to employ him in this work than to pay E&Y at their usual rate. It was estimated that he would have to be paid £54,000 to £75,000 over an eighteen month period up to and including trial. MPC budgeted for a further £100,000 for additional expenses. In addition to these estimates, MPC would have had to take into account the cost of being out of their money for many months if not years between incurring disbursements and recovery of damages. They would also have to take into account two significant areas of risk, namely that the claim would fail or that, if it succeeded, they might not be able to recover under the agreement with Mr. Arkin if he took the point that it was unlawful on the grounds of maintenance.

32. Mr. Malcolm Stewart of MPC has demonstrated in paragraph 18 of this witness statement how, if the expenses incurred by MPC to the end of the trial amounted to £600,000, which broadly reflects the constituent components contemplated by MPC at the time, and Mr. Arkin's legal costs were £1 million, which was not an excessive projection as at August 2000, were the case to be settled at US\$5 million (£3.54 million) at the lower end of the range considered by MPC, the latter would derive a very modest profit from a 25 per cent share in the settlement figure: £30,000 against an outlay of £600,000, that is to say just 5 per cent. It is to be noted that by 2nd August 2000 when the MPC Agreement was entered into 33. the proceedings against the defendants had already been in progress for three years and the Part 20 proceedings against Zim and others had not yet commenced and were not contemplated by MPC or those advising Mr Arkin. Before the agreement with MPC could be entered into it was necessary to obtain the 34. consent of the Liquidator of BCL. It had previously been agreed between Mr Arkin and the Liquidator that, in consideration of the assignment of BCL's claim to Mr. Arkin the creditors of BCL would be entitled to 50 per cent of any damages recovered in the proceedings. Mr. Arkin was therefore left with 50 per cent of any recovery and the negotiations with MPC were conducted on the basis that MPC's percentage would have to be calculated on the total recovery but would have to be paid out of Mr. Arkin's share. The Liquidator took the position that the creditors would not fund the proceedings. At the same time as Mr. Arkin entered into the MPC Agreement Susan Singleton 35. entered into a conditional fee agreement with the solicitors, Edwin Coe. Their function was to provide assistance with solicitors' administrative work and trial preparation to Susan Singleton who, as a sole practitioner, did not have the resources to deal with the very substantial amount of documentation which Mr. Arkin provided in 2000 and

subsequently as 12 Colman J. Approved Judgment

- v - well as disclosure by the defendants. Counsel had also entered into a conditional fee agreement. According to Mr Stewart, MPC did not take out ATE insurance in respect of the 36. defendants' costs. The cost would have been such that MPC would not have been prepared to fund the claim if that additional expense had to be incurred. The reasons for this are explained later in this judgment at paragraph (63) below. 37. The Terms of the MPC Agreement of 2 nd August 2000 By Clause 1.1 Mr Arkin agreed to provide the services described in the Agreement. 38. By clause 1.2 these comprised the provision of: "(a) the senior research team of MPC, including the services of Mr Mark Merrill (as head of research) and in particular, but without limitation, the instruction of an expert as provided below: (b) (i) the instruction, engagement and payment of: an expert forensic accountant(s), Mr Richard Dyson, or equivalent (i) partner in Ernst & Young's Manchester office to write an expert accountant's report, on the quantum of the claim in the proceedings for the loss of income/profits suffered by BCL as a result of the actions of the Defendants; (ii) a joint shipping expert; and in relation to the instruction and engagement of the expert, and to the extent only that they are able to contract to do so, MPC will: assist with any queries the experts may have in producing their draft (ii) report(s); (iii) assist with analyse the draft report (sic); (iv) ensure appropriate amendments are made; (v) consider and analyse the Defendant's similar such report(s); and (vi) assist in the preparation of a response thereto. the engagement and instruction and payment of any other experts deemed by (c) Mr Arkin (acting on the advice of his counsel) to be necessary to support the accountant's report from the preparation of the report through to completion of the Proceedings; secretarial, photocopying and documentation services in connection with the (d) Services; further services in relation to the conduct of the Proceedings, including (e) without limitation: 13 Colman J. Approved Judgment
- v - Mediation; attendance (including, where reasonably practicable, (i) attendance by the Ernst & Young forensic accounting experts and/or Mr Merrill) at any mediation hearing where reasonably so requested by Mr Arkin; Hearings: attendance (including, where reasonably practicable, (ii) attendance by the Ernst & Young forensic accounting experts and/or Mr Merrill) where reasonably so requested by Mr Arkin or where MPC so chooses, at all interim hearings including the trial of this action; cross examination: all reasonably necessary assistance with cross examination (iii) issues arising from the defendants' witnesses; (iv) trial: ensuring and arranging, in so far as is reasonably practicable to do so, the Ernst & Young forensic accounting experts' and Mr Merrill's attendance at the trial where so requested by Mr Arkin." 39. It is to be observed that the services were of an essentially ancillary nature, on the face of it directed to provide support to Mr Arkin with the briefing and engagement of the expert forensic accountant and of a joint shipping expert with the preparation of the report and with the conduct of the proceedings. In the event the shipping expert, Ms Jean Richards, was not a joint expert. There was an expert economist, Mr Bishop, and there was also instructed at a very late stage a tax expert, Mr Robert Brown, specifically to deal with the issue of the exposure to tax of the Multifleet Group in respect of

the proceeds of ship disposals which was unexpectedly raised by the 2-4 Defendants in the course of the trial. These other experts were found not by MPC but by Edwin Coe (Mrs Richards), Ernst & Young (Mr Brown) and counsel (Mr Bishop). 40. It was provided by clause 2 as follows: “2.1 On behalf of Mr Arkin, MPC shall engage Mr Richard Dyson, head of forensic accountancy at Ernst & Young’s Manchester office, or equivalent Ernst & Young partner, within 14 days of the date of this Agreement as Mr Arkin’s expert accountant, to undertake the work reasonably required in the Proceedings as specified by Mr Arkin’s counsel. Notwithstanding MPC’s obligation to pay such accountant, Mr Arkin or his 2.2 legal advisers, to the extent only that it is reasonably necessary in the proper conduct of the Proceedings and to the extent only that MPC are able so to procure, shall have full and unrestricted access to such accountant and anyone else engaged hereunder including without limitation MPC staff such as Mr Merrill, at all reasonable times and he may instruct him/them direct in the work that is reasonably required to be done. He shall keep MPC fully up to date on a regular basis as to the work the said accountant or other person has been engaged to do. 2.3 MPC shall through Mr Merrill, report to Mr Arkin at least on a monthly basis in writing on the progress of the report and will attend meetings with counsel and the expert and Mr Arkin and hearings at court in person where reasonably required. 2.4 Mr Arkin agrees to co-operate fully and to provide such assistance in the Proceedings as MPC and the experts and counsel reasonably require, including without limitation providing all necessary documents, making himself available for the preparation of witness statements, identifying and locating any other witnesses of 14 Colman J. Approved Judgment

- v - fact, providing instructions generally in relation to the Proceedings, attendance at court, complying with all requests for assistance, information and instructions for the experts and the like.” It is further to be noted that under clause 2.1 it was Mr Arkin’s counsel who was to 41. specify the scope of the work to be carried out by the forensic accountancy expert. Under clause 2.2 it was agreed that Mr Arkin should be entitled to give direct instructions as to the work reasonably required to be done to both that expert and the MPC staff, including Mr Merrill. There is no specific similar provision dealing with the relationship between Mr Arkin, his counsel, MPC and other experts, but I find as a fact that all concerned proceeded to engage, instruct and assist the other experts consistently with the specific provisions of clause 2. 42. In relation to the remuneration of MPC and the experts, clause 3 provided: In consideration for the provision of the Services by MPC Mr Arkin agrees to 3.1 pay to MPC 25% of the amount paid by the Defendants, or any one of them, to Mr Arkin or to any person, body or firm on his behalf (without deduction of the 50% share payable to the liquidator of BCL) (to include any interim payment or payments of damages) following settlement or judgment being given (and the time for bringing an appeal having expired) in respect of the Proceedings or any other proceedings which make use of any experts’ reports compiled in connection with the Proceedings where arranged by MPC hereunder up to £5 million and at the rate of 23% of any amount so paid over £5 million, which 25%/23% shall include the costs of the accountancy and joint shipping experts or other experts instructed by MPC in connection with the Proceedings relating to quantum and the costs of any

witnesses relating to quantum (“MPC External Fees”) reasonably incurred or paid by MPC, except and to the extent that the same can be recovered as provided in clause 3.2 below. 3.2 Where Mr Arkin receives any sums from the Defendants or any one of more of them in the Proceedings in respect of the MPC External Fees he shall pay those to MPC, subject to the other provisions of this Agreement, in addition to their 25%/23% entitlement set out above. Where no such recovery is possible, then MPC shall bear such MPC External Fees itself. 3.3 MPC shall charge VAT at the applicable rate (currently 17.5%) on its percentage entitlement (25%/23%) set out above and shall render such VAT invoices as shall be reasonably required. 3.4 MPC shall record its internal time spent in performance and arrangement of the Services hereunder and bill Mr Arkin therefore and claim in the Proceedings therefore at a reasonable rate and the parties shall seek to recover such fees from the Defendants in the Proceedings. MPC shall render such invoices as required for this purpose. Where such recovery is possible the sums received by Mr Arkin may be retained by him provided the 25%/23% payment in clause 3.1 has been made. For the avoidance of doubt nothing in this agreement shall impose any 3.5 liability on Mr Arkin, BCL, the liquidator or their legal advisers, to pay any MPC External Fees (except as imposed on Mr Arkin under this clause where recovery from the Defendants occurs) nor any fees or charges or disbursements of MPC.” 15 Colman J. Approved Judgment

- v - For the purposes of the present application a provision of crucial importance was 43. clause 4 which was in these terms: Subject to clause 4.2, Mr Arkin (and/or the liquidator as provided for in the “4.1 terms of the Assignment) shall at all times have conduct of the Proceedings, but shall fully consult with and pay due note to the opinions of MPC in advance of any significant steps being taken hereunder and shall not make any settlement or compromise of the Proceedings without the prior consent of MPC. 4.2 In the event that MPC and Mr Arkin cannot reach agreement as to a significant step in the Proceedings including, without limitation, the acceptance of a payment into court, without prejudice offer, terms of settlement, or other such proposal, the decision of leading counsel for Mr Arkin shall prevail and the parties agree to be bound by such decision.” Thus, MPC was put in a position to make its views known about the conduct of the 44. proceedings but not to control the proceedings. The nearest this clause gets to control is the provision that Mr Arkin is not to make any settlement without MPC’s consent. However, the effect of that provision has to be read in the light of two considerations. It applied only to settlement of the case and not otherwise to the conduct of (i) the proceedings. (ii) Mr Arkin was being advised by solicitors and counsel in relation to all matters relating to the proceedings and it could be anticipated that he would continue so to be advised. In the event of any disagreement between Mr Arkin and MPC the decision of (iii) leading counsel was to prevail. It has been argued by Mr Steven Gee QC on behalf of the 2-4 Defendants that the 45. reference to the decision of leading counsel was in the nature of an arbitration agreement under which leading counsel was to take into account the interests not only of Mr Arkin as the claimant but also of MPC as the funder at risk as to its liability to pay expert fees. I am unable to accept this submission. The duty of leading counsel was to give proper professional advice to Mr Arkin in all the

circumstances, including the circumstance that he had the benefit of the MPC Agreement. In the event that Mr Arkin wished to take one course but MPC another, leading counsel's professional duty was to his client (Mr Arkin alone) to tender such advice as he considered to be in his client's best interests in the context of the litigation as a whole and whether that advice was consistent or inconsistent with what Mr Arkin thought ought to be done or with what MPC thought ought to be done. In other words, not only was the last word to be that of leading counsel, but the exclusive interests of MPC as funder, as distinct from the interests of Mr Arkin as claimant, could properly be superseded. Had it been the intention of the parties that leading counsel should give advice founded on the objective of achieving some kind of equitable balance between Mr Arkin's interests as one who stood to lose little or nothing if the claim were defeated or a settlement were not entered into and the interests of MPC who stood to lose their entire expenditure if the claim were defeated or part of that expenditure and/or their anticipated profit if it were settled at a certain level, much clearer language would have to be used. In such a case leading counsel would be placed in an invidious position if, by reason of such a purpose he was placed in a position of conflict with his overriding duty to the court and to give his client advice having 16 Colman J. Approved Judgment

- v - regard to his clients' best interests in preparing and conducting his case and if it came to settlement negotiations to his reasonable prospects of success. Another important provision of the MPC Agreement was clause 5 which provided as 46. follows: "This Agreement shall not be terminated by either party except with the written consent of the parties or where either party is in material breach hereof, where if such breach is capable of remedy, it has not remedied such breach within 30 days of written notice thereof, provided that MPC may terminate this Agreement on 21 day's notice where the initial report of the forensic accountancy expert clearly shows that MPC's agreed percentage of the likely damages to be recovered is not sufficient to cover MPC's anticipated costs hereunder ("MPC Right to Withdraw"). Where MPC exercises the MPC Right to Withdraw it shall solely be responsible for payment of any MPC External Fees and shall lose its entitlement to share in any proceeds of the Proceedings which may thereafter be continued. MPC shall be entitled to recover from Mr Arkin any part of the MPC External Fees which Mr Arkin subsequently recovers in the Proceedings." It is to be observed that, in the absence of a breach by Mr Arkin which remained 47. unremedied after written notice, MPC was locked into the agreement to fund the proceedings unless the forensic accountancy expert's initial report clearly showed that the likely recovery of damages was at a level in relation to which MPC's percentage would be insufficient to cover its costs. Once that stage had passed, MPC could not withdraw even if the expert advice or counsel's advice was such that the relevant percentage of the amount likely to be recovered would be such as to be insufficient to cover MPC's costs. This represented what was at least potentially a serious risk of loss to MPC. It was additional to the overriding risk that, notwithstanding the proceedings having been conducted on the assumption that the experts' evidence would be accepted and in accordance with leading counsel's advice, in the event the claim would fail completely. In that case MPC would stand

to lose its entire expenditure, would recover no contribution to its overheads and, on the state of the law at the time when the agreement was entered into, might be exposed to a massive claim for the defendants' costs. MPC's Conduct after entering into the MPC Agreement 48. In accordance with the terms of the MPC Agreement Mark Merrill helped to sort and classify the large number of lever arch files of documents provided by Mr. Arkin in 2000 as well as a further large quantity of documents which Mr. Arkin had recovered from Israel. Documents were stored in MPC's premises because they were so voluminous that there was nowhere else to keep them. However, all decisions as to which documents ought to be disclosed were taken by Edwin Coe and Singletons.

49. Mr. Merrill also extracted from the documents financial information about the companies in Mr. Arkin's control which was needed to give the legal team and MPC "an overall appreciation of the financial position" of those companies. To enable him to do so he held some discussions with Mr. Arkin. He also had discussions with E&Y about the nature of the claim and prepared some draft documents about the nature and likely size of the claim for the purposes of discussions between counsel, solicitors and experts during the late summer and autumn of 2000. 17 Colman J. Approved Judgment
- v - From September 2000 to June 2002 Mr. Merrill carried out the functions listed in 50. paragraph 26 of his witness statement, namely: Liaising between the various advisers and experts involved to ensure that they "(a) all had up to date information about the claim and its progress. (b) Preparing a monthly report for the MPC board about the progress of the claim, although this did not include any financial information as (he) was generally unaware of the costs being incurred other than the broad estimates of the accountancy experts costs. Liaising with Mr. Arkin and making contact as requested by his solicitors with (c) former members of staff and business associates who might provide useful information in respect of the operations of BCL. Attending meetings which Edwin Coe had with some of these former (d) members of staff and business associates, particularly where financial matters might need to be discussed. Commenting on draft papers and reports by both Ernst and Young and Jean (e) Richards (who had been appointed as the shipping expert). At the early stage of the process (he) probably had a wider knowledge of the factual material available and its whereabouts than the Ernst and Young personnel had." Up to the time when Mr. Dyson of E&Y produced his first expert report Mr. Merrill 51. assisted in finding documentary sources of information but after that point E&Y relied increasingly on their in-house personnel to carry out documentary research. He also checked earlier drafts of experts reports for clarity and proof reading purposes. 52. In December 2001/January 2002 Mr. Merrill was responsible for removal and analysis of the contents of Mr. Lewis Moore's files. Mr Moore was a witness, having been a solicitor retained to advise Mr Arkin's Multifleet Group. Again he took no decisions on whether documents should be disclosed: that was left to the legal advisers. It is quite clear on Mr. Merrill's evidence which I accept that he took no part in 53. relation to the taking of decisions as to the conduct of the claimant's case. Although MPC were kept well informed at all times, they did not attempt to control the litigation. This reflected and was consistent with the terms of the MPC

Agreement, in particular, 54. clauses 1 to 4. At paragraph 30 of his witness statement Mr Merrill explained his part in relation to 55. the preparation of the expert reports. "I was asked to read the early draft experts' reports by way of proof reading more than anything else. I had a longer involvement in the factual material available than the experts and was likely to be able to identify factual inaccuracies in the narrative of supporting commentaries. MPC were not involved in suggesting whether the reports of any of the experts might be revised. I believe that any such suggestions if at all were made solely by Mr Arkin's solicitors and counsel." This evidence is important in relation to the manner in which the provisions at clause 56. 1.2(ii), (iii) and (iv) of the MPC Agreement were operated.

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57. Mr Merrill also played an important part in sorting out documents in storage which had been retrieved from Israel and in locating particular documents from this very substantial quantity and other sources as and when they were needed. Overall, his function was of an essentially administrative nature. In paragraph 38 of his witness statement he stated that he was the only person provided by MPC to provide this support role and that MPC did not seek through him to affect how Mr Arkin's advisers conducted the litigation. In the course of paragraph 22 of his witness statement, Mr Stewart, a manager at 58. MPC, stated that the only involvement in the proceedings of MPC, apart from the work of Mr Merrill, was in providing funding and attending meetings. However, at paragraph 24 he added this: "Having prepared draft reports, the experts circulated them for comments. I received draft copies of both Mr Dyson's report and Mr Bishop's report. I read the drafts in the same role as somebody who had not been immersed in the detail of the claim and as a result made suggestions for amendments to the phraseology where I felt the discussion and arguments were difficult to follow. At all times it was left to the expert to decide whether or not the suggestions were incorporated or not." He added at paragraph 25 that Ernst & Young were being instructed directly by Mr 59. Arkin's legal team. By early 2002, according to Mr Stewart's evidence, the cost of the preparation of Mr 60. Arkin's expert case had grown so considerably beyond what had originally been anticipated that MPC took legal advice as to whether, under the terms of the MPC Agreement, they could withdraw and so cut their losses before trial. They were advised that there were no sufficient grounds for doing so. Nor could MPC withdraw when in May 2002 the court gave the parties a provisional indication of its views on the dominance and causation issues which was unfavourable to Mr Arkin.
61. MPC did not take out any form of ATE cover. As I have indicated, there were strong commercial reasons. In addition to the fact that the proceedings were already three years old when MPC became involved, the legal team who were known to be about to enter conditional fee agreements did not have to procure such insurance. Further it could reasonably be assumed that MPC's expenses would be less than half the total expenditure up to the end of the trial. In the event, it was only about 40 per cent of the total. Further, it appears from the evidence of Mr Bob Gordon, an expert in the field of 62. legal expenses

insurance, that the cost of ATE insurance cover in respect of the defendants' costs or for both these and the claimants' costs for a realistic limit would have been massive, if it had been available at all. He refers to a range of 25 to 35 per cent or £630,000 to £862,000 for both sides' costs limited to £2.4 million.

63. Mr Stewart has explained the commercial considerations which would have rendered the taking out of such cover impossible at paragraphs 29 to 30 of his witness statement: "I can confirm that if Mr Arkin's legal team had required MPC to either fund or to take out such insurance cover (in respect of the Defendants' costs) and pay premiums of the order suggested by Mr Gordon before entering into agreement with Mr Arkin, then it simply would not have decided to enter into the agreement with Mr Arkin. I say this because my colleagues and I have spent many years reading client's insurance policies and know from experience not only the importance of interpreting the policy 19 Colman J. Approved Judgment
- v - clauses accurately but also the difficulties which can arise in settling insurance claims. Based on the conditions which would have been imposed and the options for avoiding liability the policy would have been unattractive not only because of the additional capital outlay which would have been required but also because of the lack of flexibility within the policy and the very serious risk that any such policy would only afford effective cover for such Defendants' costs if Mr Arkin was "wholly unsuccessful" in the litigation. It also appears that cover would not have been available for Defendants' costs alone given the nature of the ATE insurance market at the time..... If we had been considering ATE insurance we would have insisted on Expert costs cover as well to protect our downside in the event the case was lost. The scenario of only insuring defendants' costs is purely academic. We would not have wanted to have been left with the liability of both a premium and the costs of the experts especially where the upside profit on a win was already so marginal. The control exercised by insurers on things like Pt 36 offers could still make a 'win' a financial loss to us. It should also be borne in mind, that at the time the agreement with Arkin was being negotiated it was unclear as to whether any or all of any ATE premium was recoverable as costs of the action should Arkin win. Although, according to Mr Gordon's witness statement, ATE was unlikely, if it had been available, then the substantial premiums involved would require the final settlement to be a substantially higher figure in order for us to make a profit. Furthermore, if it was a legal requirement for ATE to be in effect on all claims then that would have an adverse effect on MPC's ability to provide funding. The consequences would be that MPC would have to either reduce the number of claimants it supported or withdraw from the market altogether. In practice, ATE is a nice idea, but in practice it doesn't work for complex cases like this. There is a substantial gap in the market, which needs a 'risk taker' like MPC to fill if 'access to justice' is to be a reality." Further, it was unclear whether the premium could be included in the costs 64. recoverable from the defendants in the event of a judgment in Mr Arkin's favour. Paragraph 18 to 20 of Susan Singleton's 5th Witness Statement are consistent with the 65. evidence of the MPC witnesses. Paragraph 19 encapsulates the position: "Decisions about points to be taken were taken by

counsel. Counsel were very heavily involved in this case, more than would normally be the case (a) because they were aware as a sole practitioner competition lawyer I did not have the resources and

- (b) because it was the first action for damages for breach of the EU competition rules ever and we needed their expert help in this. There was no way MPC could know about or take any decisions on these kinds of issues. They relied on the legal team to decide what case was brought. Where a major decision was to be made such as dropping the second trial/stage we would have a conference at Brick Court Chambers with counsel, me, probably someone from Edwin Coe, the liquidator, Peter Levy and a representative of MPC and always Mr and Mrs Arkin. Counsel would advise and we took their advice.” Discussion There can be no doubt on the evidence that, if Mr Arkin had not entered into the MPC 66. Agreement or an agreement with another professional funder on substantially similar terms, he could either not have pursued the claim to trial or at best would have been obliged to fight 20 Colman J. Approved Judgment

- v - the case in the hope of proving causation and loss by means of inviting inferences from such primary facts as could be gleaned by the legal team from the huge volume of documents that eventually emerged and, if the defendants called any expert witnesses on those issues on which Arkin took this course, by cross-examining such witnesses. A trial fought in this manner would not have been fought with equality of arms: Mr Arkin would have been seen to be virtually certain to lose. It is improbable in the extreme that Counsel could ever have conscientiously advised him to continue with his claim by that means. Counsel’s advice was that Mr Arkin had a very strong claim. As matters have 67. emerged at the trial, Mr Arkin had a claim that had real substance in respect of Article 82, some substance in respect of Article 81 and little substance in relation to causation and proof of loss. I have no doubt, whatever, that Mr Arkin received advice from counsel given in good faith with a genuine belief in the strength of his claim. It is not difficult to appreciate that in a case of this size and complexity counsel concentrated on the liability issues. I do not speculate on the extent, if any, to which, in forming his pre-trial optimistic view of Mr Arkin’s position, leading counsel appreciated the evidential problems presented by causation of loss in this case. It may well be that it was not until long after the entering into of the MPC Agreement that, with the emergence of the experts’ reports on loss, the attention of Mr Arkin’s legal team came to be adequately focused on the problems presented by the need to establish a causal link between the allegedly unlawful conduct of the conferences and the collapse of Mr Arkin’s Group. It may well be that the claim was allowed to come to trial in the hope that Mr Dyson would be able to identify sufficient financial information to provide proof of causation of loss. However, those problems, as the judgment shows, were never solved. Nevertheless, I am not persuaded that it should have been blindingly obvious to Mr 68. Arkin’s legal team that, however, strong his case might be on liability, it was necessarily doomed on causation of loss. Moreover, there is no evidence that the decisions to embark on the trial and to press on with the trial once the court had highlighted the obstacles to success were in any way influenced by MPC or any conduct on the part of its

representatives or Mr Merrill. Nor is there any evidence that MPC influenced or attempted to influence Mr Dyson or any of the other experts whose fees it was paying. Indeed, I find as a fact that Mr Dyson, with the assistance of the E&Y team, formed his own views on all the salient points. In so doing he acted to the best of his ability entirely independently of MPC. The fact that E&Y's outstanding fees substantially exceeded the amount of the guarantee with which MPC had provided them, in my judgment, played absolutely no part in the content of Mr Dyson's evidence. Both the structure of the MPC Agreement and the manner of its operation involved a 69. process of decision-taking as to the prosecution of the claim and the conduct of the trial in which leading counsel played a dominant part and in which MPC was permitted to play and, in fact, played no significant part at all. Once it had been committed to fund the proceedings, it was obliged to abide by counsel's advice. If one asks the question whether it was in a position where it had the ability to influence the conduct of the proceedings in a manner adverse to the due administration of justice, the answer is that it did not. The due administration of justice was insulated from the conduct or influence of MPC by Mr Arkin's legal advisers who could be expected to act with proper professional objectivity and who would be entitled to override any attempt by MPC to persuade them to act otherwise. In the course of argument much weight was placed by all the defendants on the 70. relatively high proportion of any recovery of damages or amounts paid in settlement recovered by Mr Arkin which MPC was to receive under clause 3.1 of the MPC Agreement.

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- v - It was submitted that so great was this stake in the success of the claim that MPC was in substance a party to the proceedings and ought therefore to be liable for the defendants' costs. This submission, in my judgment, entirely ignores the conceptual considerations involved in the exercise of the court's powers to make a costs order against a non-party funder which I have described earlier in this judgment. The fact that the funder is to share in the proceeds of the claim and may thereby derive a large profit from its investment will normally justify an order for costs because the very fact of the funder's stake in recovery represents a risk of interference in the due administration of justice. Although in such a case access to the court may have been provided to the funded party the countervailing consideration of avoiding the risk of interference in the due administration of justice displaces the public policy objective of such access. Generally, as the authorities demonstrate, the greater the stake, the larger is that risk. Where, however, the funder is ring-fenced out of the area of control over the conduct of the proceedings, that risk is removed. True enough, the funder's stake may be considerable, but the objective of safeguarding the due administration of justice is achieved. The characteristic of the funder's relationship to the proceedings which offends public policy has been removed. In those circumstances access to the courts re-emerges as an objective of greater weight. It is indeed highly desirable that impecunious claimants who have reasonably 71. sustainable claims should be enabled to bring them to trial by means of non-party funding. It is further highly desirable in the interests of providing access for such claimants to the courts that non-party funders, such as MPC should be encouraged to provide funding, subject always to their

being unable to interfere in the due administration of justice, particularly in order to forward their own interest in their stake in the amount recovered. If all professional funders were by definition to be subject to non-party costs orders, there would be no such funders to provide access to the courts to those who could not otherwise afford it. The defendants have in the course of argument not unnaturally emphasised the further 72. public policy objective of deterring claimants from bringing claims which they are likely to lose: cf Sir Thomas Bingham MR in relation to orders for security for costs in *Eurocross Sales Ltd v. Cornhill plc* [1995] 1 WLR 1517 at page 1523 and Phillips LJ in *TGA Chapman Ltd v. Christopher* [1998] 1 WLR 12 at page 22. They have also drawn attention to CPR 25.14(2)(b) which provides in terms for orders for security for costs against a person “who has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property which the claimant may recover in the proceedings” and have submitted that these authorities and that rule respectively identify and reflect the objective of deterrence of the bringing of a weak claim so as to prevent or discourage the injustice which might be caused if such claimants were immune from costs orders. 73. Now there can be no doubt that such a public policy objective is the basis for the principle that costs follow the event (my objective (i) at paragraph (18) above. However, once it is recognised that there may be cases where objective (ii) – access to the courts – displaces that objective, as it did under the Legal Aid Scheme and as it was held to do in the case of pure funders in *Hamilton v. Al Fayed*, one is entitled to approach the position in relation to non-party costs orders on the basis that objective (i) may not be determinative in all cases. The identification of the circumstances in which it may not be determinative can only be accomplished by reference to those public policy objectives which now prevail. For the reasons given in this judgment I am not persuaded that, with regard to the 74. order of priority of the public policy objectives as now formulated by *Hamilton v. Fayed* and *Factortame*, the fact that a professional funder fails to agree with the impecunious claimant to pay the defendant’s costs if the claim fails should necessarily lead to a costs order being 22 Colman J. Approved Judgment

- v - made against it. Thus, if a professional funder is sufficiently insulated from control over the proceedings and thereby prevented from interfering in the due administration of justice and does not attempt to do so, he could normally only be treated differently as to a costs order from a pure funder, if the fact that he had a chance of making a profit from his share of the proceeds made all the difference. It is therefore necessary to ask whether there is some aspect of public policy which would justify an order for costs in those circumstances. In *McFarlane v. E. E. Caledonian Ltd.* (No.2) 75. following a dicta of Lord Denning MR in *Hill v. Archbold* [1968] 1 QB 686, concluded that a professional funder’s contract which did not provide for the funder to pay the opposite party’s recoverable costs was on that account illegal in as much as it offended against the objective of deterring defective claims. In *Condliffe v. Hislop* [1996] 1 All ER 431 Kennedy L. J cited with approval the following passage from the judgment of Longmore J. at page 373:

[1995] 1 WLR 366 Longmore J., “It may well be that it is not necessary to every case of lawful maintenance that the maintainer should accept a liability for a successful adverse party’s costs; for example, a member of a family or a religious fraternity may well have sufficient interest in maintaining an action to save such maintenance from contractual illegality, even without any acceptance of liability for such costs. But in what one may call a business context (e.g. insurance, trade union activity or commercial litigation support for remuneration) the acceptance of such liability will always, in my view, be a highly relevant consideration.” 76. In this connection, however, it is important to appreciate that “highly relevant” is not equivalent to “determinative”. The overriding public policy consideration must on each set of facts be whether the objective of deterring weak claims should displace the objective of access to the courts. An illuminating example of a case where the access objective displaces the deterrence objective is that of a solicitor who acts under a CFA. He is to bear the costs and disbursements involved in the conduct of the case, including perhaps the cost of witnesses, and is to be entitled to recover profit costs by way of uplift if the claimant wins. Yet the law does not require that the solicitor undertakes to pay the defendant’s costs. No doubt the perception is that, if it were otherwise, solicitors would not wish to enter into such agreements and impecunious litigants would therefore be deprived of legal representation. In relation to the provision by a professional funder of an undertaking to pay the 77. defendants’ recoverable costs against the funded party there could be a wide range of possible factual situations extending from the case where the defendant’s costs bill was likely to be relatively modest and accordingly the cost of ATE cover could also be expected to be relatively low to cases where the potential costs exposure might run into millions of pounds and the cost of ATE cover would be so large that even a professional funder could not be expected to carry it as a potentially irrecoverable expense of the funding. In a case at the bottom end of the scale where adverse costs are likely to be modest and the cost of ATE insurance relatively low there is much to be said for the view that the Section 51 jurisdiction should be exercised against the funder on the basis that a requirement that he should have undertaken to carry those costs or insured against them as part of his funding agreement would not be expected to deter professional funders from entering into conditional funding agreements and could not therefore imperil the availability of such agreements in the interests of access to justice. However, at the other end of the scale, where the costs are of a potentially crippling order of magnitude and the cost of premium commensurately high, or where such insurance is not available, the considerations may be quite different. The court will then have to consider the possibility of a wider effect of its making a costs order against a professional funder who has failed to make provision for the defendant’s costs. If that 23 Colman J. Approved Judgment

- v - effect would be to deter professional funders in future from funding those claims where the defendant’s costs were likely to be very large, there would be a serious lack of the means of access to the courts for impecunious claimants with large and complex claims. In such circumstances a court might well be justified in taking the view that in the interests of

avoiding that consequence, the absence of an agreement to pay the defendant's costs should not attract a costs order against the funder under section 51. Such an order would in effect be saying to professional funders that, if it were not commercially viable for them to make provision for the defendant's costs, they should not have provided the funding in the first place, even if that meant depriving the claimant of his means of access to the courts. There was much reliance by the defendants on various passages from my judgment in 78. The *Kommunar* [1997] 1 Lloyd's Rep. 22, notably my observation at page 26 in relation to the unreported decision of Lindsay J. in *Eastglen Ltd. v. Grafton & Others* (12 May 1996): "I do not consider that the analysis of whether the facts of a given case amount to unlawful maintenance is essential for the exercise of the s.51 jurisdiction against supporting parties. As Mr Justice Lindsay observed, following the passage which I have cited: Nowhere is it said that if a supporter's position is such that he would, when maintenance was a tort, have been "guilty" of it that that in itself necessarily suffices to make him liable under s. 51 as a non-party. Conversely, his "innocence" of maintenance, had it still been a tort, is nowhere said of itself necessarily to lead to his escape from liability." 79. The defendants have sought on the basis of this passage to neutralise the effect of the reasoning of the Court of Appeal in *Factortame*, the exercise there being primarily to decide whether the funding agreement was illegal on the grounds of maintenance. But the passage in *The Kommunar* is saying no more than that the section 51 jurisdiction ought not necessarily to be exercised co-extensively with the establishment of unlawful maintenance. However, it is, in my judgment, now reasonably clear that the public policy objectives which I have sought to identify in paragraph (18) of this judgment are likely to be material matters to be taken into account both for the purposes of identifying unlawful maintenance and for the purposes of deciding how to exercise the court's discretion to make costs orders against non-party funders. The judgments in *Hamilton v. Al Fayed* and *Factortame* have developed the analysis of the relationship between, and the relative priority that ought be given to, the relevant public policy objectives beyond that which was perceived at the time of *The Kommunar* so that it is now possible to articulate more clearly the key underlying considerations relevant to this particular costs jurisdiction.

Conclusion

80. The application of these relevant principles set out in this judgment to the facts of this case leads to the conclusion that I should not exercise my discretion in favour of a costs order against MPC. 81. Although MPC was a professional funder which provided funding to Mr. Arkin to enable him to prosecute this claim and in the hope that its agreed share of those damages would provide it with a profit, its relationship to Mr. Arkin and to the proceedings generally was not adverse to considerations of public policy which would otherwise have called for a costs order. It could not and did not attempt to control or influence the conduct of the proceedings otherwise than in accordance with the advice of Mr. Arkin's leading counsel. 24 Colman J. Approved Judgment

- v - Had it not entered into the funding agreement, Mr. Arkin would have had to abandon the claim or fight it without calling expert evidence, a virtually futile exercise. MPC could not commercially undertake responsibility for the defendants' potentially huge costs as part of their funding agreement. ATE cover would have been so expensive as to render it impossible for MPC to bear the premium. The claim was very complex and the documentary evidence very difficult to analyse in such a way as to demonstrate before the trial started that the claim could have no real substance. MPC was entitled to rely on leading counsel's advice. In these circumstances the public policy objectives of the deterrence of weak claims 82. and of the protection of the due administration of justice from interference by those who fund litigation must yield to the objective of making access to the courts available to impecunious claimants with claims of sufficient substance. An order for costs against MPC would, I have no doubt, operate as a strong deterrent to professional funders to provide support for impecunious claimants with large and complex claims. 83. Accordingly, this application for costs against MPC is refused. 25

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