England and Wales Court of Appeal (Civil Division) Decisions

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Case Nos: A2/2004/0281, 0309 and 0314
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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
The Honourable Mr Justice Colman
[2003] EWHC 2844 (Comm) and [2003] EWHC 3088 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL
26 May 2005

B e f o r e :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE BROOKE
and
LORD JUSTICE DYSON

Between:

YEHESHKEL ARKIN — **Claimant**

- and –

BORCHARD LINES LTD
CAMOMILE LINES PLC
FURNESS WITHY(SHIPPING) LTD
ZIM ISRAEL NAVIGATION CO LTD
DEUTSCHE NAH-OST LNIEN GmbH & CO KG
KNSM-KROONBERGH BV — **First, Second & Third Defendants**
-and-
MANAGERS & PROCESSORS OF CLAIMS LTD — **First, Third and Fifth Part 20 Defendants**

11th Part 20 Defendants

**(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)**

**Charles Gibson QC and Peter Irvin (instructed by Constant & Constant) for Borchard Lines Ltd
Steven Gee QC and Hugh Mercer (instructed by Davies Arnold and Cooper) for Camomile, Furness, DNOL and KNSM
Vasanti Selvaratnam QC and Fergus Randolph (instructed by Berwin Leighton Paisner) for Zim
Guy Mansfield QC and Sarah Lambert (instructed by Gordon Dadds & Co) for MPC (in the first three appeals)**

HTML VERSION OF JUDGMENT

Lord Phillips, MR

This is the judgment of the court to which all members have contributed.

Introduction

1. The court is concerned with the considerable fall-out of a disastrous piece of litigation. The claimant, Mr Arkin, is and was a man without means. His lawyers were acting for him under conditional fee agreements. He was, however, only able to pursue his claim to judgment because of the financial support provided by a professional funder, Managers and Processors of Claim Ltd ('MPC'). Mr Arkin's claim failed. His lawyers have recovered nothing. MPC's support has cost them in excess of £1.3 million, for no return. Very substantial costs have been incurred by the defendants and the Part 20 defendants. Together these amount to nearly £6 million. This appeal is about those costs.

2. The four defendants, whom we shall call respectively Borchard, Camomile, Furness and Manchester, and the active Part 20 defendants, namely the third, whom we shall call DNOL, the fifth whom we shall call KNSM and the first and sixth, whom we shall Zim, sought to persuade Colman J that MPC should be ordered to pay their costs. In a judgment delivered on 27 November 2003 [2003] EWHC 2844 (Comm); [2004] 10 Lloyd's Rep 88 the judge declined to make the order sought. They appeal against that judgment, pursuant to permission granted by the judge himself.

3. Pursuant to a judgment dated 16 December 2003 Colman J ordered that Borchard should pay 90% of Zim's costs and 80% of each of DNOL and KNSM's costs. Borchard appeals against that order, pursuant to permission granted by Dyson LJ.

The facts

4. At this point we shall set out the facts in outline. In due course we shall have to elaborate some of them in a little more detail. Mr Arkin and his wife founded and owned a company called BCL Shipping Line Ltd ('BCL'). It traded between 1988 and 1992. Its trade was the operation of liner services on varied routes to and from Haifa and Ashdod in Israel. In January 1989 BCL complained to the European Commission that two shipping Conferences were infringing Articles of the Treaty of Rome, which are now Article 81 or 82. We shall refer to them as such. The Conferences in question were CONISCON and UKISCON. The defendants and the Part 20 defendants were members of one or both of these

Conferences, as were a number of other companies.

5. In November 1991 the European Commission issued a 'Statement of Objections' indicating an intention to fine the Conferences for breach of Article 81. The members of the Conferences other than Borchard joined together to defend themselves, instructing a single firm of solicitors to represent them and sharing the costs of so doing. There was a hearing in April 1992. In September 1993 the Commission determined that there was an insufficiently strong Community interest to justify proceeding to a decision because the Conferences' agreements had been amended in a material respect in early 1991.

6. Meanwhile, in May 1992, BCL had ceased trading. In September 1993 BCL was struck off the Companies Register for failing to file accounts. The company was insolvent and was dissolved. Mr Arkin contended that the company's business had been destroyed by the unlawful activities of the two shipping Conferences.

7. It was not until 1996 that Mr Arkin took the first steps that led to the litigation with which we are concerned. He got BCL restored to the Register and placed in liquidation. He then took an assignment from the liquidator of claims against the members of the Conferences for breaches of Articles 81 and 82 on terms that he would share any recoveries with BCL's creditors on a 50/50 basis. He obtained legal aid and, on 18 April 1997, served the writ in these proceedings. For reasons which have always been unclear, he impleaded only four UK-based members of the UNISCON Conference, Borchard, Camomile, Furness and Manchester (in fact the latter did not trade in the relevant market and played no effective role in the events complained of in the litigation with which we are concerned).

8. The Statement of Claim was served on 2 May 1997. It alleged that the four defendants acted collectively with the other members of the two Conferences to abuse a dominant position by predatory pricing and other activities that infringed Article 82 and that they were guilty of price fixing that infringed Article 81.

9. No sooner had Mr Arkin commenced proceedings than his legal aid was withdrawn. He had no resources to fund the litigation. He persuaded solicitors, and later counsel, to act for him on a conditional fee basis. The same course was not open to him in relation to expert evidence. However, under an agreement concluded on 2 August 2000, he persuaded MPC to agree to fund the expert evidence and the cost of organising documents on a contingent fee basis. MPC would only be paid if the claim succeeded. If it did, they would receive a share of the damages recovered.

10. On 27 July 2001 Borchard were granted permission to issue Part 20 notices against DNOL, KNSM and Zim.

11. The trial began on 20 February 2002 and, on 26 April 2002, it was adjourned part heard. On 23 May 2002 an application was made by the defendants and part 20 defendants that MPC should provide security for their costs. The application was refused. On 10 April 2003 judgment was given in favour of the defendants and the Part 20 defendants. Mr Arkin was comprehensively defeated. On breach of duty the judge found that Mr Arkin had failed to prove infringement of Article 81 or 82. On causation the judge found that BCL's cessation of trading had not been proved to be attributable to events on the relevant market.

The MPC appeal

MPC's role

12. MPC was founded in 1996 by the amalgamation of three firms that specialised in work relating to claims for compensation and, in particular, the quantification of loss. Its business was described by its Managing Director as "the managing and processing of compensation claims and providing assistance in claims assessment and litigation". As part of its business MPC responded to requests for assistance in funding litigation in circumstances where legal aid was not an option. In such circumstances, the funding was provided on terms that MPC would receive a percentage of the recovery if the claim succeeded and nothing if it did not.

13. Under their agreement with Mr Arkin, MPC undertook to instruct, engage and pay for one or more expert forensic accountant in the firm of Ernst & Young to provide a report on the quantum of BCL's loss attributable to the actions of the defendants. They also agreed to provide various services ancillary to this accountancy exercise, including secretarial services. Their agreed remuneration was 25% of

recoveries from the litigation up to £5 million and 23% thereafter. In addition they were to receive any payments in respect of costs of witnesses in relation to quantum recovered from the defendants. If the initial expert's report suggested that the damages recovered would be inadequate to enable MPC to cover their costs, they had an option to withdraw from the agreement. Thereafter, they were locked in. The agreement provided that Mr Arkin should have the conduct of the proceedings, but would need the consent of MPC to any settlement or compromise. In the event of dispute, the decision of leading counsel acting for Mr Arkin was to prevail.

14. The judge found that MPC took no part in the taking of decisions as to the conduct of Mr Arkin's case. Although MPC were kept well informed at all times, they did not attempt to control the litigation.

15. The judge accepted that, when MPC entered into the agreement, they estimated that their total outlay up to the end of the trial might amount to some £600,000. He also referred to evidence that suggested that MPC viewed the probable settlement range as being between US$ 5 million and US$ 10 million. While in argument counsel suggested that MPC may have had their sights on a very much larger recovery, we have seen nothing that invalidates the judge's assessment of the position.

The judge's approach

16. Although Mr Arkin's claim failed on every front, the judge observed that counsel had advised that Mr Arkin had a very strong claim and that he was not persuaded that it should have been blindingly obvious that, however strong the case might be on liability, it was doomed on causation of loss. He also observed that, if Mr Arkin had not entered into the MPC agreement, or an agreement with another professional funder on substantially similar terms, he could not have pursued his claim to trial. The judge's view of the implication of these facts appears from the following paragraph of his judgment:

> "71. It is indeed highly desirable that impecunious claimants who have reasonably 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."

17. The judge examined a number of authorities and subjected two to detailed scrutiny. These were *R (Factortame) Ltd v Transport Secretary (No 8)* [2002] EWCA Civ 932; [2003] 2 Lloyd's Rep 225 and *Hamilton v Al Fayed (No. 2)* [2002] EWCA Civ 665; [2002] 3 All ER 641. He concluded that these established that support of litigation furthered the important public policy objective of facilitating access to justice. Providing that such support was not attended by adverse features which would offend against the prohibition of champerty, such support was to be encouraged, not discouraged. Holding MPC liable for the defendants' costs would discourage the funding of litigation. Accordingly the applications for costs orders against MPC would be rejected.

18. The appellants attacked the judge's reasoning. Their counsel submitted that the judge had wrongly equated the test for deciding whether a funding agreement was champertous with the test for deciding whether costs should be ordered against a non-party. The two questions were not the same. The latter question required the court to have regard to the requirements of fairness. It was fair that a funder who, for profit, had supported a claim which had turned out to be without foundation, should be required to indemnify the successful defendant against legal costs reasonably incurred in resisting the claim.

19. The appellants submitted that their case was supported by the authorities. We turn to consider these.

The authorities

20. Section 51(1) and (3) of the Supreme Court Act 1981 provide:

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

In *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 the House of Lords held that this power was expressed in wide terms, leaving it to the rule making authority, if it saw fit to do so, to control its exercise by rules of court and to the appellate courts to establish principles for its exercise. In particular, there was no justification for implying a limitation on the power to award costs to the effect that an award could only be made against a party to the litigation.

21. CPR 48.2 provides that where the court is considering whether to exercise its power under section 51 to make a costs order against a person who is not a party to the proceedings, that person must be added to the proceedings for the purposes of costs only. It was in accordance with this rule that MPC were added as 11th Part 20 defendants.

22. CPR 44.3 deals with the discretion of the court in relation to awarding costs and the circumstances to be taken into account when exercising its discretion. CPR 44.3 (2)(a) provides that if the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. CPR 44.3 goes on to set out circumstances that may lead the court not to follow the general rule. Broadly speaking CPR 44.3 evidences a policy of using costs as a sanction for the `conduct of legal proceedings that deviates from the 'overriding objective' that is laid down by CPR 1. A party whose unreasonable conduct causes unnecessary costs to be incurred is at risk of being ordered to pay those costs, even if successful. This is not inconsistent with the main principle that underlies the general rule that the unsuccessful party pays the successful party's costs. It is important in the context of this appeal to bear that principle in mind.

23. 'Cost shifting' under which costs usually follow the event is not a universal rule in common law jurisdictions. In particular, it is not a rule that applies in the United States. The main principle that underlies the rule is that if one party *causes* another unreasonably to incur legal costs he ought as a matter of justice to indemnify that party for the costs incurred. A defendant who has wrongfully injured a claimant and who has refused to pay the compensation due should pay the costs that he has *caused* the claimant to incur, so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the defendant in respect of the costs he has *caused* the defendant to incur. Causation is usually a vital factor when considering whether to make an award of costs against a party.

24. Causation is also often a vital factor in leading a court to make a costs order against a non-party. If the non-party is wholly or partly responsible for the fact that litigation has taken place, justice may demand that he indemnify the successful party for the costs that he has incurred. There have been various circumstances in which the court has considered making an order for costs against a non-party. We shall confine our attention to those cases where this course has been urged on the ground that the non-party had supported the unsuccessful claimant.

25. By way of background we must refer to the decision of the Court of Appeal in *Hill v Archbold* [1968] 1 QB 686. In that case an issue arose as to whether a trade union, which had funded an unsuccessful libel action by two claimants, had been guilty of unlawful maintenance. Giving the leading judgment Lord Denning MR held that it had not. He said at pp 494-5:

> "Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side."

26. In *McFarlane v EE Caledonia Ltd (No 2)* [1995] 1 WLR 366 the conduct of a Scottish company was in issue. It had been formed to support personal injury claims on a contingency basis and had done so in relation to an unsuccessful claim for personal injury that had been brought in the English court. Its policy was not to accept liability for a successful adverse party's costs. Longmore J made an order for costs against the company. Citing *Hill v Archbold*, he observed that the exercise of this policy affected the contingency agreement with illegality under English law, quite apart from the additional illegality that arose out of the champertous nature of the agreement.

27. In *Murphy v Young's Brewery* [1997] 1 WLR 1591 the plaintiff had brought an unsuccessful action for wrongful dismissal. This had been funded as to £25,000, the limit of the cover, under what would now be called before the event (BTE) insurance against legal costs. The successful defendant sought an

order for costs against the insurers. In the leading judgment Phillips LJ rejected this application, holding that legal expense insurance was in the public interest in that it not only provided desirable protection to the assured, but a potential source of meeting the costs of the adverse party. Agreeing, Sir John Balcombe distinguished the case from one in which a third party funded a particular claim and had a direct commercial interest in the outcome.

28. The result in that case differed from that in *Chapman Ltd v Christopher* [1998] 1 WLR 12, where a costs order was made against insurers. The insurers in question were the liability insurers of an unsuccessful and impecunious defendant. They were contingently liable to the claimants by reason of the provisions of the Third Parties (Rights against Insurers) Act 1930. They funded and conducted the unsuccessful defence in their own interest. But for their intervention the action would not have been defended. All of these factors were material in leading the Court of Appeal to the conclusion that it was just to order the insurers to pay the successful claimants' costs.

29. We now come to one of the decisions to which Colman J attached particular importance. In *Hamilton v Al Fayed (No 2)* the claimant, an impecunious MP, brought a libel action against a well-known and extremely wealthy businessman. Most of his legal expenses were paid for out of a 'fighting fund' to which several hundred donors had contributed. The action failed and the defendant sought an order that nine of the major contributors to the fighting fund, whose identities he had ascertained pursuant to a court order, should pay the costs which he was unable to recover from the claimant. The judge rejected this application and the claimant appealed.

30. The leading judgment in the Court of Appeal was given by Simon Brown LJ. After extensive consideration of authority, including the cases to which we have referred above, he identified that there was a conflict between two principles: on the one hand the desirability of the funded party obtaining access to justice; on the other, the desirability that the successful party should recover his costs. He considered that, where the funders were 'pure funders' the former principle should prevail. There were indications that this result accorded with public policy. The statutory scheme under which lawyers could act under a conditional fee agreement ('CFA') encouraged litigation in circumstances where the defendant would have to pay the claimant's costs, including a success fee, if the claim succeeded, but would be unable to recover his costs if the claim failed. "If in these cases solicitors (or, indeed, barristers) are not to be liable for the other side's costs if their client's claim fails, why should the pure funder be?" (paragraph 45). Where the legal aid fund supported a claim that failed, the successful defendant would not normally have recourse to the fund to recover his costs. Nor did the law require an impecunious claimant to put up security for costs as a condition of pursuing his claim "so long as the law continues to allow impoverished parties to litigate without their having to provide security for their opponent's costs, those sympathetic to their plight should not be discouraged from assisting them to obtain representation" (paragraph 48).

31. The term 'pure funder' was one that Morland J had employed in the court below to describe a funder who contributes to costs as an act of charity, without control over how his donation is spent, who plays no part in the management of the trial and who has no interest in its outcome, other than the hope that his donation may be repaid if the claim succeeds. Morland J had commented, in passages cited with apparent approval by Simon Brown LJ, on the contrast between the pure funder and the professional funder:

> "70. 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 …
>
> 71. … It would be very exceptional that a situation would arise where it would not be just and reasonable to make a s51 order against a professional funder.
>
> 72. 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."

32. Simon Brown LJ recognised that one benefit of the principle that costs follow the event was that this deterred the bringing of actions that were likely to be lost – see *Roach v News Group Newspapers Ltd* [1998] EMLR 161. The fact that lawyers would assess the merits carefully before appearing under a CFA, and that the Legal Services Commission required a similar exercise before approving the grant of legal aid were likely to achieve the same benefit. Pure funders were less likely to exercise the same careful judgment. Nonetheless, the desirability of access to justice prevailed.

33. In a concurring judgment, Chadwick LJ observed at paragraph 63

> "The starting point, as it seems to me, is to recognise that, where there is tension between the principle that a party who is successful in defending a claim made against him ought not to be required to bear the costs of his defence and the principle that a claimant should not be denied access to the courts on the grounds of impecuniosity, that tension has to be resolved in favour of the second of those principles."

Hale LJ concurred, albeit with some reservation.

34. In *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi* [2004] EWCA Civ 292 this court refused an application for a costs order against an individual who had provided funding for an unsuccessful defendant. We remarked at paragraph 54:

> "We are not sure that the adjective 'pure' assists in the analysis. It is, we believe, designed to draw a distinction between those who assist a litigant without ulterior motive and those who do so because they have a personal interest in the outcome of the litigation. Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation. Intervention to this end will not normally render the intervener liable to pay costs. If the intervener has agreed, or anticipates, some reward for his intervention, this will not necessarily expose him to liability for costs. Whether it does will depend upon what is just, having regard to the facts of the individual case, if the intervention is in bad faith, or for some ulterior motive, then the intervener will be at risk in relation to costs occasioned as a consequence of his intervention."

35. Colman J cited extensively from the judgment of this court in *Factortame (No 8).* That judgment concerned fees paid by the successful claimants to a firm of accountants, Grant Thornton. The claimants had agreed to pay Grant Thornton 8% 'of the final settlement received'. This was to constitute payment for Grant Thornton's accountancy and back-up services in relation to the assessment of quantum and for the retention and payment by Grant Thornton of independent expert witnesses. The defendant challenged the claimants' right to recover this payment as costs on the ground that the agreement in question was champertous and unenforceable. The court rejected this argument. Relevant to its decision was the fact that Grant Thornton did not attempt to exert any influence upon the conduct of this phase of the litigation, the fact that the 8% recovery did not exceed what would have been fair remuneration for Grant Thornton's services, indeed it acted as a cap on their fees, and the fact that the agreement to remunerate Grant Thornton in this way had been necessary in order to procure for the claimants access to justice. The court observed that the introduction of CFAs evidenced a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees would be contingent on success.

36. The most recent decision, delivered after Colman J's judgment, was the one upon which the appellants placed most reliance. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2004] 1 WLR 2807 was an appeal to the Privy Council from the Court of Appeal of New Zealand. In giving the advice of the Board, Lord Brown of Eaton-under-Heywood stated that there was no difference of approach on the part of the courts of England, New Zealand and, indeed, Australia when considering whether to make an award of costs against a non-party. The Board held that, in the circumstances of the case before it, justice required a costs order against a non-party. The non-party in question was a family company, 'Associated', which had advanced monies to the defendant in the litigation which was secured by a debenture. Associated had funded appeals to the Court of Appeal and to the Privy Council, in their own interest, and those appeals would not have been brought without their support. At paragraph 25 Lord Brown set out the principles to be derived from the English and Commonwealth authorities 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 paragraph 40 of *Hamilton v Al Fayed* as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.
>
> 3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence - see, for example, the judgments of the High Court of Australia in *Knight* and Millett LJ's judgment in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in *Knight*, provided that he is "a real party in ... very important and critical respects" - see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406, referred to in *Kebaro* at pp 32-3, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13 (2) (f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".
>
> 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."

Discussion

37. If Colman J had had the benefit of the summary of the principles given by Lord Brown in *Dymocks Franchise Systems* we do not believe that he would have approached the fact that MPC were professional funders in the way that he did. After considering the passages from the judgment of Morland J in *Hamilton,* that we have quoted at paragraph 31 above, he held at paragraph 21:

> "21. It is, in my judgment, a misunderstanding of this passage and seriously inconsistent 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."

38. While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event. *Factortame (No 8)*, on which he strongly relied, was not a case in which there was any need to take this balancing factor into account. In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.

39. If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.

40. The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.

41. We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided.* The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.

42. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.

43. In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. We have not, however, had to explore the ramifications of an extension of the solution we propose beyond the facts of the present case, where the funder merely covered the costs incurred by the claimant in instructing expert witnesses.

44. While we have confined our comments to professional funders, it does not follow that it will never be appropriate to order that those who, for motives other than profit, have contributed to the costs of unsuccessful litigation, should contribute to the successful party's costs on a similar basis.

The result in this case

45. MPC will not have entered into the funding agreement with Mr Arkin on the assumption that they would be held liable to pay, or to contribute to, the defendants' costs should Mr Arkin's claim not succeed. They must, however, have contemplated that this was at least a possibility. At the hearing of the application against MPC for security for costs, which took place in the period during which the trial had been adjourned, it does not appear that MPC challenged the proposition that they were contingently at risk of a costs order. In his judgment on that application Colman J remarked that the magnitude of the risk that MPC would be ordered to contribute to the defendants' costs should Mr Arkin's claim fail seemed to him to be 'very substantial'. In these circumstances, we can see nothing unjust in applying the approach that we have outlined above. Accordingly, we propose to order that MPC pay £1.3 million by way of contribution to defence costs. To whose benefit this payment should accrue, and the form of order necessary to ensure that it does, is a matter to which we shall revert after the second part of this judgment: see paras 83-84 below.

The costs order against Borchard

46. We now turn to Borchard's appeal against the order made by the judge on 16 December 2003 to the effect that it should pay 90% of Zim's costs and 80% of each of DNOL's and KNSM's costs. DNOL and KNSM, while resisting this appeal, are seeking in the alternative an order that Borchard should pay the whole or an appropriate part of the costs they incurred in preparing and adducing expert evidence for the purposes of the trial.

47. The judge's general approach, which we will examine in greater detail in due course, was that there was no particular feature of this case to take it outside the general rule that the costs of Part 20 proceedings should follow the event in the Part 20 proceedings, so that when the claimant's claim failed and the Part 20 proceedings were as a consequence dismissed, the claimant in the Part 20 proceedings should pay the costs of the defendants to the Part 20 proceedings whom it had chosen to join.

The history of the litigation

48. In order to understand the reasons why Borchard came to join Zim and other Conference members as Part 20 defendants in the summer of 2001 it is necessary to understand the course which the litigation had taken up to this point. For all practical purposes connected with the litigation we need only consider the two Conferences as comprising four companies each: the UKISCON Conference comprising Borchard, Furness, Camomile and Zim, and the CONISCON Conference comprising Borchard, DNOL, KNSM and Zim. Zim, who were the Israeli national carrier and by far the single largest participant in each group, were not joined to the action by Mr Arkin, although at the relevant time they had an office in London at which service could have been effected. Instead, he limited himself to suing the three other companies in the UKISCON Conference (we exclude the fourth defendants Manchester, for whom see para 7 above). As a result a direct claim by Mr Arkin against Zim, DNOL, and KNSM became effectively statute-barred soon after the writ was issued, but they were always answerable to a claim in Part 20 proceedings.

49. By the spring of 2000, when Borchard's Amended Defence was served, the litigation was limited to Arkin's claims for damages for breaches of duty committed during the six years immediately preceding the issue of the writ in April 1997. The general nature of Mr Arkin's claim is summarised in para 8 above. In essence he was saying that the companies we have mentioned, acting "collectively as both Conferences", caused loss to BCL by the abuse of their dominant position. Part of his claim involved a contention that the Conferences were not entitled to the benefit of a block EC exemption in favour of liner Conferences for the reasons the judge summarised in paragraph 31 of his main judgment.

50. Zim was a very important participant in each Conference, and Mr Arkin's decision to seek compensation from the three other extant members of the UKISCON Conference, and not from Zim, created difficulties in terms of the documentary material and other evidence which would be available to the trial judge. These difficulties were accentuated because Mr Arkin developed a very detailed case to the effect that he was also entitled to rely on Zim's anti-competitive activities on a container route which embraced ports in South Africa, Greece, Turkey and Israel, in which none of the other participants in the two Conferences were involved at all. Paragraphs 4-10 of the "strike-out" judgment, delivered on 19 June 2001, shows how this case first surfaced in a single paragraph in a schedule to the amended Statement of Claim, was developed in further information served in January 2000, was further developed in the Reply served in July 2000, and particularised in greater detail when yet further information was served and later amended in the ensuing months. These allegations created unusual difficulties from a procedural standpoint because Borchard and the other two defendants were being charged with legal liability in respect of matters in which they had not participated at all and in which the prime mover, Zim, was a non-party outside the jurisdiction of the English court. We will refer to these issues generally as "the ancillary market issues".

51. Furness (a member, like DNOL, of the Hamburg Sud group of companies) and Camomile (a member, like KNSM, of the P & O group of companies) decided from the outset to instruct the same firm of solicitors, Davies, Arnold & Cooper ("DAC"). Borchard, which is a family-owned company, declined a suggestion that they should instruct the same firm, and they later turned down an overture from DAC to the effect that they should collaborate in preparing the evidence for the trial: in particular, they refused to share the cost of instructing expert witnesses. In August 2000 Miss Holmes, the DAC solicitor in charge of her clients' case, called on the Haifa offices of Mr David Malkoff while she was visiting Israel on other business. He was a lawyer for Zim who had defended most of the Conference participants when they were collaborating in their response to BCL's complaints to the EC Commission in the late 1980s.

52. Mr Malkoff gave her access to such documents as he had in his office, which mainly related to the EC case, but when she asked for access to Zim's documents more generally (in so far as they related to activities that were relevant to the issues in this litigation), he told her that Zim had now closed their London office. All in all she did not receive a very positive response to her request.

53. The judge held a number of hearings in late 2000 and early 2001 to deal with different aspects of the case, and at one such hearing, on 28 February 2001, he discussed with counsel some outstanding issues relating to discovery of documents, and in particular a problem arising out of the non-availability of the minutes of a body called the Freight Marketing Committee ("FMC"), of which only two sets of minutes were in the possession of any of the parties. Counsel for Mr Arkin told the judge that there was no possibility that his client might be able to get any more of these minutes, and that Zim was the likely repository of these documents. The judge suggested that the effective way forward would be for his client either to approach Zim or to bring proceedings against them. Mr Arkin refused to take the latter course, and the upshot of further discussion between the judge and counsel was that the judge made an order in these terms:

> "The Claimant, by 1st March 2001, will write to Zim to ask for disclosure of the additional documents referred to in the Claimant's application for disclosure (which application, for the avoidance of doubt, remains currently pending before the Court). The Defendants will also write to Zim informing Zim that they have no objections to Zim's production of those documents to the Claimant, and the Defendants will copy those letters to the Claimant by 1st March 2001."

By the same order the judge directed that the matter should be set down for a seven-week trial starting on the first available date in January 2002.

The approach to Zim in March 2001 and the strike-out application

54. On 1 March, therefore, the claimant's solicitors wrote to Zim, in pursuance of the judge's order, indicating a very large variety of documents of which they required disclosure. On 5 March Mr Tubb (of Borchard) told his solicitor Mr Reynolds that he had spoken to Mr Stramer (of Zim) who told him that the letter of 1 March had been referred to Mr Malkoff's office. Mr Tubb gained the impression, however, that Zim would be unlikely to reply to the letter in any event, and that is how things turned out. On 6 and 7 March Borchard's solicitors and DAC both wrote to Zim along the lines suggested by the judge's order, but Zim did not respond to any of these letters, either.

55. The effect of these problems might have been mitigated if the defendants had succeeded in an application they now made to the judge for an order striking out the ancillary market issues, alternatively for summary judgment on this aspect of the case. On 19 June 2001 the judge dismissed this application, but during his judgment he showed himself well aware of the difficulties created by Zim's non-involvement in the litigation. He said at para 50 that it could not be assumed that anything like all the relevant evidence from the defendants and Zim was before the court, and that further disclosure might well give rise to evidence which was further supportive of the claimant's case He had referred earlier in his judgment to the role played by Mr Levy (of Zim), and he now said:

> "…[I]t cannot be said that there is no realistic prospect of any further supportive evidence by means of further disclosure or by means of the cross-examination of witnesses who are likely to give evidence. For example, the defendants might be placed in a very questionable position if without good reason they failed to call Mr Levy, even though he was an employee of Zim and not of the defendants. Given that there is some, albeit slender evidence to support the claimant's allegation, it would be quite unfair to deny the claimant the opportunity for further disclosure and further investigation through cross-examination offered by a full trial. CPR 24.2 has the purpose of anticipating the claim which is fanciful but not the claim which is merely improbable."

56. The judge had accepted (at para 45) that there was some uncertainty as to the minimum that needed to be proved in order to implicate in liability for the anti-competitive acts of a cartel member other members of the cartel if they had participated in arriving at an agreed overall anti-competitive policy and had also exchanged information about competitors, even if they had little or no knowledge of the specific anti-competitive conduct of that member. He took the view, however, that the law was clearly in a process of development, and that the outcome in any particular case would depend on the precise facts as to the availability of information to cartel members and their means of knowledge and actual knowledge of such facts.

The decision to join the Part 20 defendants and the Phase 3 directions

57. This order created a dilemma for Borchard and the other two defendants. Mr Reynolds believes that Mr Tubb (who had died before Mr Reynolds made a witness statement about these events two years later) spoke to Mr Stramer at least twice in the week following the strike-out judgment. Nothing came of these conversations, and Mr Tubb then instructed his solicitors to seek to join Zim (and DNOL and KNSM, as the other two relevant members of CONISCON) as Part 20 defendants. On 27 July 2001 the judge granted this application. In giving detailed case management directions leading up to a trial commencing on 28 January 2002 the judge accepted an undertaking from DAC's clients that they would write to Zim forthwith to call for Zim to make available any relevant documents during the period April 2001 to May 2002. In other words, Borchard sought to resolve the dilemma created by the judge's order by joining further parties, including Zim, as Part 20 defendants. DAC's clients, for their part, sought to proceed by way of further correspondence with Zim.

58. On 17 September 2001 the judge gave directions in the Part 20 proceedings. That hearing, of which we have been provided with a transcript, throws a vivid light on the attitude of all the defendants following the strike-out judgment, with the trial due to start in four and a half months' time. After referring to Miss Holmes's evidence about her visit to Haifa the previous year, Borchard's counsel told the judge:

> "This rather seems to bear out Mr Reynolds's surmise…that Zim are deliberately dragging their heels. That perhaps makes it all the more pressing that some sort of an order should be made that brings them here, albeit kicking and screaming, and makes it desirable that they should be forced to join the party or be bound by the result if they do not want to.
>
> What we discussed last time, what we would want to avoid particularly in a case where we cannot win, and you are never going to get any costs from the claimant, is to have to spend a lot of money pursuing Zim in separate proceedings where they may not even be bound by the result of the earlier proceedings and where a whole lot of new material and evidence may suddenly pop up which may show that the original result perhaps was wrong. They have not acted expeditiously. They have obviously been keeping tabs on the action as it goes along, as they must be able to see some potential liability even at the stage where interlocutory proceedings were going on."

59. Counsel then appearing for the second and third defendants, for his part, told the judge (after the judge had resolved to make an order for substituted service on Zim):

> "Our position is we would like a CMC earlier because we do want Zim to actively participate in the trial…….
>
> We do want Zim brought in. We do want them brought in as soon as possible and we do want a CMC as soon as possible so that we can start marshalling our forces. So we would suggest if they are allowed 14 days to acknowledge service."

60. The next case management conference took place on 11 October 2001. By this time DAC had been instructed by DNOL and KNSM as well, and Zim was now represented by a firm of London solicitors. In the light of Zim's concerns about the imminence of the trial date, the judge postponed the start of the trial for two weeks and directed that the hearing would be divided into two phases. Phase 1 would be confined to issues of liability and questions in respect of the North European market. Phase 2, which would relate to all other issues, including the ancillary market issues, would be heard "not before the beginning of the April term". In further directions, given on 20 December 2001, the earliest date for the start of the Phase 2 trial was now to be July 2002.

61. Further directions were given by the judge, in agreed terms, on 18 January 2002. These included what were called "Phase 3 Directions" in these terms, so far as are material:

> "7. Issues of contribution, if relevant, shall be resolved in a third phase to the trial of this action, such phase to follow the judgment on matters of liability and question in the main action.
>
> …

> 9. Each Defendant and Part 20 Defendant shall be deemed to have served a Part 20 contribution notice on every other Defendant and Part 20 Defendant. In the event that the matter cannot be agreed between the parties, there shall be directions at a further CMC for appropriate pleadings to be exchanged in respect of such contribution proceedings following the judgment on liability and questions on the main action.
>
> 10. Each Part 20 Defendant to be bound by the judgment of the main action.
>
> …
>
> 12. Nothing in this part of the Order is intended to affect the incidence of costs."

62. On 27 May 2002 the judge made an order directing that the balance of the trial of the Phase 1 proceedings would be completed in the hearing now fixed for October 2002, and noting that the Phase 2 proceedings had been discontinued. (We were told that Mr Arkin took this step following some unfavourable comments by the judge on the case he had heard so far). The hearing of the Phase 1 trial was completed on 31 October, and after a hearing arranged before Christmas for counsel's closing submissions, the judge delivered his main judgment on 10 April 2003, when he dismissed all the claimant's claims (for his judgment see [2003] EWHC 698 (Comm); [2003] 2 Lloyd's Rep 225). His judgment on the incidence of costs as between the defendants and the Part 20 defendants was delivered on 16 December 2003 ([2003] EWHC 3088 (Comm); [2004] 1 Lloyd's Rep 646).

The judge's reasons for his judgment on costs

63. In this costs judgment the judge accepted that what he called a cut-through order (see *Sanderson v Blyth Theatre Company* [1903] 2 KB 533) might be made in those cases where a claimant was impecunious and justice required that an unsuccessful defendant should pay the costs of a successful defendant direct. The judgment of this court in *Johnson v Ribbins* [1977] 1 WLR 1458, however, showed that the impecuniosity of the claimant was not in itself a feature sufficient to justify a departure from the normal rule that the costs of third party proceedings should follow the event in those proceedings. He accepted that this type of order should not be regarded as inviolate, but he said that it would only be in exceptional cases that what he called "the separability principle" (whereby Part 20 proceedings were treated as quite separate from the main proceedings) would justifiably be departed from. His judgment continued (at paras 34-36):

> "34. Further, in the present case, the Part 20 proceedings were not such as would necessarily be conclusively determined by the result of the main action. I can see that in cases where, if the defendant lost to the claimant, it would inevitably follow that the third party must be liable to the defendant, to impose on the defendant the burden of the Part 20 defendant's costs as well as his own might amount to an injustice so great as to justify making an order that the Part 20 defendant should recover his costs direct from the impecunious claimant. However, where, as in this case, there were likely to be discrete Part 20 issues arising out of the Conference Agreements and the conduct of Zim in relation to conference members, the Part 20 issues do no more than overlap on the issues in the main action. They are not co-extensive.
>
> 35. Additionally, this is not a case where Borchard and the third party Part 20 defendants made common cause as to joinder. Quite the contrary. Borchard did not send letters before action or invite conditional acceptance of liability before commencing the Part 20 proceedings. Instead it pursued an arm's length approach to the Part 20 defendants which was consistent with the maintenance of the separate nature of the Part 20 proceedings. Further, Borchard has derived from the joinder of Zim the benefit of both factual and expert evidence, while adducing no expert evidence itself. It may well be that even if Zim had not been joined, the factual evidence would still have been available. However, the expert evidence would not.
>
> 36. In these circumstances this would not, in my judgment, be an appropriate case in which to make a cut-through order confining the Party 20 defendants to recovery of their costs direct from Mr Arkin."

64. The judge then refused to make an order requiring Borchard to contribute to the costs incurred by the second and third defendants in instructing expert witnesses. He also refused to spare Borchard the

obligation of paying the whole of the costs incurred by the Part 20 Defendants in instructing expert witnesses. He said (at para 40):

> "In reaching this conclusion I have very much in mind that Borchard was aware at the time when it joined the Part 20 defendants that it was facing an impecunious claimant and that absent a section 51(3) order against an outside funder (MPC) it was exposed to the risk of the court taking the approach to costs identified in *Johnson v. Ribbins.* It made no attempt before the trial to co-operate with the other conference members as to the provision of or the cost of expert evidence and was content to pursue its defence by the cheapest means possible – reliance on the expert evidence adduced and paid for by others. There was a very low level of co-operation between Borchard and all the other parties as to how expert evidence was to be deployed by way of defence."

65. It is not easy to see how in reaching his ultimate conclusions the judge took into account some of the matters to which he had alluded at the beginning of his judgment. Thus in para 3 he recalled how Mr Arkin had made specific allegations against Zim in relation to the ancillary market issues, and how it had become clear at an early stage in the pre-trial hearings that evidence of central importance to the case against all the other defendants was likely to be in Zim's possession. In para 4 he described how he had himself raised the question of how the trial could be sensibly conducted in Zim's absence, and how he had given a strong indication that Zim ought to be joined. In para 5 he said he was satisfied that there was nothing intrinsically unreasonable in joining Zim :

> "In particular, Zim occupied a central position in Mr Arkin's allegations of abusive conduct and, on the face of it, had evidence directly material to those allegations. Secondly, although Zim had given a measure of co-operation to Miss Holmes of the 2-4 defendants' solicitors in the course of her visit to Israel in 2000, it was far from clear whether they had approached the process of disclosure of documents as effectively and searchingly as would have been the case if they had been a party to the proceedings. Thirdly, it was quite unrealistic for Borchard to fight the claim on the basis that if Mr Arkin succeeded, separate proceedings could be pursued against Zim. The risk of inconsistent findings was far too great to leave that to chance."

He went on to say (at para 6) that Zim played a major part in the trial, did not cause increased costs by duplication of evidence given by other parties, and adduced evidence of facts, disclosed documents and made available factual witnesses who gave important evidence helpful to the court.

The practical effect of the judge's costs order

66. Borchard complained that the injustice of the judge's order can be seen in the following table, which shows the effect of his order when applied to the costs claimed by the various defendants and Part 20 defendants:

	Own Costs	Zim's Costs	DNOL/KNSM's Costs	Total Liability
Borchard	£813,000	£1.62 m	£1.085 m	£3.518 m
Furness/Camomile	£1.830 m			£915,000 each
DNOL/KNSM	£1.36 m		£271,000	£135,500 each
Zim	£1.8 m	£180,000		£180,000

67. We have recited the facts as they appeared to Borchard. Borchard's own costs were lower than those of the other parties because they adduced no expert evidence and their factual evidence was attenuated by reason of Mr Tubb's untimely death. It appears that they did not join in the common defence to the EC Commission proceedings, either, because of their differences of opinion with other conference members at that time.

68. The costs of DAC's four clients (whom we will call "the DAC parties") were substantially greater because they bore the cost of instructing accountancy experts and shipping experts at the trial. Although DNOL/KNSM agreed to share the expense equally with FW and Camomile from the time they were joined to the proceedings, Mr Steven Gee QC, who appeared for all the DAC parties, accepted

that this internal costs sharing agreement would not necessarily be binding as against Borchard when costs came to be assessed.

69. Zim, for its part, instructed an economist, but the bulk of its costs represented legal costs and disbursements and the cost of advisory accountants who did not give evidence at the trial. The judge, as we have seen, praised Zim for not duplicating the costs of other parties. Zim adduced evidence from Mr Malkoff to the effect that Borchard had made no attempts to secure Zim's co-operation until after the Part 20 proceedings had been issued. He averred that Zim had expressed itself more than willing to co-operate with DAC, and that they would have been willing to help Borchard if they had approached them. Earlier, in October 2001, he had filed a witness statement in which he sought to soften the impression that might have arisen from Borchard's need to seek an order for substituted service and the delay that occurred in August and September 2001, culminating in an acknowledgement of service filed by Zim on 2 October 2001 indicating an intention to challenge the jurisdiction of the English Court.

70. He did not address the problems created earlier by Zim's failure to respond in any way to the letters sent to them, at the judge's direction, in early March 2001 (see para 54 above). Instead he said that Zim was just starting to look for relevant documents in early October 2001, and he accepted that his clients were the only participant in either Conference who were in a position to lend evidence dealing with the relevant facts relating to the route to South Africa.

71. When the judge made his ruling on the incidence of costs as between the defendants and the Part 20 defendants, the Phase 2 proceedings had been discontinued and no expense had been incurred as between any of the parties in connection with the prospective Phase 3 contribution proceedings other than the exchange of statements of case in the Part 20 proceedings whose effect has been helpfully set out in a single Part 20 case memorandum. We heard enough by way of submissions from counsel, however, to show us that even if the judge had held that all these parties had collective responsibility for breaches of Articles 81 or 82 of the Treaty of Rome vis a vis BCL, there would have been plenty for them to argue about if and when the judge went on to consider how much of this collective liability should fall on each of them. Except for the costs of preparing their pleaded cases, however, the parties did not incur any expense in preparation for this potential dogfight.

How should the costs be apportioned justly?

72. How, then, should the costs have been justly apportioned between the various parties, given that they all took part in the successful defence to the claimant's claim? And was the judge wrong in the approach he adopted and the order he made?

73. As has often been said by this court, the CPR represents a new procedural code, and it is often unwise to place too much weight on decisions made under the former rules. The ground rules are very simply set out in CPR Parts 1, 20 and 44.

74. CPR 1.1 and 1.2 make it clear that the overriding objective of enabling the court to deal with cases justly must permeate the interpretation of any rule and the way in which the court exercises any power given to it by the Rules. CPR 20.3(1) provides that a Part 20 claim should be treated as if it were a claim for the purposes of the CPR, and the note beneath CPR 20.9(1)(c) refers back to the court's case management powers under CPR 3.1(2)(e) and (j). And CPR 44.3 provides that:

> "(1) The court has discretion as to
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but
>
> (b) the court may make a different order."

75. In the usual course of things the court will consider the incidence of costs in the main proceedings quite separately from the incidence of costs in the Part 20 proceedings, but nobody submitted that this was an inviolable rule. Even under the former regime, and long before the House of Lords illuminated the wide scope of section 51 of the Supreme Court Act 1981 in *Interbulk Ltd v Aiden Shipping Co Ltd* [1986] AC 965, this court had held that both the High Court and the county court had "full and ample power to make such orders as to costs as between defendants and third and subsequent parties as the justice of the case may require" (see *Edginton v Clark* [1964] 1 QB 367, 384 where Upjohn LJ said that the court would have been prepared to order that the plaintiff should pay the third party's costs directly if the defendants had invited them to).

76. *Johnson v Ribbins* [1977] 1 WLR 1458 is a good example of a case decided under the old regime. A legally aided plaintiff had failed in her action against her mortgagees for negligently selling her hotel at a gross under-value. The mortgagees' third party claim against the estate agents who had advised them therefore fell to be dismissed. This court applied the normal rule (see RSC O62 r3(2)) that costs should follow the event in the third party proceedings, and said that the judge had been wrong to make an order that the legally aided plaintiff, who had the benefit of the costs protection available to legally aided parties, should pay the third party direct. Goff LJ said at p 1464 G-H:

> "Apart from the impact of legal aid, the consideration of which, as we have already observed, is excluded by the Act itself, we can see nothing which the defendant can call in aid except the impecuniosity of the plaintiff, but it cannot be right to deprive a third party of an order for costs to which he is otherwise entitled against the defendant, because the defendant when looking to the plaintiff for reimbursement found a person not worth powder and shot."

77. In the ordinary run of cases under the CPR the same principle will be applied. A successful Part 20 defendant should not be deprived of his prima facie right to an order for costs against a Part 20 claimant merely on the ground of the claimant's impecuniosity (see Goff LJ at pp 1465H – 1466A). The fact that in an appropriate case a defendant may, and a Part 20 defendant may not, obtain an order for security for costs against a claimant may be a relevant factor in some cases, but in the present litigation DAC endeavoured but failed to obtain such an order against Mr Arkin, so that the point does not arise. The issue that has to be determined on the peculiar facts of the present litigation is whether the interests of justice deemed that some different order should be made (see CPR 44.3(2)) as between the various Conference participants who successfully beat off the claimant's claim.

78. In our judgment the judge fell into error in the exercise of his discretion by apparently giving no weight to the important matters to which he alluded in paragraphs 3-5 of his judgment (see para 64 above) and by failing to take into consideration the very unusual circumstances of the claim. This was akin to being a conspiracy claim in which it was being asserted that the various Conference participants bore collective responsibility pursuant to Articles 81 and 82 of the Treaty of Rome for the losses BCL had suffered at the hands of any of them, so long as they were implementing Conference policy. And not only that: it was also being asserted that they bore collective responsibility in relation to the ancillary market issues, about which none of them, apart from Zim, knew anything at all. The fact that Mr Arkin chose to sue only three of them, and did not sue Zim or the other parties to the CONISCON Conference, must not be permitted to produce an unjust result, so far as the incidence of costs as between the Conference parties is concerned.

79. As the judge indicated, Zim were joined after he had intimated that he could not see how he could try the case, and particularly the ancillary issues, fairly in the absence of Zim's documents and the oral evidence of Mr Levy. Although Mr Malkoff was to assert in the autumn of 2001 how co-operative his clients would have been willing to be in the absence of joinder, their previous conduct (see paras 50-54 above) did not evidence such willingness in any great measure, and after the failure of the judge-inspired correspondence in March 2001 and the judge's refusal to strike out the ancillary market issues in mid-June 2001, Borchard had to take urgent action to protect its position with the trial date in January 2002 looming ever nearer. The fact that the DAC defendants prudently decided to shelter behind Borchard's coat-tails once they knew that Borchard was intent on embarking on Part 20 proceedings – their solicitors were shown the Part 20 claim in draft in early July 2001 – does not in our judgment mean that justice requires them to be treated more favourably. Their enthusiasm for what Borchard had done is amply evidenced by what their then counsel told the judge on 17 September 2001 (see para 59 above), and by their willingness to join in the agreed order for the Phase 3 trial whereby all the conference participants were deemed to be seeking contribution from all the others without further order.

Our conclusions on Borchard's appeal

80. In our judgment justice demands that we should set aside the judge's order, which produces a very unfair result. But what should we put in its place? We were persuaded by the submissions we received, particularly from Zim, that the sharing of costs liability in accordance with the Conference participants' trade share would be unjust. We see no merit in remitting the matter for the judge to decide, however, since we would have to indicate the basis on which he should decide it, and short of allowing him to embark on an expensive additional further hearing we can decide the matter just as well ourselves.

81. Were it not for one matter, we would have considered it fair to allow the six parties' costs to lie where they fall. The reason why we do not consider that to be a just solution is that it would permit Borchard, who incurred no costs in instructing experts (whether in an evidential or in an advisory capacity), to benefit from the costs incurred by their fellow Conference members who did bear this expense.

82. We therefore direct that on the assessment of the defendants and Part 20 defendants' costs an inquiry should be made into the costs incurred by the DAC parties and Zim in and about instructing experts, whether such experts were to act in an evidentiary or an advisory role, such costs to include the legal costs associated with giving such instructions. Once the total of those costs has been ascertained, they should be borne equally by Borchard, the four DAC parties and Zim as to a one sixth share apiece. Subject to this, these six parties should bear their own costs both in the main proceedings and in the Part 20 proceedings, and the appeal of Borchard and the cross appeal of the DAC parties will be allowed to this extent.

The distribution of MPC's liability for costs between the six parties

83. We consider it just that the £1.3 million which we have ordered MPC to pay should be divided between the six parties in proportion to the amount each has borne in respect of the costs of its defence and the Part 20 proceedings excluding the costs of and occasioned by the Part 20 costs applications and appeal. This is to be ascertained after taking into account any payments made between the six parties in respect of instructing of experts under our order. We considered, and discarded, the idea that MPC's liability should be divided into six equal parts. Although this solution would have been easier to administer, it would not have afforded justice to those who contributed more heavily to the costs of the successful defence.

84. We will hear counsel as to the terms of the order we should make in order to put our judgment into effect. It may be desirable that in the first instance MPC should pay the £1.3 million into a fund to be controlled by the six parties' solicitors, and that its ultimate disposition should await the final ascertainment or agreement, of the costs liabilities, with interim payments out of the fund being made by agreement, or in default of agreement, by the Commercial Court.