



Dispute Resolution
Case Law Update
Rosling King LLP

Background

The First to Third Defendants were former directors and/or shareholders of the Claimant companies.

In or around July 2007, the First Defendant (“**Mr Zhunus**”), the Second Defendant (“**Mr Arip**”) and the Third Defendant (“**Ms Dikhanbayeva**”) left Kazakhstan for Dubai where they worked in a business involving the exploitation of oil assets in Siberia. This business was carried out through an Isle of Man company called Exillon Energy Plc (“**Exillon**”), which underwent an initial public offering in 2009.

In January 2009, Mr Arip arranged for valuable shareholdings in Exillon to be issued to a trust called the WS Settlement of which Mr Arip and the Fourth Defendant (“**Mrs Arip**”) were the beneficiaries. By 2013, the trustees of the WS Settlement sold the shares in Exillon issued to the WS Settlement for a total of around US\$397 million. The sale proceeds were then largely distributed to Mrs Arip. Mrs Arip subsequently transferred US\$97.5 million from the sale proceeds to her mother, the Fifth Defendant (“**Ms Asilbekova**”).

In August 2013, the Claimants commenced proceedings in England alleging fraud against the Defendants. Mrs Arip and Ms Asilbekova were not parties to these proceedings. In December 2017, Mr Justice Picken handed down judgment in favour of the Claimants. He found Mr Arip and Ms Dikhanbayeva liable for the sum of US\$298,834,593 and ordered them to pay £8,000,000 as an interim payment on account of costs.

In January 2018 Mrs Arip commenced without notice proceedings in relation to the WS Settlement and the Wycombe Settlement, one of Mr Arip’s declared assets, in Cyprus and sought orders prohibiting the Claimants from taking steps to enforce their judgment against the assets of these settlements before any court outside Cyprus.

The Claimants made a without notice application against the Defendants’ former solicitors Cleary Gottlieb (“**Cleary**”) seeking disclosure of the identity of individuals and entities who had paid their fees and disbursements for the proceedings. The Court made an order requiring Cleary to provide this information. It was discovered that Mrs Arip had paid £13.9 million and Ms Asilbekova, the mother-in-law of Mr Arip, had paid £500,000 towards Cleary’s fees and disbursements.

The Claimants then applied for non-party costs orders under section 51 of the Senior Courts Act 1981 against Mrs Arip and Ms Asilbekova who had funded Mr Arip’s unsuccessful defence to a very substantial fraud claim.

Decision

The Court made non-party costs orders against Mrs Arip and Ms Asilbekova. Considering the circumstances of the case, Mr Justice Jacobs stated that the exercise of the discretion under section 51 can take into account the conduct of a non-party who has taken steps to render it more difficult for a claimant to recover costs from a defendant.

The Court acknowledged that Mr Arip was the origin of the monies which Mrs Arip then used to discharge his legal costs, but Mr Justice Jacobs did not consider that this in itself would be a sufficient reason for making an order. In his view, what more important were the following factors:

1. That the funding of Mr Arip's legal costs by his wife, and his mother-in-law, began very quickly after the distribution of approximately US\$181 million. The effect of this distribution was to reduce the assets of the settlement or indeed to discharge any potential liability to pay the costs of the opposing party in the litigation. Mr Justice Jacobs considered that this was a very long way indeed from the usual and simple case of a wife advancing her own funds, acquired during the course of a marriage, out of natural love and affection. That it seemed improbable in the extreme that, at the time of the transfer of monies to Mrs Arip, there was no plan as to how Mr Arip's legal bills would be met.
2. That Mrs Arip provided funding not simply for the defence of her husband, but also for the defence of Ms Dikhanbayeva. This only supported the conclusion that the use of monies, distributed to Mrs Arip, for the continued defence of the litigation was a use which was planned. Mr Justice Jacobs added that even assuming that there was no plan, the size of the amount received and its proximity to the request for funding created an overwhelming moral obligation on Mrs Arip to provide funds for M. Arip's continued defence of the proceedings.
3. That Mrs Arip was not a "pure funder", i.e. a person who derives no benefit from the successful outcome of the litigation. The evidence in this case suggests that Mrs Arip, enjoyed an extravagant lifestyle and during the proceedings it was established that Mrs Arip's living expenses were on average around £3 million per year. The money paid to defend this case was for the purpose of defeating very substantial claims which would potentially threaten that extravagant lifestyle.
4. That both Mrs Arip and Ms Asilbekova were the recipients of substantial assets ultimately derived from Mr Arip, for no consideration. There was the obvious potential for such assets to be the object of potential enforcement measures in the event that the claim succeeded. The expenditure on Mr Arip's legal costs would, if the defence succeeded, potentially benefit both Mrs Arip and Ms Asilbekova because assets which they had received would not be susceptible to enforcement.

The Court for the reasons set out above had the discretion to make an order against Mrs. Arip and Ms. Asilbekova.

Commentary

The Commercial Court's decision is a rare example of the Courts making a non-party costs order against family members under section 51 of the Senior Courts Act 1981.

The decision confirms that the Court will consider all circumstances of the proceedings to establish whether non-party funders are "pure funders".



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The Court held that there was no firm rule as to how funding provided by family members was to be regarded in the context of a section 51 application and that it was necessary to look at the facts in order to deal with the case justly.

Although the facts were unusual, this case provides helpful guidance on the factors the court may take into account when determining whether justice requires such an order to be made

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.