Neutral Citation Number: [2019] EWHC 1401 (Ch)

Case No: HC-2017-001868

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

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

Date: 05/06/2019

Before:

MR JUSTICE MORGAN

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Between:

IAIN PAUL BARKER

Claimant

- and -

(1) CONFIÀNCE LTD
(2) EUAN BARKER (a child by his litigation friend DEBORAH BARKER)
(3) STUART BROWN
(4) JOAN BARKER
(5) INGRID HEYWOOD
(6) MARGOT WHITE

Defendants

(7) TOM BARKER (a child by his litigation friend SUSAN MARY GLOVER)
(8) FREYA BARKER (a child by her litigation friend SUSAN MARY GLOVER)

Applicants

(9) ALISON MEEK (former litigation friend to EUAN BARKER)
(10) LAUREN CHADWICK (a child)
(11) ROWAN BARKER (a child by his litigation friend DEBORAH BARKER)

Third Party Respondents

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Adam Cloherty (instructed by **Memery Crystal LLP**) for the **Claimant**
Elspeth Talbot Rice QC and **Emer Murphy** (instructed by **Reynolds Porter Chamberlain LLP**) for the **First Defendant**
Constance McDonnell QC (instructed by **Withers LLP**) for the **Second Defendant** and **Rowan Barker**
James MacDougald (instructed by **Harcus Sinclair LLP**) for **Ms Meek**
Daniel Saoul QC and **Stephen Hackett** (instructed by **Candey Ltd)** for the **Applicants** and **Ms Glover**

Hearing date: 16 April 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MORGAN

The Hon Mr Justice Morgan:

Introduction

1. This judgment deals with various applications relating to the costs of an unsuccessful application made by two children (Tom and Freya Barker), acting by their mother as their litigation friend. The applications for costs raise issues of principle as to the circumstances in which a litigation friend can be ordered to pay costs and further issues as to whether orders for costs should be made against the children themselves.

2. These issues of principle are not discussed in the White Book; nor do they appear to be covered in the standard practitioners' works. They are dealt with in Halsbury's Laws, 5th edn., vol 10 (2017), Children and Young Persons but some of the submissions made to me challenged the way the principles were there described.

The main proceedings

3. The applications for costs relate to an application which was made by Tom and Freya on 27 June 2017, which I will describe in more detail below. On 8 November 2018, I handed down judgment dismissing that application. The neutral citation of that judgment is [2018] EWHC 2965 (Ch). That judgment sets out in detail the background to that application and I will not set out that background again. However, it is necessary to make a brief reference to earlier proceedings (which I will call "the main proceedings") which resulted in an order made on 25 July 2014.

4. In the main proceedings, Mr Barker applied for orders which would, in effect, free him from the provisions of a trust and sub-trust which had been declared. His case in those proceedings was that the trust and sub-trust failed by reason of the operation of a condition to which the trust was subject, alternatively, should be set aside for mistake.

5. Mr Barker joined as defendants to the main proceedings, the trustee (Confiànce Ltd), one of his five children (Euan Barker) but not Tom and Freya, a representative employee beneficiary under the trust and other adult beneficiaries. Euan was intended to be a representative defendant for Mr Barker's five children (including Tom and Freya). At all times, including at present, the five children were under 18. Euan acted by a litigation friend, a solicitor Ms Meek, and she instructed leading and junior counsel. After some negotiations, a settlement was agreed by all of the adult parties giving Mr Barker most of what he sought to achieve in those proceedings. As the settlement was to bind minor beneficiaries, the parties asked the court to approve the settlement. At a hearing on 25 July 2014, Asplin J appointed Euan as a representative defendant to represent all of Mr Barker's five children and she approved the settlement on behalf of the five children.

The application of 27 June 2017

6. On 27 June 2017, Tom and Freya, acting by their mother, Ms Glover, as their litigation friend, applied for various orders, namely:

    i) an order adding Tom and Freya as Defendants to the main proceedings;

ii) an order lifting a stay of the main proceedings, which stay had been ordered on 25 July 2014;

iii) an order revoking or varying the order of 25 July 2014 which approved a settlement of the main proceedings;

iv) an order directing that the order of 25 July 2014 approving the settlement of the main proceedings was not binding on Tom and Freya.

7. There was no court order providing for Ms Glover to act as a litigation friend for Tom and Freya. Ms Glover acted as a litigation friend without a court order in reliance on CPR 21.4(3) which provides:

> "(3) If nobody has been appointed by the court or, in the case of a protected party, has been appointed as a deputy as set out in paragraph (2), a person may act as a litigation friend if he—
>
> (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
>
> (b) has no interest adverse to that of the child or protected party; and
>
> (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party."

8. CPR 21.5(3) and (4) required Ms Glover to file and serve a certificate of suitability stating that she satisfied the conditions in CPR 21.4(3). Ms Glover did not at any stage give an undertaking of the kind referred to in CPR 21.4(3)(c). Reference had been made at various stages during the course of the application dated 27 June 2017 to the fact that Ms Glover had not given an undertaking of this kind. For example, on 10 August 2017, the solicitors for Mr Barker wrote to the solicitors for Ms Glover and asked her to give such an undertaking. On 16 August 2017, the solicitors for Ms Glover replied that she was not obliged to give such an undertaking as Tom and Freya were not claimants within CPR 21.4(3)(c).

9. The application of 27 June 2017 was considered at three separate hearings over four days on 3 October 2017, 30 and 31 July 2018 and 5 October 2018. At an early stage, the relief sought by the application was limited to an order directing that the order of 25 July 2014 was not binding on Tom and Freya.

10. On 8 November 2018, I handed down judgment dismissing the above application.

The present applications

11. The present judgment deals, first, with four applications which have been made arising out of the application of 27 June 2017. One of the four applications was made before I handed down judgment on 8 November 2018 and the other three of those applications were made following judgment. The present judgment also deals with applications

which were made by some of the parties for orders for costs against Tom and Freya; those applications were dealt with as consequential matters arising from my earlier judgment.

12. On 23 July 2018, Euan applied for an order that he cease to be a party to the application of 27 June 2017. Euan had initially acted in relation to the application of 27 June 2017 by a solicitor, Ms Meek, as his litigation friend and, by order of 3 October 2017, she was replaced as litigation friend by Euan's mother, Deborah Barker. Euan also applied for an order pursuant to CPR 46.2, that Ms Glover be added as a party to these proceedings for the purposes of costs only and for an order, pursuant to section 51 of the Senior Courts Act 1981, that Ms Glover pay his costs of that application. He further applied for an order that Tom and Freya do pay his costs of the application dated 27 June 2017.

13. On 27 February 2019, Confiànce Ltd ("Confiànce") applied for an order pursuant to CPR 46.2, that Ms Glover be added as a party to these proceedings for the purposes of costs only and further applied for an order, pursuant to section 51 of the Senior Courts Act 1981, that Ms Glover pay its costs of the application dated 27 June 2017. As a matter consequential on my earlier judgment, Confiànce also applied for an order that its costs of the application dated 27 June 2017 be paid by Tom and Freya.

14. On 20 March 2019, Ms Meek (who had been separately joined as a respondent to the application of 27 June 2017) applied for an order pursuant to CPR 46.2(1) that Ms Glover be added as a party to these proceedings for the purposes of costs only. She then applied for an order, pursuant to section 51 of the Senior Courts Act 1981, that Ms Glover pay her costs of the application of 27 June 2017. She also applied for an order that Tom and Freya do pay her costs of the application dated 27 June 2017 but she did not press that application at the hearing in relation to costs.

15. On 29 March 2019, Mr Barker applied for an order pursuant to CPR 46.2(1)(a), that Ms Glover be added as a party to these proceedings for the purposes of costs only and further applied for an order, pursuant to section 51 of the Senior Courts Act 1981, that Ms Glover pay his costs of the application dated 27 June 2017. Mr Barker did not seek an order for costs against Tom and Freya.

16. For the purpose of dealing with the applications which are now before me, I will proceed on the basis that anyone reading this judgment will have access to my earlier judgment and I will not therefore repeat or summarise what I there said.

The position of a litigation friend

17. Ms Glover was the litigation friend for Tom and Freya throughout. Further, Euan acted through a litigation friend, first Ms Meek and then Deborah Barker. The legal principles which apply in relation to the potential liability of a litigation friend for the costs of opposing parties are of central importance to the applications for orders for costs against Ms Glover. However, when the applications for costs were argued at the hearing before me, the applicants for costs did not focus on the special position of a litigation friend but instead sought to bring the case within the principles which apply to applications for non-party costs orders under section 51 of the Senior Courts Act 1981 and CPR 46.2. As a result, I heard detailed submissions on the law and the facts as to whether Ms Glover had controlled the litigation pursuant to the application of 27 June 2017,

whether she had funded that application and whether she stood to benefit from the pursuit of that application.

18. Nonetheless, at the hearing of the applications for costs, reference was made to the decision in Rutter v Rutter [1921] P 136 and, in the light of that decision, I suggested to the parties that it might be more appropriate to concentrate on the special position of a litigation friend than to consider questions as to control, funding and potential benefit from the application.

19. After the hearing, Mr Cloherty for Mr Barker referred me to Halsbury's Laws, 5th ed., Vol 10 (2017), Children and Young Persons, in particular, at paras. 1417 to 1421; I will refer to this work below as "Halsbury's Laws, Vol 10". In the light of that reference, I invited the parties to make further submissions in writing in relation to some of the propositions contained in those paragraphs. The parties then made detailed submissions as to the potential liability of a litigation friend for the costs of opposing parties and also as to the potential liability for costs of a child who acts by a litigation friend. I found the written submissions to be of considerable assistance and, indeed, of greater assistance than the submissions made at the hearing as to non-party costs orders.

20. A litigation friend is appointed for a child or a protected party in order to "conduct" proceedings on their behalf. The word "conduct" is used throughout CPR Part 21. A litigation friend is expected to conduct such proceedings fairly and competently: see CPR 21.4(3)(a). For that purpose, a litigation friend must acquaint themselves with the nature of the proceedings and is obliged to take all due steps in those proceedings to further the interests of the child or protected party: see In re Whittall [1973] 1 WLR 1027 and AKB v Willerton, OH v Craven [2017] 4 WLR 25 at [14]; and see also In re Barbour's Trusts [1974] 1 WLR 1198.

21. A litigation friend ought not to have an interest of their own which is adverse to the interests of the child or protected party. This is reflected in the wording of CPR 21.4(3)(b) and is made clear in the authorities: see, for example, Rhodes v Swithenbank (1889) 22 QBD 577. Pursuant to CPR 21.7, the court may direct that a person may not act as a litigation friend or may terminate the appointment of a litigation friend. A litigation friend can be removed where their interest conflicts with that of the child or protected party: see, for example, Nottinghamshire CC v Bottomley [2010] Med LR 407 at [17]-[19].

22. It was accepted at the hearing before me that a litigation friend is not a party to the proceedings in which they act. This is consistent with the decisions to that effect in Sinclair v Sinclair (1845) 13 M & W 640 and Dyke v Stephens (1885) 30 Ch D 189.

23. Before the CPR introduced the term "litigation friend", the predecessor of the litigation friend was "the next friend" acting for a claimant and a "guardian *ad litem*" acting for a defendant (at any rate these were the terms used in the Chancery and Queen's Bench Divisions). In the early cases, a next friend was called, in law French, a *prochein amy* (or some similar spelling).

Halsbury's Laws, Vol 10

24. Halsbury's Laws, Vol 10, para. 1418 is headed "Liability of child claimant and litigation friend for costs" and para. 1420 is headed "Liability of child defendant and

litigation friend for costs". So far as litigation friends are concerned, the first of these paragraphs considers the liability for costs of a litigation friend acting for a child "claimant" and the second of these paragraphs considers the liability of a litigation friend acting for a child "defendant". These paragraphs suggest that the liability for costs of a litigation friend may differ depending on whether the litigation friend is acting for a "claimant" or a "defendant". I will consider later whether this distinction is justified by the authorities and/or is appropriate. However, in the first instance, I will consider what the authorities say as regards the liability for costs of a litigation friend.

25. I note that there is no relevant discussion about the liability of a litigation friend for costs in Halsbury's Laws dealing with Mental Health and Capacity (Vol 75) or with Civil Procedure (Vols 11, 12 and 12A).

A litigation friend for a child claimant

26. There is a long line of cases which establish the practice that in the case of an unsuccessful claim by a child claimant acting by a litigation friend, the usual order is that the litigation friend will be ordered to pay the successful defendant's costs. Those cases include Englefield v Round (1727) Cooke, Common Pleas 32, Slaughter v Talbot (1739) Barnes 128 also reported at (1739) Willes 190, Buckly v Buckeridge (1767) Dickens 395, Marnell v Pickmore (1796) 170 ER 424, Sinclair v Sinclair (1845) 13 M & W 640 per Parke B, Jones v Lewis (1847) De G & Sm 245, Collins v Brook (1860) 5 H & N 700, Beavan v Beavan (1862) 31 LJ (P) 166, Catt v Wood [1908] 2 KB 458 (affirmed by the House of Lords on a different point, [1910] AC 404), Slingsby v Attorney-General (1916) 32 TLR 364 (Court of Appeal) and (1916) 33 TLR 120 (House of Lords) and Rutter v Rutter [1921] P 136.

27. The principle was stated in those cases in general terms. For example, in the early case of Slaughter v Talbot, as reported in (1739) Barnes 128, it was said:

> "by the uniform practice of all the Courts the *prochein amie* is liable to costs."

28. There are other cases (not included in the above list) where costs were awarded against a next friend where the court disapproved of their conduct but the authorities listed above indicate that the usual order was that the litigation friend was ordered to pay the successful defendant's costs even where there was no specific disapproval of the conduct of the next friend. In effect, the courts treated the litigation friend as being responsible for the costs which would otherwise be ordered against the child if that party had been an adult.

29. The cases referred to above were decided long before the Senior Courts Act 1981 and the CPR. Section 51(3) of the Senior Courts Act 1981 provides that the court has full power to determine "by whom and to what extent the costs are to be paid". That wording plainly permits the court to apply the earlier practice as regards the liability of a litigation friend for the costs of an unsuccessful claimant, acting through that litigation friend. The substantial case law which has developed as to the making of non-party costs orders pursuant to section 51(3) has identified the relevance of matters such as whether the non-party has controlled and/or funded the litigation and whether the non-party stood to benefit from the litigation. The earlier cases about litigation friends proceeded on different principles which made it unnecessary to examine matters such

as funding of the litigation and benefitting from the litigation. As to control, the litigation friend was expected to control the litigation. The case law which has developed in relation to section 51(3) has not considered the position of litigation friends and I do not read that case law as in any way supplanting the established rules as to litigation friends and replacing those rules with new criteria which involve an assessment of matters such as funding and benefitting from the litigation.

30. As to the position under the CPR, CPR 44.2(4) directs that when exercising the discretion as to costs the court has regard to all the circumstances. Again, the wording plainly permits the court to apply the earlier practice. I consider that the reasoning in the earlier cases remains valid at the present time. Nothing in the Senior Courts Act 1981 nor the CPR undermines that reasoning or calls for it to be reconsidered.

31. Mr Saoul QC, for Ms Glover and Tom and Freya, referred to the specific reference to costs in CPR 21.4(3)(c). This provision only applies where the child or protected party is "a claimant" and specifically requires a litigation friend for a claimant to give an undertaking to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings. I heard argument as to whether Tom and Freya were "claimants" within CPR 21.4(3)(c) and I will refer to that argument later in this judgment. Mr Saoul submitted that where a litigation friend acted for someone who was undoubtedly a claimant, CPR 21.4(3)(c) showed that a litigation friend can only be made liable for costs where they have given an undertaking to be so liable. I do not accept that submission. I consider that the specific requirements of CPR 21.4(3)(c) supplement the general principles which otherwise apply and do not detract from them.

32. The applicants for costs against Ms Glover relied on CPR 21.9(6) which provides that the liability of a litigation friend for costs continues until notice is given under that rule to the effect that the appointment of the litigation friend has ceased. That rule shows that there can be cases in which a litigation friend is liable for costs but the rule itself does not define what those circumstances are. Nonetheless, the wording of the rule is consistent with my understanding of the legal position as described above.

33. I explained earlier that a litigation friend is not a party to the proceedings. In the earlier cases to which I referred, there was no sign of the court joining the litigation friend as a party as a preliminary to making an order for costs against the litigation friend. CPR 46.2, which deals with costs orders in favour of or against non-parties provides that such a person must be added as a party to the proceedings for the purposes of costs only. It is not clear to me that this rule requires a litigation friend to be added as a party before the court can make an order for costs against them. However, there is no difficulty in the present case as I am able to make Ms Glover a party to the proceedings if that is necessary before I make any order for costs against her.

A litigation friend for a child defendant

34. Halsbury's Laws, Vol 10, para. 1420 contains the statement:

> "A litigation friend is not liable to pay the costs of an unsuccessful defence unless he has been guilty of gross misconduct."

The footnote to this statement cites Morgan v Morgan (1865) 11 Jur NS 233 and Vivian v Kennelly (1890) 63 LT 778. The footnote also cites Rutter v Rutter [1921] P 136 at 141-142 in a way which suggests that this case might not support the statement in the text.

35. Before considering Morgan v Morgan it is necessary to refer to the earlier case of Bamford v Bamford (1845) 5 Hare 203, which was considered in Morgan v Morgan. Bamford v Bamford did not involve a litigation friend. It was a claim by a widow for dower. The widow sued the persons in possession of the estate of her late husband for dower. The claim was defended and the defence failed. The widow then asked for her costs of her successful claim. She submitted that as the claim had been unsuccessfully defended, the case came within "the ordinary rule of adverse suits". The defendants argued that the general rule in claims for dower was that there was no order as to costs. They also argued that their defence had been a reasonable defence, albeit unsuccessful. The Vice-Chancellor (Sir James Wigram) referred to the general rule in claims for dower that there was no order as to costs. He then qualified the general rule by saying that if a defendant set up a positive defence to the claim, he "may be liable to pay the costs of the suit occasioned by that unsuccessful defence". He then referred to a case where the defence was without "any just ground" or was based on a statement which the defendant knew or ought to have known was untrue, where the widow would be entitled to the costs occasioned by such defence. He then held that the unsuccessful defence in Bamford v Bamford was not of such a character and he made no order as to costs. I interpret that case as holding that in a claim for dower, costs did not necessarily follow the event. An unsuccessful defence did not necessarily result in the defendant paying the costs. However, a defence which was open to some criticism (of the kind instanced by the Vice-Chancellor) could justify an adverse order for costs.

36. Morgan v Morgan was also a claim by a widow for dower. The estate of the deceased husband was vested in a trustee for his heir who was a child and who was the sole defendant. The child acted through a guardian *ad litem* who defended the claim setting up an alleged agreement on the part of the widow which was said to be inconsistent with the claim to dower. The Vice-Chancellor (Sir Richard Kindersley) held that the alleged agreement had not been established and, if it had been, it would have been within the Statute of Frauds. The widow then applied for her costs and cited Bamford v Bamford. The Vice-Chancellor said:

> "The question is whether a guardian *ad litem* becomes liable to costs by raising such a defence as would, upon the authority of *Bamford v Bamford*, make an adult defendant so liable. I will ascertain, through the registrar, whether there is any fixed practice upon this subject and, if there is none, I must decide upon what I think the practice ought to be."

37. The Vice-Chancellor returned to court some days later and then said:

> "I have looked into the question, and I think it is impossible in this case to order the guardian *ad litem* to pay these costs. I do not mean to say there could not be such a case of gross misconduct as to render him liable to do so, but that is not the case here; and [the widow] is much in the same position as a

> plaintiff suing a pauper defendant. Each party, according to the ordinary rule in dower suits, will bear his own costs."

38. The parties before me disagreed as to the correct interpretation of the Vice-Chancellor's ruling. Mr Saoul submitted that the Vice-Chancellor held that it was not appropriate to make an order for costs against the litigation friend of a child defendant unless the litigation friend was guilty of gross misconduct. Ms Talbot-Rice submitted that the Vice-Chancellor simply applied the earlier decision in Bamford v Bamford and held that costs did not follow the event in a dower case unless the defendant was guilty of gross misconduct.

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

40. If Morgan v Morgan is interpreted in this way, it does provide some support for the statement in Halsbury's Laws, Vol 10, para 1420. I recognise, however, that I cannot be wholly confident as to the correct interpretation of the ruling in that case.

41. The second case cited in Halsbury's Laws, Vol 10 was Vivian v Kennelly (1890) 63 LT 778. In that case, the widow of the deceased brought proceedings in which she propounded his will. An infant niece of the deceased challenged the will on a number of grounds and, acting by a guardian *ad litem*, defended the widow's proceedings on five separate grounds including allegations of insanity and undue influence. The niece also brought a counterclaim based on the same allegation of insanity. After a five-day trial, the widow succeeded on all points. The court ordered the taxation of her costs. The registrar taxed the costs and ordered that they be paid by the niece's guardian *ad litem*, but not by the niece. On appeal, Sir James Hannen P ordered the guardian *ad litem* of the niece and the niece herself to pay the successful plaintiff's costs. The law report does not contain any reasons for the decision. In the absence of reasons, the case does not provide any support for the general proposition in Halsbury that the court does not order the litigation friend of a child defendant to pay costs in the absence of gross misconduct. In that case, the litigation friend was ordered to pay the costs and the law report does not contain any reference to gross misconduct.

42. Vivian v Kennelly was cited in Rutter v Rutter where there was a petition for divorce by a husband who was under 21 (acting by a guardian *ad litem*) and a cross-petition for divorce by a wife. In the Probate Division of the High Court, a guardian *ad litem* for a petitioner was similar to a next friend. The husband's petition failed and the wife's cross-petition succeeded. The wife applied for and obtained an order that the husband's

guardian pay her costs of the husband's petition. The wife did not apply for an order that the husband's guardian pay her costs of her cross-petition. The judge ordered the guardian *ad litem* for the husband to pay the wife's costs. This case is not authority either way in relation to a claim for costs against the litigation friend of a child defendant. The wife had not asked for the costs of her cross-petition against the guardian *ad litem* and the judge commented that such a claim would raise "a different question": see at 140.

43. Having reviewed the authorities referred to in Halsbury's Laws, Vol 10, there is really only one case (Morgan v Morgan) which provides any support for the proposition that the court will not make an order for costs against the litigation friend of a child defendant in the absence of gross misconduct. Further, the many cases I referred to earlier which described the position of a litigation friend effectively treated the litigation friend as the relevant person (rather than the protected party) when the court considered the question of costs. The reasoning in those cases can readily be applied whether the litigation friend acts for a claimant or for a defendant. Yet further, under the rules of the CPR in relation to costs, although one has regard to all the circumstances of the case, claimants and defendants are generally treated in the same way.

44. Mr Saoul submitted that CPR 21.4(3)(c) showed that a litigation friend can only be made liable for costs when acting for a claimant and that precluded a litigation friend being liable for costs when acting for a defendant. I do not accept that submission. I consider that the specific requirements of CPR 21.4(3)(c) supplement the general principles which otherwise apply and do not detract from them.

45. It could be said that it might sometimes be appropriate to distinguish between a case of a child claimant (acting by a litigation friend) who starts proceedings and a case of a child defendant who needs advice as to whether to defend the proceedings and where a litigation friend is appointed to assist the child defendant. However, a possible distinction of that kind would not justify the adoption of an inflexible general rule of the kind stated in Halsbury.

46. I am not persuaded that the relevant principles to be applied at the present time should be regarded as fixed by the approach adopted in Morgan v Morgan. It is far from clear that the authorities did establish the existence of such a general rule in the past. Further, the position at the present time is governed by CPR 44.2(4) which directs the court to have regard to all the circumstances. If a distinction between a child claimant acting by a litigation friend and a child defendant so acting is considered to be a relevant distinction in a particular case then the court will have regard to that distinction when it considers all the circumstances of the case. But that does not mean that the court must apply an inflexible general rule.

Who is a claimant and who is a defendant?

47. If I am wrong about the legal principles and there is a special rule to the effect that the court will not make an order for costs against a litigation friend for an unsuccessful child "defendant" in the absence of gross misconduct, then it would be necessary to establish how one is to distinguish between a "claimant" and a "defendant" for the purposes of this special rule. The many cases to which I have referred, where the court ordered litigation friends to pay costs, involved facts where the distinction between a claimant and a defendant was clear cut. Those cases did not discuss the test to be applied

in order to distinguish between a claimant and a defendant where the position was not so clear. If there is a special rule of this kind, then the reason for the rule could be said to be a recognition of a difference between a party (acting by a litigation friend) who starts proceedings and a party who is called upon to defend proceedings. In accordance with that possible justification of a special rule, one would therefore ask whether, in a particular case, the party acting by a litigation friend had started the process which led to the costs being incurred.

48. To answer the question in the last paragraph, the court should have regard to the substance of the matter and not merely the form of the proceedings. The court should adopt a similar approach to that adopted when asking itself who is the claimant, and what are the nature of the proceedings (interim or substantive), when dealing with applications for security for costs; on which point, see GFN SA v Bancredit Cayman Ltd [2010] Bus LR 587 at [22]-[27].

49. By their application of 27 June 2017, Tom and Freya sought various heads of relief. They asked to be joined as defendants to the main proceedings brought by Mr Barker. They sought an order lifting a stay of those proceedings granted on 25 July 2014. They asked for the order of Asplin J of 25 July 2014 to be revoked or varied or declared to be not binding on them. They indicated that they sought directions for the final hearing of this application.

50. Having regard to the substance of the application of 27 June 2017, I consider that Tom and Freya acting by their litigation friend started the legal process which led to the costs being incurred. By the time they made that application, having regard to what had happened on 25 July 2014, they were not merely defending proceedings that had been brought against them but they were initiating a challenge to the pre-existing state of affairs based on new allegations which they were advancing. On this basis, even if there is a special rule that the court will not order a litigation friend of a defendant to pay the costs of a successful claimant, in the absence of gross misconduct, I conclude that such a rule would not apply to the circumstances of the application of 27 June 2017.

51. I am aware that on the first day of the hearing of the application dated 27 June 2017, leading counsel who then appeared for Tom and Freya accepted a suggestion from the court that the only relief they needed was a determination that the order of 25 July 2014 was not binding on them. I do not regard that change of position on the part of leading counsel for Tom and Freya as altering the substance of the application and how the application should be assessed for the purposes of applying the alleged special rule as to orders for costs against a litigation friend for a defendant.

52. The applicants for costs submitted that Tom and Freya were "claimants" within the meaning of CPR 21.4(3)(c). The applicants for costs then submitted that Ms Glover ought to have given an undertaking to pay any costs which Tom and Freya were ordered to pay and that I should proceed on the basis that she had given such an undertaking. Mr Saoul submitted that Tom and Freya were not "claimants" within the meaning of this rule. I consider that it is not necessary to decide whether Tom and Freya qualified as "claimants" for the purposes of CPR 21.4(3)(c) and, if so, whether I should treat Ms Glover as having given an undertaking when she in fact had not done so. Even if this case does not come within this rule, the existence of the rule does not preclude the court having regard to all the circumstances of the case in order to decide how to exercise its discretion as to costs.

Conclusion as to the liability of a litigation friend for costs

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

Orders for costs in favour of a litigation friend

54. So far, I have focussed on the circumstances in which a litigation friend may be held to be liable for costs. It is also necessary to consider briefly the circumstances in which a party acting by a litigation friend may be entitled to recover costs. I will only deal with this briefly as there was no real argument about this matter. It is nonetheless a relevant topic because I have before me applications for costs in favour of Euan at a time when he acted by his litigation friend Ms Meek and later when he acted by his litigation friend Deborah Barker.

55. The position appears to be that a child or protected party who acts by a litigation friend and who would, applying the usual principles as to costs, be entitled to an order for costs in his favour, will be entitled to an order which makes the paying party pay the costs incurred by the litigation friend. It is not open to the paying party to say that as the party entitled to recover costs was a child or a protected party, they did not incur any costs because they did not retain the solicitors who were instead retained by the litigation friend.

How should the discretion as to costs be exercised?

56. Mr Saoul submitted that, quite apart from the fact that Ms Glover was (only) a litigation friend for her two children, there were good reasons why the court should not make any order for costs against her. He relied on four matters in particular. He submitted that:

    i) the conduct of the other parties in relation to the exclusion of Tom, Freya and Ms Glover from the main proceedings brought by Mr Barker and from the hearing before Asplin J was such that the court should not order Ms Glover to pay any of the costs of any of the other parties;

    ii) when the application of 27 June 2017 was made it was initially "legally sound" and it was not until 30 July 2018, when the Supreme Court refused permission to appeal against the decision of the Court of Appeal dated 8 December 2017 (in the negligence proceedings which Mr Barker had brought against Mr Baxendale-Walker), which reversed the decision of Roth J dated 23 March 2016, that the position changed in a way adverse to the success of the application;

    iii) Confiànce should not have its costs because it should not have incurred them but instead it should have remained entirely neutral on the application of 27 June 2017;

iv) Ms Glover would suffer hardship if an order for costs were made against her.

The relevant conduct

57. In support of his submissions as to the relevance of conduct in relation to the exclusion of Tom, Freya and Ms Glover from the proceedings brought by Mr Barker in relation to the trust and from the hearing before Asplin J, Mr Saoul relied on the references to "the conduct of the parties" in CPR 44.2. In particular:

i) rule 44.2(4) directs the court to have regard to all the circumstances including the conduct of all the parties;

ii) rule 44.2(5) states that "the conduct of the parties" includes certain matters; the first of the specified matters is conduct before, as well as during, the proceedings and particular reference is made to the use of pre-action protocols; other matters specified in rule 44.2(5) appear to relate to conduct in the course of the proceedings.

58. The conduct complained of by Mr Saoul occurred in the period up to the order made by Asplin J on 25 July 2014. Mr Saoul does not complain about the conduct of the parties by way of their response to the application of 27 June 2017, except in so far as he contends that Confiànce should not have incurred any costs (a matter which I will consider separately below). Mr Saoul says that the respondents to that application brought the application upon themselves and, in that sense, their conduct caused them to incur the costs which they now claim from Ms Glover.

59. It was said by Brooke LJ in Groupama Insurance Co Ltd v Overseas Partners Re Ltd [2004] C.P. Rep. 18 at [29] that the court:

> "… was entitled to consider any relevant aspect of the conduct of the parties, whether it related to their conduct in relation to the matters that gave rise to the litigation, or to their conduct in the period that led up to the issue of proceedings, or to their conduct in the proceedings themselves."

60. In my earlier judgment, I made detailed findings as to the way in which Mr Barker brought proceedings to undo the trust and sub-trust that had earlier been created. The particular matters now complained of by Mr Saoul are recorded at [28]-[29] of that judgment as follows:

> "28. It is clear from the documents on Ms Meek's file that neither Ms Glover, the mother of Tom and Freya, nor Tom and Freya themselves, were told of the proposed claim by Mr Barker nor about the proposed settlement. They were not told that Euan was to be appointed as a representative for Tom and Freya and that Euan's litigation friend would be advised by counsel as to the suitability of the proposed settlement. It is also clear from those documents, that the omission to inform Ms Glover or Tom and Freya was deliberate. The decision not to inform her seems to have reflected the wishes of Mr Barker and Deborah Barker. Ms Meek, Mr Barlow and Mr Dew knew that Ms Glover and Tom

> and Freya had not been informed of what was happening and either supported the decision to keep them in the dark or did not oppose the implementation of that decision. It is also clear that Ms Glover and Tom and Freya were not informed of what was happening because it was foreseen that Ms Glover would "cause problems", to quote an email from Mr Dew to Ms Meek and Mr Barlow on 9 April 2014. On 20 June 2014, Ms Meek expressed the view to Mr Barlow and Mr Dew that Ms Glover, if she was aware of what was proposed, might create a "degree of contention".
>
> 29. In the present application, I was provided with a witness statement of Mr Rands, a solicitor acting for Mr Barker. Mr Rands did not act for Mr Barker at the time of the claim to recover the assets of the Trust and the Sub-Trust. However, Mr Rands sought to explain why Euan had been chosen to be the only child who was made a party to the proceedings. Mr Rands suggested that there were a number of reasons for this choice and included the explanation that, at the time of the proceedings and since, Ms Glover harboured considerable animosity against Mr Barker and if Tom and Freya had been involved in the proceedings, Ms Glover would have tried to become their litigation friend and possibly litigation friend for all the children. Mr Rands suggested that Ms Glover would not have been suitable as a litigation friend as she would have been influenced by her personal feelings towards Mr Barker rather than a desire to act in the best interests of the absent family beneficiaries."

61. In summary, the relevant conduct was that:

    i) Tom, Freya and Ms Glover were deliberately not told of the proceedings brought by Mr Barker;

    ii) they were not involved in the negotiations for the settlement of those proceedings;

    iii) they were not told that Euan was appointed as a representative defendant for Tom and Freya;

    iv) when the court was asked to appoint Euan as a representative defendant and to give its approval to the settlement of the proceedings, it was not told that Tom, Freya and Ms Glover were not aware of the proceedings or of the settlement;

    v) the reason why this occurred was because Mr Barker did not want to have Ms Glover involved in the proceedings, the settlement or the application to the court; he must have considered that if she were involved, matters would not proceed in the way in which he wished them to proceed or, at any rate, would not proceed smoothly.

62. The conduct of which Mr Saoul complains was the foundation for the application of 27 June 2017. At [66]-[68] of my earlier judgment, I set out the submissions of Mr Seitler

QC who then appeared for Tom and Freya (acting by their litigation friend, Ms Glover) and essentially the same criticisms of the relevant conduct were made by Mr Saoul in relation to the issues as to costs.

63. In my earlier judgment, I refrained from expressing any comment on the findings I had made as to the conduct which was complained of. That was because it was not necessary for me to make any such comments for the purpose of deciding the outcome of that application. However, in view of the submissions made by Mr Saoul as to the costs of the application, I now do need to express my views as to the conduct which is complained of.

64. At the hearing of the application of 27 June 2017, Mr Seitler submitted that the conduct complained of amounted to collusion between the parties which would justify the court in holding that the order of Asplin J made on 25 July 2014 should not bind Tom and Freya. He also submitted that the fact of collusion meant that Ms Meek, and leading and junior counsel who advised her as the litigation friend for Euan (as a representative defendant), did not adopt a truly independent approach to the duties which they had to perform. It was also said that the court should have been told the full facts as to the deliberate concealment of matters from Tom, Freya and Ms Glover. Mr Seitler made it clear that he did not allege that Ms Meek (or the leading and junior counsel who were advising her) were guilty of bad faith.

65. There is no doubt that Mr Barker, Ms Meek and, indeed, leading and junior counsel instructed by Ms Meek, did agree to the relevant conduct described above. So far as relevant, I also find that Ms Deborah Barker agreed to the relevant conduct, although she was not a party to the earlier proceedings.

66. It can be seen that Mr Barker adopted an approach to the litigation which he considered was in his best interests and the other parties and their advisers went along with that approach. In ordinary adversarial litigation, a party is entitled to take advantage of what the rules specifically require, and do not require, and apply the rules in a way which suits their purpose. However, in this case, the parties asked the court to make an order that Euan should represent Tom and Freya and, further and most importantly, asked the court to approve a settlement on behalf of children, including Tom and Freya.

67. When the court is asked to approve a settlement on behalf of children or protected parties, the court has to make a decision as to what is in the best interests of those persons, because those persons cannot make the decision for themselves. The court must be fairly informed of the facts and considerations which are relevant to the making of that decision. Otherwise, the court is being asked to make a decision on behalf of a party, who is himself unable to make a decision, but in circumstances where the court has not been told a relevant fact or circumstance. That is plainly unacceptable.

68. As explained by Megarry J in In re Barbour's Trusts [1974] 1 WLR 1198 at 1201 E-H, the court will normally rely heavily on the litigation friend, solicitors and counsel acting for the child or protected party. Megarry J stressed the heavy responsibility undertaken by these representatives of the child or protected party. Indeed, the responsibility of the court goes further still than those responsibilities. As was said by Lady Hale in Dunhill v Burgin (Nos 1 and 2) [2014] 1 WLR 933 at [33], one of the objects of the requirement that the court approves a settlement involving a child or a protected party is in order to enable the court to protect them from any lack of skill or experience of their legal

advisers which might lead to a settlement of a money claim for far less than it is worth. The court is not a rubber stamp and parties should not treat it as if it were.

69. What happened in this case resulted in Ms Meek as the litigation friend for Euan, as a representative defendant, and leading and junior counsel advising Ms Meek, deliberately not informing Tom and Freya and Ms Glover of a proposed compromise so as to prevent them expressing their views upon that compromise. The decision not to inform Tom and Freya and Ms Glover was because it was foreseen that Ms Glover would be likely to raise objections to the compromise and would not agree to it. Ms Meek and counsel may or may not have thought that Ms Glover might be influenced by collateral considerations and might not act in the best interests of Tom and Freya. On the material before me, Ms Meek and counsel appear to have readily acquiesced in Mr Barker's wishes and opinions on the matter; they do not appear to have thought it necessary to form their own opinion on that matter. It might have been open to Ms Meek and to counsel to come to a reasoned and well-informed conclusion that it was not in the best interests of Tom and Freya for Ms Glover to be told of the proceedings but simply acquiescing in Mr Barker's wishes did not amount to reaching a reasoned and well-informed conclusion on the matter.

70. In any event, even if Ms Meek and counsel had properly considered the matter and had decided that Ms Glover should not be told of the proceedings, I consider that it was completely unacceptable for the court not to have been given a fair account of the position in that respect when the court was asked to appoint Euan as a representative for Tom and Freya and was further asked to approve a settlement on behalf of Tom and Freya. The information which was deliberately withheld from the court would have been relevant to the decision which the court had the responsibility for making, even if the court took the view that from a legal standpoint the interests of the five children were the same. However, it was not alleged, and I do not find, that Ms Meek (or the leading and junior counsel who were advising her) acted in bad faith.

71. If the court had been given a fair account of the position in relation to Tom and Freya, the court would then have had to decide what to do. The court might well have taken the view that it should not make a representation order in relation to Tom and Freya. The court might have taken the view that there was no difficulty in joining all five children as Defendants to Mr Barker's claim so that there was no real need for a representation order. The court might also have thought that it was inappropriate to make a representation order where two of the parties being represented were likely to have a different attitude to the proceedings from that of the proposed representative defendant. In addition, the court might have been very concerned at the strategy being adopted which was to use a representation order as a means of keeping Tom and Freya (and Ms Glover) in the dark as to what was happening. If the court had declined to make a representation order then it seems likely that Tom and Freya would have been joined as parties. The question would then have arisen as to whether they should have a litigation friend and, if so, should their litigation friend be Ms Glover or someone else.

72. When the court was asked to approve the settlement it was asked to make a decision on behalf of Tom and Freya without being aware of the fact that the proceedings had been deliberately concealed from them. On the facts of this case, if the court had been told the true position, it may well have thought that it would be unfair to proceed in that way. If Ms Meek and counsel had reached a reasoned and well-informed decision as to why Ms Glover (and hence Tom and Freya) should not be informed of the proceedings,

then that matter should have been fairly explained to the court so that the court could decide what to do. The court may have thought that it was simply unfair to consider whether to approve the settlement without hearing from someone on behalf of Tom and Freya. The court might also have welcomed relevant adversarial argument so that the court would have before it the full range of relevant considerations. Conversely, the court would not have welcomed adversarial argument put forward for collateral purposes although the court would have been wary of shutting out such argument without even hearing it.

73. In these circumstances, I disapprove of the course which was adopted in this case when the court was asked to make a representation order and to approve a settlement involving children where information relevant to the court's decision was deliberately withheld from the court.

74. For the avoidance of doubt, I wish to make it clear that I am not laying down any general ruling as to the duty of a representative defendant in all cases. I am aware of the comments of Norris J (which were not in any event relied upon before me) in The Girls' Day School Trust v GDST Pension Trustees Ltd [2016] Pens LR 181 at [15] where he explained that, where it is appropriate to have a representative defendant, the representative is chosen because he is a person having the same interest as other persons in the represented class and is therefore typical of the class. Being a representative defendant does not require that person to consult everyone in the class and then to convey their views to the court. My decision in the present case is based on the particular facts of this case.

75. It was submitted on behalf of the applicants for costs that because all five children (including Tom and Freya) had the same interest (or lack of it) under the trust and the sub-trust, it was appropriate to appoint Euan to represent all five children and for Ms Meek, and counsel advising her, to treat all the children in the same way. In my judgment, that was not a justification for adopting a strategy of having a representation order for the principal (if not the only) purpose of keeping Tom and Freya and Ms Glover in the dark and preventing them being involved in the negotiations and any application to approve a settlement. Further, it was not a justification for withholding relevant information from the court when it was asked to make a representation order and to approve the settlement.

76. The natural consequence of the proceedings being concealed from Ms Glover was that she has harboured a strong sense of injustice and a belief that Tom and Freya have been unfairly treated. However, as I explained in some detail in my earlier judgment, the inappropriate conduct in the present case was not enough in the end to persuade me to hold that the order of 25 July 2014 was not binding on Tom and Freya when such a holding would not give them anything of value and would not be fair or just to anyone.

77. In these circumstances, should I accede to Mr Saoul's submission and deprive Mr Barker, Euan, Ms Meek and Confiànce of their costs of successfully resisting the application of 27 June 2017? As explained above, I have power to deprive a party of all or part of its costs if I considered that was a just result. Of course, that does not mean that I must exercise that power.

78. I will first consider the position in relation to Mr Barker. Ms Glover plainly found out about what had happened in relation to the earlier proceedings and the settlement. She,

with the assistance of Mr Baxendale-Walker, formed a company called Twin Benefits Ltd ("Twin Benefits") of which she was a director. Twin Benefits took over proceedings which had been begun by Mr Baxendale-Walker against Mr Barker and Confiànce. In those proceedings it was pleaded that Twin Benefits was owned legally and beneficially by Ms Glover and that any proceeds of the causes of action asserted in those proceedings were held on trust absolutely for Ms Glover and Tom and Freya. More detail as to the Twin Benefits proceedings is given in [49]-[56] of my earlier judgment. In short, the proceedings were struck out as against Confiànce. Twin Benefits was liable to pay Confiànce's costs but did not do so and it was later wound up. The claim against Mr Barker was dismissed with costs which, again, were not paid by Twin Benefits. Later, Mr Baxendale-Walker was ordered to pay Mr Barker's costs but he did not do so and he was later made bankrupt. In my earlier judgment, I held at [89]-[90] that if I had been prepared in principle to hold that the order of 25 July 2014 was not binding on Tom and Freya I would not have permitted them to start fresh proceedings without first paying the costs incurred by Confiànce and Mr Barker in the Twin Benefits proceedings.

79. As I have explained, the conduct of Mr Barker (amongst others) of which I have disapproved was the foundation for the claim which Ms Glover caused to be made in the Twin Benefits proceedings and in the application of 27 June 2017. However, both attempts to make that claim have failed. In my earlier judgment I gave two separate reasons why it was just to hold that Tom and Freya remained bound by the order of 25 July 2014.

80. It is not uncommon for a party (for example, a defendant) to have behaved in a way of which a court does not approve and to be sued for the consequences of such behaviour but yet for the claim to fail on various grounds notwithstanding that behaviour. In such a case the defendant is typically regarded as the successful party and prima facie entitled to its costs. It is by no means automatic for the court to deprive such a defendant of all or part of its costs. To deprive a defendant of costs is to impose a financial penalty on that defendant when the court has decided that the claimant is not legally entitled to any compensation for the relevant behaviour of which the court disapproves. The court would often attach decisive weight to the consideration that the defendant's costs were all incurred in relation to a claim against it which has failed. In any case, the court would not impose a financial penalty on the defendant unless that penalty was proportionate to the circumstances which were thought to justify the imposition of that penalty. In the present case, the costs incurred by Mr Barker in successfully defending the application of 27 June 2017 are substantial.

81. By the time that Ms Glover brought the application of 27 June 2017, she knew or ought to have known of the difficulties she would have to overcome to succeed in her application. She nonetheless went ahead and her application has failed. Nonetheless, this could be an appropriate case in which to mark the court's disapproval of the earlier conduct in connection with the main proceedings and the hearing on 25 July 2014 by depriving Mr Barker of a part of his costs of responding to the application of 27 June 2017. However, I conclude that it would not be right to take that course essentially for the reasons given in the next paragraph.

82. In considering whether to penalise Mr Barker for his earlier conduct, I ought to take into account the fact that Mr Barker has already suffered a substantial penalty as a result of incurring substantial irrecoverable costs in successfully defending the Twin Benefits

proceedings. In those circumstances, I would not consider it appropriate to impose on him a second penalty by way of withholding part of his costs of successfully resisting the application of 27 June 2017.

83. Next, on the question of conduct, I will consider the position of Confiànce. As a result of the findings in my earlier judgment, I do not consider that Confiànce was responsible for the conduct which is now complained of. Mr Saoul submitted that I should make an order that Confiànce recover its costs from Mr Barker but I should not make an order that it recover its costs from Ms Glover. I can see no reason (based on Mr Barker's conduct) why I should not give Confiànce its costs against Ms Glover if it is otherwise entitled to them. For the sake of completeness, I note that Confiànce has applied for an order that Mr Barker indemnify it in relation to its costs but that application is resisted by Mr Barker and has been adjourned for argument on a later occasion.

84. I will next consider the position of Euan in relation to the submissions as to conduct made by Mr Saoul. Euan's application for costs raises quite separate considerations which I will deal with later in this judgment. At this point, I will consider whether the submissions as to conduct are relevant to Euan.

85. When Mr Barker brought the main proceedings in 2014, Ms Meek was appointed as the litigation friend for Euan and Euan was appointed as a representative defendant for the children including Tom and Freya. Ms Meek was still the litigation friend for Euan when Ms Glover made her application of 27 June 2017. It appears to be the case that Euan cannot have been acting as a representative for Tom and Freya after that date. On 22 September 2017, Ms Meek applied to be discharged as the litigation friend for Euan in favour of Euan's mother, Deborah Barker. On 3 October 2017, I acceded to that application. Ms Meek then ceased to be the litigation friend for Euan and Deborah Barker became his litigation friend. I also ordered that Euan should be a representative defendant for Rowan Barker.

86. The application for costs in relation to Euan is an application for costs by Euan acting through a litigation friend, first Ms Meek and then Deborah Barker. This application is different from the separate application for costs made by Ms Meek as a separate respondent to the application of 27 June 2017.

87. The question is whether I should withhold costs from Euan by reason of the conduct complained of. The position of Euan, acting by Ms Meek, was central to that conduct. Ms Meek allowed him to be put forward as a representative defendant for Tom and Freya and the court was asked to approve the settlement on behalf of all five children (including Tom and Freya). Although Euan, as a child, did not play any personal role in that conduct, the person who bears a large share of responsibility for it is Ms Meek acting as his litigation friend. I am not asked to make an order for costs against Euan personally but I am asked to disallow all or part of his costs by reason of the earlier conduct.

88. When I considered the position of Mr Barker in relation to the submission that I should disallow his costs by reason of his conduct, I concluded that it would not be right to impose such a penalty on him because of the orders for costs in his favour in the Twin Benefits proceedings which were not satisfied. As I understand it, Euan obtained an order for costs in his favour in those proceedings and that order was complied with. Accordingly, his position is different from that of Mr Barker in that respect. I conclude

that I should mark the court's disapproval of the conduct complained of by disallowing a part of Euan's costs of resisting the application of 27 June 2017. I consider that the proportionate response to that conduct is to disallow 10% of any costs to which Euan might otherwise be entitled in relation to the application of 27 June 2017.

89. As to Ms Meek, I disapprove of her conduct in relation to the proceedings which led to the order of 25 July 2014. In the absence of other considerations, I would have been minded to disallow some part of Ms Meek's costs to reflect that disapproval. However, any amount disallowed would have to reflect the fact that the relevant conduct was not in connection with the application of 27 June 2017 and, insofar as such disallowance was to punish Ms Meek for her earlier conduct, the penalty would have to be proportionate to the relevant conduct. I note that Ms Meek has previously obtained two orders for costs in the Twin Benefits proceedings. On 13 February 2017, Arnold J ordered Twin Benefits to pay £60,000 costs to Ms Meek and on 19 July 2017, Asplin J ordered Twin Benefits to pay £10,000 to Ms Meek. On the assumption that those costs orders have not been complied with and as Twin Benefits is now in liquidation, I do not consider it is appropriate to impose a further penalty on Ms Meek for the conduct which I have criticised.

Was the application initially legally sound?

90. Mr Saoul's next submission was that when the application of 27 June 2017 was made it was initially "legally sound" and it was not until 30 July 2018, when the Supreme Court refused permission to appeal against the decision of the Court of Appeal dated 8 December 2017 which reversed the decision of Roth J dated 23 March 2016 (in the negligence proceedings brought by Mr Barker against Mr Baxendale-Walker), that the position changed in a way adverse to the success of the application. Mr Saoul also submitted that the judgment of the Court of Appeal "altered the landscape fundamentally".

91. The procedural history of Mr Barker's negligence proceedings against Mr Baxendale-Walker which led to the decision of the Court of Appeal was as follows. Roth J dismissed those proceedings on 23 March 2016. Mr Barker appealed on 8 July 2016. (Ms Glover made her application on 27 June 2017 and would have known that the decision of Roth J was the subject of a pending appeal.) The Court of Appeal allowed an appeal from Roth J on 8 December 2017 and on 30 July 2018 the Supreme Court refused permission to appeal from that decision of the Court of Appeal.

92. I do not accept the submission that Ms Glover's application was "legally sound" when it was made. When I examined her application, I held in my earlier judgment that it was not "legally sound". Some of my reasoning, but not all of it, was based on the decision of the Court of Appeal. Insofar as part of my reasoning was not based on the decision of the Court of Appeal, it cannot be said by Ms Glover that that reasoning only became valid on 8 December 2017. Insofar as my reasoning was based on the decision of the Court of Appeal, that decision did not involve a change in the law. It is not to be equated with a statutory provision which comes into force in the course of a claim and which nullifies a previously valid claim. The law as disclosed by the decision of the Court of Appeal was always the law and, in particular, it was the law at the time Ms Glover's application was made.

93. As to the alternative submission that the decision of the Court of Appeal "altered the landscape", I accept that some at least of my reasoning might have been different if the Court of Appeal had upheld the decision of Roth J. To that extent, Ms Glover could say that it was more reasonable for her to make her application when she was seeking to base herself on the decision of Roth J. As against that, she knew when she made her application that the decision of Roth J was the subject of a pending appeal. However, more fundamentally, the allocation of costs in this case principally depends on which party is the successful party and does not involve an assessment of whether the losing party was reasonable to make the application. There are many cases where the stance taken by both parties is eminently reasonable but when the result emerges and one party succeeds and the other fails, the usual rule is that the losing party pays the costs of the successful party.

Should Confiànce have remained neutral?

94. Mr Saoul's next submission was that Confiànce should not be awarded its costs because it should not have incurred any but instead it should have remained neutral in response to Ms Glover's application. I do not accept that submission. Confiànce was not in the position of a neutral party which was not affected by the outcome of a dispute between other parties. Ms Glover was seeking relief which would enable Tom and Freya to sue Confiànce for an alleged breach of trust. Just as Confiànce could not have remained neutral in response to a claim based on an alleged breach of trust, it was entitled not to remain neutral on the question of whether Tom and Freya should be permitted to bring such proceedings against it.

Hardship

95. Mr Saoul's next submission was that an order for costs against Ms Glover would cause her great hardship. He made that submission on the basis that the jurisdiction I was exercising when awarding costs against Ms Glover was the jurisdiction to make a non-party costs order where, he submitted, the matters I could take into account when deciding to make such an order could include the question of hardship. However, at this stage, I am not exercising any special jurisdiction to make a non-party costs order but I am instead exercising the normal jurisdiction to award costs against an unsuccessful party and, in effect, treating a litigation friend for a party as in the same position as that party. In that context, the court does not normally decline to order costs against an unsuccessful party on the ground that such an order would cause hardship to that party. Mr Saoul did not show me any rule or any authority to support any other approach.

Conclusions as to Ms Glover

96. I am now in a position to arrive at my conclusions as to the applications for costs against Ms Glover. For this purpose, I will apply the ordinary rules as to the costs payable by an unsuccessful party, treating a litigation friend for such a party in the same way as the party.

97. I conclude that Mr Barker and Confiànce have established that it is just for their costs to be paid by Ms Glover.

98. I next consider the application for costs by Euan acting by his litigation friends, first Ms Meek and then Deborah Barker. Euan's application is based on the fact that he was

only a necessary party whilst Tom and Freya were pursuing the parts of the application of 27 June 2017 for orders lifting the stay imposed by the order of 25 July 2014 and revoking or varying that order. In due course, Tom and Freya indicated that they were not pursuing that relief but were instead only seeking an order that the order of 25 July 2014 was not binding on them. When that became clear, Euan did not incur further costs, apart from the need to incur the costs of applying to recover his earlier costs.

99. I conclude that Euan has made out his claim to costs on the basis on which it was put. I should add a word of explanation in this respect. Euan is a party and is entitled to his costs. In the event, Euan did not himself retain solicitors and incur legal costs. However, the practice in a case involving a litigation friend is not to apply the indemnity principle so as to hold that Euan has incurred no costs and so is not entitled to recover costs. Instead, the costs incurred by the litigation friend (who will have retained the relevant solicitor) are considered to be the costs of the party. Another way of analysing the matter might involve holding that the litigation friend is entitled to an indemnity from the party for whom they were the litigation friend and, in that way, the party does incur the liability for the costs in question. As I understand it no difficulty of that kind arises in the present case and I need not consider the point further.

100. I will qualify my conclusions as to Euan's costs in one respect. I do not see why Ms Glover should pay the costs incurred by Euan (acting through his litigation friends) in connection with the application to remove Ms Meek as his litigation friend and to replace her with Deborah Barker. Ms Glover was not responsible for that application being made and did not oppose it when it was made.

101. This conclusion as to Euan's costs is subject to my earlier decision that 10% of his costs should be disallowed by reason of the conduct complained of in relation to the main proceedings and the hearing of 25 July 2014.

102. Euan has applied for his costs to be assessed on the indemnity basis. I am not persuaded that this is a case outside the norm which would justify such an order. I am not persuaded that there is any reason why Euan should be allowed to recover more costs than the costs which are reasonable costs, reasonably incurred, and which are proportionate to the matters in issue which involved him.

103. Finally, I consider Ms Meek's application for costs as a separate respondent to the application of 27 June 2017. Having dealt with the earlier arguments concerning Ms Meek, I conclude that she has established that it is just for her costs to be paid by Ms Glover.

The application for non-party costs orders

104. The applicants for costs orders against Ms Glover initially presented their applications by reference to the body of case law which has developed in relation to claims for costs orders against non-parties. The applicants for costs cited a large number of authorities which identified the principles to be applied and the relevance of criteria which included the control and funding of the litigation and whether a non-party stood to benefit from the litigation. As I have explained, I do not regard those principles as the relevant principles to be applied in relation to the claims against Ms Glover. However, in case it is or becomes material, I will record my findings of fact in relation to the matters which are argued as to control, funding and benefit.

105. I will first consider whether Ms Glover controlled the proceedings in relation to which the relevant costs were incurred. Mr Saoul asked me to find that Ms Glover did not control these proceedings. Before addressing the evidence on that point, I comment that it is distinctly odd for Ms Glover to say that she did not have control of those proceedings. As I explained earlier, Ms Glover appointed herself as a litigation friend which meant that it was her duty to "conduct" proceedings on behalf of Tom and Freya. To perform the duties upon her, she had to conduct the proceedings fairly and competently and she had to acquaint herself with the nature of the proceedings and she was obliged to take all due steps in those proceedings to further the interests of Tom and Freya.

106. Mr Saoul submitted that Ms Glover's evidence was to the effect that she did not control these proceedings but instead they were controlled by Mr Baxendale-Walker and that the position in these proceedings was the same as in the Twin Benefits proceedings. Ms Glover's evidence does stress the role played by Mr Baxendale-Walker but it does not deny her own involvement. Much of her witness statement in the present proceedings consists of quoting other witness statements which sought to emphasise how significant Mr Baxendale-Walker's involvement was in the Twin Benefits proceedings. These witness statements were prepared in connection with an application for a non-party costs order against Mr Baxendale-Walker in relation to the Twin Benefits proceedings. Nonetheless, the various statements include references to Ms Glover having input into decision-making. She also said that she "delegated" decision-making to Mr Baxendale-Walker in view of his expertise and because he was funding the litigation. She also prepared and served her own detailed witness statements in support of her application. I find that in view of her role as the litigation friend for Tom and Freya, with its attendant duties to conduct the proceedings, and notwithstanding that she may have "delegated" many matters to Mr Baxendale-Walker, she controlled these proceedings.

107. As to funding, I was told that Ms Glover has served a statement of her costs which contains a certificate that she is liable to the solicitors instructed by her for those costs. However, I accept Ms Glover's evidence that she has not used any of her own money to pay for the cost of these proceedings. Her evidence is that Mr Baxendale-Walker arranged the funding of these proceedings. She has also stated that although he was made bankrupt on 11 July 2018, the funding of these proceedings has continued with the source of funds being Minerva Services Ltd, a company registered in Belize, with which she has no other connection. On the material before me, I conclude that Ms Glover has not funded these proceedings.

108. I will next consider whether it could be said that Ms Glover would potentially benefit from these proceedings. If the proceedings had succeeded, it was apparently intended that Tom and Freya would bring proceedings against Confiànce for equitable compensation for breach of trust and there might have been a tracing claim made against Mr Barker. Those proceedings would have been for the benefit of Tom and Freya and not directly for the benefit of Ms Glover. In her witness statement, Ms Glover stated that she wished to obtain funds to provide for the needs of Tom and Freya and she gave information as to what those needs were. She accepted that a financial recovery by Tom and Freya would have alleviated the financial burden on her. I was also shown an email dated 15 July 2017 from Ms Glover to Mr Barker which referred to the possibility of reconstituting the original sub-trust and she explained that this would enable Tom and Freya to pay back the debts she had incurred. Accordingly, if Tom and Freya did make

a financial recovery as a result of these proceedings (and further proceedings) then there could be an element of an indirect benefit to Ms Glover.

The liability of Tom and Freya for costs

109. Confiànce and Euan ask for orders that their costs be paid by Tom and Freya. Mr Barker and Ms Meek do not ask for orders for costs against Tom and Freya.

110. Tom and Freya made the application of 27 June 2017. If they had been adults, I do not see why I could not make an order that they pay the costs of their unsuccessful application. Although they were never formally made parties to the main proceedings, I do not see why that would prevent the court from making an order against them in respect of the costs of their failed application. The question therefore is: does it make a difference that they were children at all times?

111. Halsbury's Laws, Vol 10 at para 1418 states:

> "[a] child claimant is not liable personally for the costs of legal proceedings unless, after attaining full age, he elects to continue the proceedings or obtain an order for their discontinuance."

112. Halsbury's Laws, Vol 10 at para 1420 states:

> "[a] child defendant has not usually been ordered to pay costs unless he has been guilty of fraud; but on a petition for divorce, a child respondent or co-respondent may be condemned in costs."

113. However, the cases do not present a clear or a coherent picture.

114. In Turner v Turner (1725) 2 Strange 708, an infant, acting by his next friend, commenced a probate action which failed. The Lord Chancellor (Lord King) said that no case had been cited where an infant plaintiff had been obliged to pay costs either at law or in equity and he then referred to two cases where no order for costs was made against an unsuccessful infant plaintiff.

115. I have already referred to Vivian v Kennelly (1890) 63 LT 778 where an order for costs was made against an infant defendant (and against her guardian *ad litem*).

116. In Brockelbank v Brockelbank and Borlase (1911) 27 TLR 569 which was a divorce case where the co-respondent was an infant, the co-respondent was ordered to pay the petitioner's costs. The co-respondent did not have a guardian *ad litem*. This case was followed in Quinn v Quinn [1920] P 65, another divorce case where costs were ordered against an infant respondent who did not have a guardian *ad litem*.

117. In Slingsby v Attorney-General (1916) 32 TLR 364, the Court of Appeal ordered costs against the infant petitioner and his guardian *ad litem*. In the same case, the House of Lords made an order for costs against the guardian *ad litem* alone: see (1916) 33 TLR 120.

118. There have been a number of cases where an infant was found liable for wrongdoing and was ordered to pay the costs: these cases were considered in Woolf v Woolf [1899]

1 Ch 343. However, unlike as in Woolf v Woolf, there is no suggestion that Tom and Freya are liable for any wrongdoing and, accordingly, that case is not applicable here. The question then is whether the other cases to which I have referred lay down a general rule and, if so, whether it still applies since the coming into force of the CPR.

119. The earlier cases I have cited are not consistent on the question as to whether the court has a general discretion to make an order for costs against an unsuccessful child litigant. I consider that the above cases considered together do not establish the propositions in paras. 1418 and 1420 of Halsbury's Laws, vol 10. They do not establish that the court cannot make an order for costs against an unsuccessful child claimant. Nor do they establish that the court can only make an order for costs against an unsuccessful child defendant if he has been guilty of fraud. The earlier cases contain examples of orders for costs being made against both child claimants and child defendants. The earlier cases also provide examples of orders for costs being made against child litigants even where they had litigation friends.

120. As to the position under the CPR, I referred earlier to CPR 21.4(3)(c) which requires a litigation friend for a claimant to undertake to pay "any costs which the child or protected party may be ordered to pay in relation to the proceedings". That rule does not spell out the circumstances in which a child or protected party will be ordered to pay costs but it certainly does not suggest (as per Halsbury's Laws, Vol 10) that there is a general rule that a child who is an unsuccessful claimant will not be ordered to pay costs. CPR 46.4 provides that when a child or protected party is ordered to pay costs, the costs must be the subject of a detailed assessment. That rule shows that the court can make an order for costs against a child but, I accept, it does not indicate anything as to the circumstances in which such an order might be appropriate.

121. I therefore conclude that there is no general rule that the court will not make an order for costs against a child unless they have been guilty of fraud or gross misconduct. Instead, as always, the general rule is that the court must consider all of the circumstances of the case.

122. In some cases, the court might take the view that it is pointless to make an order for costs against children on the ground that they have no assets with which to meet such a liability. It was not argued in this case that it would be pointless to make orders for costs against Tom and Freya.

123. I was not given any evidence as to Tom and Freya's awareness of, and views as to, this litigation. I do not even know if they are aware that the court is now being asked to make orders for costs against them. I was told that the solicitors and counsel instructed by Ms Glover are acting for Tom and Freya. However, there is a potential conflict between Ms Glover and the two children in that Ms Glover may wish to be indemnified by them in relation to her liability for the costs of the application of 27 June 2017 and Tom and Freya may need independent advice as to whether to resist such an indemnity.

124. I have been given very little information as to Tom and Freya's circumstances. I know they were born in July 2001 and will soon be 18. They were nearly 16 when the application of 27 June 2017 was issued. I note from the Twin Benefits proceedings that Tom and Freya executed assignments of their rights in relation to this dispute to Mr Baxendale-Walker on 18 December 2015 and 19 January 2016 but I do not know the circumstances in which they did so.

125. In her witness statements, Ms Glover gave some limited information about Tom and Freya. She referred to them both as being vulnerable and she provided further detail in support of that statement. It appears that one of the children is much more vulnerable than the other. The impression one gets from Ms Glover's various witness statements is that the decision to bring the application of 27 June 2017 was made by her alone. Neither Tom nor Freya made any witness statement in connection with the application of 27 June 2017.

126. The choices presented to me are to make orders for costs (in favour of Confiànce and Euan) against Tom and Freya in addition to orders for costs against Ms Glover or to decline to make orders for costs against Tom and Freya. I am not asked to consider whether Ms Glover should be entitled to an indemnity from Tom and Freya although I can see that there may be considerable scope for argument about that. Of course, if Ms Glover were entitled to an indemnity from Tom and Freya, that might be relevant to whether the court should make orders for costs which are directly enforceable against them by Confiànce and Euan.

127. I have considered whether, in order to avoid the possibility of injustice to Tom and Freya, I should adjourn the applications for costs against them until they are 18 and can be separately represented and when I can be told more about their circumstances and their knowledge of the litigation which was brought in their name. However, I am asked to make my decision based on the material before me.

128. On that material, I consider that the risk of injustice is greater if I make orders for costs against Tom and Freya than it is if I leave Confiànce and Euan to the benefit of the orders for costs which I will make against Ms Glover. On the material before me, it seems likely that the application of 27 June 2017 was brought by Ms Glover of her own initiative in circumstances where Tom and Freya had no ability to control or influence the course of that application. Tom and Freya have gained nothing from the application. Accordingly, I will not make orders for costs against Tom and Freya personally.