IN THE COURT OF FIRST INSTANCE AND THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

6 May 2025

CASE Nos: AIFC-C/CFI/2023/0002, AIFC-C/CA/2023/0040 and AIFC-C/CFI/2024/0018

MICHAEL WILSON & PARTNERS, LIMITED

Claimant

v

(1) CJSC KAZSUBTON
(2) KAZPHOSPHATE LLP
(3) KAZPHOSPHATE LIMITED

Defendants

- and -

MICHAEL EARL WILSON

Added Party

JUDGMENT ON THE SECOND DEFENDANT'S APPLICATION FOR COSTS

AGAINST MR MICHAEL EARL WILSON

Justice of the Court:

Justice Sir Stephen Richards

JUDGMENT

Introduction

1. As the latest round in this protracted litigation, the Court has before it an application by the Second Defendant, Kazphosphate LLP ("KPLLP") for a costs order against Mr Michael Earl Wilson personally pursuant to Rule 26.26 or alternatively Rule 26.28 of the AIFC Court Rules. Rule 26.26 relates to the power of the Court to make a costs order against a person who is not a party to the proceedings. Rule 26.28 concerns the power of the Court to make a wasted costs order against a legal or other representative. Mr Wilson is a qualified solicitor who has acted throughout for the Claimant, Michael Wilson & Partners, Limited ("MWP"), though the capacity in which he has acted and the significance of his conduct are the subjects of dispute. MWP is a company incorporated in the British Virgin Islands ("the BVI"). KPLLP is a company incorporated in the Republic of Kazakhstan.

2. The background to the case is that MWP has in its favour a number of judgments and orders of the English High Court and a Dutch Court relating to unpaid fees for legal services said to have been rendered by MWP to KPLLP and to the First Defendant. The judgment debts, including costs and interest, owed to MWP by KPLLP alone amount to hundreds of thousands of US dollars. There is extensive evidence before this Court about those debts but the detail is unimportant.

3. The proceedings in the AIFC Court arise out of an attempt by MWP to enforce those foreign judgments and orders through the AIFC Court following its failure to secure enforcement through the ordinary courts of Kazakhstan:

    (1) First, MWP applied to the AIFC Court of First Instance ("the CFI") for an order recognising and enforcing the judgments (Case No. AIFC-C/CFI/2023/0002). In a judgment dated 26 September 2023 the CFI held that the Court had no jurisdiction to entertain the proceedings and that the Claim Form should be set aside and the proceedings dismissed. In a further judgment dated 31 October 2023 the CFI awarded costs of USD 14,238.45 against MWP in favour of KPLLP and also made an award of costs in favour of the Third Defendant.

    (2) MWP then applied to the AIFC Court of Appeal ("the CA") for permission to appeal against those decisions. The application was determined on the papers without an oral hearing and permission was refused in a judgment dated 31 January 2024 (Case No. AIFC-C/CA/2023/0040). No order as to costs was made on that occasion.

    (3) MWP applied next for an oral renewal of the application for permission to appeal. The application was refused in a judgment of the CA dated 28 August 2024, the Court holding that there is no right to an oral renewal or oral hearing of a permission application following refusal of the application on the papers. The application for an oral renewal was given a separate case number administratively, as Case No. AIFC-C/CFI/2024/0018, but it was in substance incidental to the application in Case No. AIFC-C/CA/2023/0040. By a related Order dated 12 November 2024 the CA awarded costs of KZT 1,000,000 against MWP in favour of KPLLP and also made an award of costs in favour of the Third Defendant.

(4) Execution Orders to give effect to the costs order made by the CFI were issued by the Court on 23 February 2023. MWP applied subsequently for their withdrawal and re-issue in amended form so as to remove errors in them concerning its address and company registration details and to remove reference to the company's Branch in Kazakhstan. The application was allowed by an Order of the CFI dated 10 January 2025 to the limited extent of varying the Execution Orders to include details of MWP's identity as a BVI company with a BVI address and company number, but retaining details of the company's Branch in Kazakhstan. An application by KPLLP to strike out MWP's application for the withdrawal and re-issue of the Execution Orders was refused. The CFI made no order as to the costs of the various applications before it on that occasion. An application by MWP for permission to appeal against the CFI's Order of 10 January 2025 has yet to be determined by the CA.

(5) Once initiated by the AIFC Court, execution is subject to the normal procedures of domestic Kazakh law and to the supervision of the ordinary courts of Kazakhstan. MWP has brought separate challenges to the process in the ordinary courts but the detail is not needed for present purposes.

(6) In addition to those main steps, there have been numerous ancillary directions and applications in the course of the proceedings.

(7) KPLLP's application for a costs order against Mr Wilson personally was made on 31 December 2024. This was a few days before the CFI's Order of 10 January 2025 varying the Execution Orders but it was not affected by that Order. The subsequent history of KPLLP's costs application is dealt with below.

4. The reasons behind KPLLP's costs application are broadly twofold. First, MWP has failed to satisfy the costs orders made against it and it has not been possible for KPLLP to achieve more than partial enforcement pursuant to the Execution Order in its favour. The execution process has led to recovery of only about USD 6,000, by enforcement against the assets of MWP's Branch in Kazakhstan. It has not been possible to identify other assets within the jurisdiction or to enforce against MWP in the BVI. It is believed, however, that Mr Wilson has a residence in Kazakhstan and assets which could be attached if a costs order were made against him personally, and that the conditions for the making of such an order are satisfied. Secondly, it is contended that Mr Wilson has been abusive and unreasonable in the conduct of proceedings on behalf of MWP, with numerous groundless applications, requests, emails and other documents, harassing the parties and the Court and distracting resources for no good reason. His conduct is said to have caused KPLLP unnecessary costs.

The history of the present application

5. As stated above, KPLLP's application for a costs order against Mr Wilson personally was made on 31 December 2024. It was contained in a document headed "Second Defendant's application for a costs order" which was accompanied by the written evidence in support and a draft order and was sent by email to the Court's Registry and to the email addresses used consistently by MWP in extensive correspondence with the Court and parties, including michael.wilson@mpw.kz. It was made pursuant to Rule 26.26, alternatively Rule 26.28, of the AIFC Court Rules and sought a costs order "upon the

Claimant's representative or director of the Claimant's Branch in Kazakhstan, Mr Michael Earl Wilson". It stated that KPLLP had sought from Mr Wilson to clarify his status before filing the application, to identify if he was acting as a legal representative, a director, or in another capacity, but Mr Wilson had refused to cooperate. The application was headed with the case number of the original claim in the CFI (Case No: AIFC-C/CFI/2023/0002) but the substantive text referred also to the applications for permission to appeal to the CA and for an oral renewal of the application for permission to appeal (Case Nos: AIFC-C/CA/2023/0040 and AIFC-C/CFI/2024/0018).

6. On 28 February 2025 I issued directions consequent upon the application. They were sent to the same email addresses as the application had been sent to. The directions provided first that:

> *"Having regard to the Second Defendant's application dated 31 December 2024 for a costs order against Mr Michael Earl Wilson ("Mr Wilson") pursuant to Rule 26.26 or Rule 26.28 of the AIFC Court Rules, and in the light of the Court's preliminary consideration of the issues raised by that application, it is directed that:*
>
> *1. Mr Wilson is added as a party to the proceedings in Case Nos: AIFC-C/CFI/2023/0002, AIFC-C/CA/2023/0040 and AIFC-C/CFI/2024/0018 for the purposes of costs only, pursuant to Rule 26.26(1)."*

7. The directions provided further that the application was to be listed for a hearing by video-link on 23 April 2025, and set out a timetable for the filing and service of witness statements, documents and authorities by KPLLP and Mr Wilson, for the filing of e-bundles and skeleton arguments, and for the allocation of time for submissions at the hearing. Limited extensions of time were subsequently granted (with a warning in the Registry's email of 2 April that "There will be no further changes to the timetable"). The final date for filing of any further evidence or authorities by KPLLP was 26 March; for filing of any evidence or authorities by Mr Wilson was 4 April; for filing of e-bundles was 11 April; and for filing of skeleton arguments was 16 April. The hearing date was maintained throughout.

8. By an application made on a standard Claim/Application Form, dated 2 April 2025, registered by the Court on 3 April and bearing the Case No: AIFC-C/CFI/2023/0002, MWP applied for a declaration "that the purported application by KPLLP of 31.12.24 is not a proper and valid application, and accordingly that there is no application presently before the AIFC Court" and that my directions of 28 February 2025 be rescinded and set aside, and any hearing vacated. I will refer to this as "the cross-application". It elaborated a point raised briefly in an email dated 4 February 2025. From the terms of the cross-application and the way in which the argument was presented by Mr Wilson at the hearing, it is apparent that the stance being taken by him was that there was no valid application for costs against him, that despite my directions he was not a party to the proceedings, that all the steps taken in opposition to the application (including the filing of evidence) were taken by MWP, and that his own involvement in the proceedings was on behalf of MWP alone and not on his own behalf. That matter is considered below as the first of the main issues for decision. In the meantime, when setting out the remainder of the history I will refer as appropriate to communications etc. from or to "MWP", without prejudice to the question whether they were sent or received in reality by Mr Wilson personally or on his behalf.

9. An email from the Court Registry dated 3 April 2025 sending the cross-application to the parties provided that "If the Parties wish to provide any further documents in response to this application, they may do so by no later than 17.00 Astana time on Thursday, 17 April 2025". Whilst there was a tension between this and the timetable set by my directions of 28 February 2025 and subsequent extensions, nothing turns on it (see, further, my reasons below for refusing to admit into evidence the witness statement of Mr Aubakirov).

10. KPLLP complied with the timetable in my directions as extended. Its additional evidence consisted of (i) a witness statement of Ms Natalya Chernyakova, the Head of the Legal Department at KPLLP and (ii) a witness statement of Mr Bakhyt Tukulov, a partner in the law firm which represented KPLLP in the various proceedings in the AIFC Court. An e-bundle was duly filed on behalf of KPLLP for the hearing (Hearing Bundle A), as was a skeleton argument of Mr Tukulov.

11. MWP filed evidence in the form of a witness statement of Mr Wilson himself within the time set by the extended timetable. In addition to its Hearing Bundle A, KPLLP had provided, at the request of the Court, an e-bundle of MWP materials (Hearing Bundle B), but this was not acceptable to MWP which chose to supply a 725 page e-bundle of its own (headed "MWP's bundle for the hearing on 23.04.25") and a separate "bundle of authorities". No skeleton argument as such was provided, but the hearing bundle included a document dated 2 April 2025, submitted under the name of MWP and headed "MWP's outline submissions in relation to KPLLP's purported application of 31.12.24 …".

12. On 17 April 2025, within the time allowed by the Registry's email of 3 April, KPLLP filed a short response to the cross-application. That response came after the filing of KPLLP's bundle and was therefore before the Court as a separate document.

13. Also on 17 April, MWP filed further evidence in the form of a substantial witness statement of that date by Mr Yermek Aubakirov, described as a senior lawyer of MWP. The witness statement was said to be made *inter alia* in opposition to KPLLP's costs application of 31 December 2024, in ongoing and further support of the cross-application dated 2 April 2025, in reply to the witness statements of Ms Chernyakova and Mr Tukulov, and in relation to the ongoing enforcement by MWP of the various English and Dutch judgments etc. It contained a lot of argument and introduced new factual material. It was filed with no apology for lateness and no application for an extension of time for it.

14. KPLLP put in an immediate objection to the admissibility of Mr Aubakirov's witness statement. I ruled on the matter soon after the start of the hearing on 23 April. Having outlined my concerns to Mr Wilson and given him an opportunity to respond to them, I held that the witness statement could not be admitted into evidence without permission of the Court and I refused permission in the exercise of my discretion. My reasons were: (i) in so far as the witness statement purported to be a response to KPLLP's costs application or the evidence filed by KPLLP in support of that application, it was filed well beyond the extended deadline laid down by the Court, a deadline which had been extended at the request of MWP and with an express warning that no further change to the timetable would be made; nor was any reason given for the failure to meet the deadline; (ii) in so far as the witness statement purported to be in support of the cross-application, no separate timing issue arose, since the Registry's email of 3 April had allowed until 17 April only for further material "in response to" the cross-application, not for further material in support of the cross-application, and had not displaced the timetable otherwise laid down;

(iii) in so far as the witness statement consisted of argument, the points were properly for submissions and did not need a witness statement; (iv) the witness statement contained much that was duplicative and of limited if any relevance, and did not appear to contain anything of critical importance for MWP's case; and (v) if the witness statement were admitted into evidence, KPLLP would need time to respond to it and the overall timetable would be adversely affected.

15. On the morning of 23 April, just before the hearing and again well outside the timetable laid down by the Court and without any apology for lateness, emails were sent to the Court by MWP attaching (i) by way of skeleton argument, an updated version of MWP's outline submissions document of 2 April, together with some additional documents concerning assessment of a bill of costs in English proceedings; and (ii) an updated hearing bundle, now 860 pages in length. I did not have time to consider that material before the hearing and therefore reserved my position on it, whilst emphasising the purpose of advance provision of skeleton arguments and hearing bundles, and the limited value of their late provision. In the event I have decided to leave out of account the documents concerning assessment of a bill of costs in English proceedings; I have found the skeleton argument to contain only insubstantial additions to the outline submissions document (namely a reading list and bundle references); and I can effectively disregard the updated bundle since the additions to it appear to consist only of Mr Aubakirov's witness statement, the documents concerning assessment of a bill of costs, and the skeleton argument.

16. At the video hearing on 23 April, KPLLP was represented by Mr Tukulov, assisted by Ms Mariya Petrenko. I am grateful to them for the focus and economy of their submissions. The representation for MWP/Mr Wilson consisted of Mr Wilson himself and Mr Aubakirov.

17. I allowed short cross-examination of Mr Wilson by Mr Tukulov in accordance with a previous written application by him. It was not particularly productive. Mr Wilson was an evasive and difficult witness with a tendency to engage in unhelpful argument rather than give direct answers to questions asked. At the end of his cross-examination, Mr Wilson applied to cross-examine KPLLP's witnesses, namely Ms Chernyakova and Mr Tukulov. No such application had been signalled in advance. I refused it.

18. I then identified what appeared to me to be the main issues in the case, as set out below, heard submissions primarily from Mr Tukulov and Mr Wilson, with short additional submissions from Ms Petrenko and Mr Aubakirov respectively, and reserved my judgment.

19. The day after the hearing the Court was sent an email by KPLLP by way of fuller response to an enquiry I had made at the hearing. That triggered an email from MWP to the effect that the hearing was over and no more submissions were allowed, but also challenging the substance of the points advanced in KPLLP's email. I have drawn a line at the end of the hearing and have left both emails out of account.

The main issues

20. I consider there to be four main issues, as follows:

    (1) Whether, as argued in the cross-application, KPLLP's costs application against Mr Wilson is not a proper and valid application and should not be considered by the Court. I declined to treat this as a preliminary issue at the hearing, choosing instead to hear argument on it as part of counsel's overall submissions.

(2) Whether, as argued by MWP, by reason of MWP's exercise of a right of set-off against debts owed to it by KPLLP in the English and Dutch proceedings, MWP no longer owes any monies to KPLLP pursuant to the costs orders of the AIFC Court, with the result that there is no basis for KPLLP's present costs application.

(3) Subject to issues (1) and (2), whether the Court can and should make a costs order pursuant to Rule 26.26 against Mr Wilson personally. There was not suggested to be any issue as to the power of the Court to make an order against a person who is not otherwise a party to the proceedings or as to the principles governing the exercise of the power. The central question is whether an order is justified on the facts.

(4) Again subject to issues (1) and (2), and in the alternative to issue (3), whether the Court can and should make a wasted costs order pursuant to Rule 26.28 against Mr Wilson as a legal or other representative of MWP.

21. Mr Tukulov agreed with those issues. There was no such agreement from Mr Wilson. I should note that the written and oral submissions of MWP and Mr Wilson raise other issues, particularly concerning the validity of the Execution Orders and the related enforcement proceedings (see paragraph 3(4) above), but in my view they are not relevant to the applications before me and I decline to deal with them.

Issue (1): the cross-application

22. To explain the basis of the cross-application it is convenient to set out in full the details given in the Claim/Application Form dated 2 April 2025 (see paragraph 8 above):

> *"On 31.12.24 KPLLP purported to issue an application for a costs order, however, such is and was in the wrong form as KPLLP failed to draft, prepare, sign and file a Claim Form/Application Notice in the AIFC's standard form, in compliance with and as required by Part 6 of the AIFC Court Rules, practices and procedures, including in this case applying for leave to serve out of the jurisdiction, and to procure that the Claim/Application Form Notice was accepted and recorded by the AIFC Court Registry in its systems, approved, registered, issued, stamped, sealed and dated by the AIFC Court Registry.*
>
> *In addition to the above, and in any event, KPLLP has failed to validly and properly serve a Claim/Application Form Notice on all parties, including all and any intended parties, located outside of the jurisdiction or otherwise, in compliance with Part 5 of the AIFC Court Rules, practices and procedures, and to file evidence of service.*
>
> *Given that there is and never was a proper and valid Claim/Application Form Notice filed in, registered, approved, issued, stamped and sealed before the AIFC Court, no permission or leave granted to serve out of the jurisdiction, and no valid service, there is and was never any basis in law or fact for the purported directions of 28.02.25 to have been issued and made, so that the same must now be rescinded and set aside ab-initio."*

23. In MWP's outline submissions document it is submitted that MWP has always been required by the AIFC Court to use its standard forms and to comply with the Rules when making its various applications, and that all users of the Court, including KPLLP, must comply with the Rules and use the prescribed forms, without favour or exception.

24. I do not accept the line of argument advanced in the cross-application. It is not supported by the Rules and it would impose an unwarranted procedural rigidity upon proceedings.

25. Part 4 of the Rules contains important rules concerning *commencement of a claim*, starting with the issue of a Claim Form by the Court sealing it, allotting and inscribing on it a unique claim number, and dating it (Rules 4.1 and 4.2), and including specific requirements as to service of the Claim Form within the Republic of Kazakhstan and service out of the Republic of Kazakhstan (Rules 4.9 and following). Those seem to be the rules to which the cross-application is referring. But the making of an application *in the course of existing pr*oceedings is subject to different rules. In particular:

    (1) Rule 6.1 provides that when a party makes an application to the Court after a claim is brought in accordance with Part 4, he shall file and serve an "application notice" subject to the rules of Part 6. By Rule 6.2(1), "application notice" means simply "a document in which the applicant states his intention to seek a Court order"; and by Rule 6.11 the document shall state simply "(1) what order the applicant is seeking; and (2) briefly, why the applicant is seeking the order". There is no requirement to use a Claim Form or other standard form.

    (2) The general rule is that an applicant shall file an application notice (Rule 6.3). Filing simply requires lodging the document with the Court. There is no equivalent of the Part 4 provisions relating to issue of a Claim Form (sealing by the Court, allotting a unique claim number, and dating the form).

    (3) The general rule is that a copy of the application notice shall be served by the applicant on each respondent (Rule 6.5). Where that general rule applies, a copy of the application notice shall be served as soon as practicable after it is filed, and the fall-back provision as to time of service is that it shall in any event be served at least 3 days before the Court is to deal with the application (Rule 6.12).

    (4) Subject to any directions by the Court, evidence in support of any application shall be filed and served with the application notice (Rule 6.14). When a copy of the application notice is served it shall be accompanied both by the written evidence in support and by a draft of the order which the applicant seeks (Rule 6.13).

26. KPLLP's application dated 31 December 2024 for a costs order against Mr Wilson met all the relevant requirements for an application notice within Part 6. It was made in existing proceedings and was a document in which KPLLP stated its intention to seek such an order and why KPLLP was seeking it. It was filed with the Court. It was served promptly on each respondent (a point to which I come back below). It was accompanied by, and served with, the written evidence in support and a draft of the order sought. It was a proper and valid application for the relief sought by it. It did not have to comply with the procedural requirements governing commencement of a claim by a Claim Form, any more than, for

example, a simple application for costs after a judgment has been delivered has to comply with such requirements.

27. As to service, I have noted that the application was sent to the email addresses used consistently by MWP in correspondence with the Court and parties, including michael.wilson@mpw.kz. Rule 5.3 provides that a document "may be served by any method which brings the document and its contents to the attention of the party being served". Service by email in this way was plainly effective in the circumstances to bring the application and its contents to the attention of MWP and of Mr Wilson personally. The subsequent history, including the extensions sought to the timetable laid down by my directions of 28 February, the terms of the cross-application dated 2 April, the filing of material for the hearing on 23 April, and Mr Wilson's attendance at the hearing, all go to show that MWP and Mr Wilson personally were fully aware of the application. The provisions governing service of a Claim Form out of the Republic of Kazakhstan have no bearing on the situation. And since this part of the proceedings is concerned only with costs orders made in favour of KPLLP, it is unnecessary to consider questions of service on the First Defendant (which has in any event played no part in any of the proceedings in the AIFC Court) or on the Third Defendant (which was in fact served by email at the same time as service on MWP).

28. It follows that the Court acted properly in accepting KPLLP's costs application and that there existed a proper basis for the issue of my directions on 28 February 2025. Further, paragraph 1 of those directions was effective to join Mr Wilson as a party to the proceedings for the purposes of costs only. It was appropriate to join him as such a party not only to the original proceedings in the CFI but also to the proceedings constituted by the unsuccessful applications for permission to appeal to the CA and for an oral renewal of the application for permission to appeal: as stated above, although KPLLP's costs application was headed with the case number of the CFI proceedings alone, the substantive text referred also to the applications to the CA.

29. As to what happened after Mr Wilson was joined as a party, on a strict view of the stance adopted by him it might be said that he chose to put forward no evidence or submissions on his own behalf in opposition to the costs application; but in the circumstances I am prepared to treat the material emanating from MWP, as well as the evidence and oral submissions at the hearing, as being put forward as much on behalf of Mr Wilson as on behalf of MWP.

30. If, contrary to the view I have formed, KPLLP's costs application did fail to comply with any relevant rules or there was otherwise an error of procedure, it would not invalidate any step taken in the proceedings and I would if necessary make an order to remedy the error (see Rule 3.4). The simplest approach would be to exercise the power of the Court under Rule 1.8 to waive any procedural requirement that had not been complied with. I am satisfied that such an approach would be in accordance with the overriding objective. No prejudice has been caused to Mr Wilson by the course the proceedings have taken. I have received evidence and heard argument on all the issues. It would be an absurd waste of the Court's resources and the parties' time and money to have to start again in order to end up months later in the same place.

31. The threshold procedural objection raised on behalf of MWP and Mr Wilson by the cross-application is therefore without merit and is dismissed.

Issue (2): set-off

32. By a letter dated 30 January 2025 from MWP to KPLLP, MWP purported to set off the costs payable by it pursuant to orders of the AIFC Court against the debts owed by KPLLP to MWP pursuant to orders of the English and Dutch courts. The letter reads:

> "*We are writing to you regarding the outstanding judgment debts that are owed by [KPLLP] to [*MWP*] pursuant to all of the following:*
>
> > *[The letter then lists 8 judgments/orders of the English or Dutch courts and refers in addition to the accrual of interest at the judgment rate of 8% per annum, compounded annually, and to the continuing accrual and incurring of costs, for all of which KPLLP is said to be liable and which are defined collectively as the "Judgment Debts".]*
>
> *In light of all of the above, we hereby give you formal notice that, in accordance with our rights in law, we have exercised our right to set-off against the Judgment Debts all and any amounts awarded in your favour by the AIFC in Case Nos. AIFC-C/CFI/2023/0002, AIFC-C/CA/2023/0040, AIFC-C/CFI/2024/0018. Of course, and as is trite law, as a result of such set-off, you are owed no monies by [MWP] and have no right to continue with, pursue and must immediately cancel and cease all enforcement efforts, steps and measures in relation thereto, failing which we shall apply for restraining, freezing and other injunctive relief and sanctions against you, plus costs, as well as further enforcing against your assets ….*"

33. By way of illustration of the Judgment Debts, MWP's outline submissions cite an Order of Master Leslie dated 4 August 2004, as restated and amended by Master Yoxall on 21 August 2013, which ordered that judgment be entered for MWP against KPLLP for the sum of £111,401.70 together with costs, which with interest is now said to total £296,000 and to dwarf the costs awarded against MWP in favour of KPLLP in the proceedings in the AIFC Court.

34. I received only limited assistance from counsel on the set-off issue. MWP's outline submissions state that MWP "refers to and relies on the law as set out and referred to in the 5th Edition of Derham on the Law of Set-Off", whilst giving no specific references and providing no copy of any relevant passages. In his oral submissions Mr Wilson referred to a part of the witness statement of Mr Aubakirov which he adopted by way of submission notwithstanding that I had excluded the witness statement itself from evidence. In that passage reliance is placed on equitable set-off and on paragraph 43(vi) of the judgment of Rix LJ in *Geldof Metaalconstructie NV v. Simon Carves Ltd* as setting out the applicable test, namely:

> *"For all these reasons, I would underline Lord Denning's test, freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely: 'cross-claims…so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'. That emphasises the importance of the two elements identified in Hanak v. Green; it defines the necessity of a close connection by reference to the rationality of justice and the avoidance of injustice; and its general formulation, 'without taking into account', avoids any traps of quasi-statutory language*

which otherwise might seem to require that the cross-claim must arise out of the same dealings as the claim, as distinct from vice versa."

It is submitted, in application of such a test, that the judgment debts, costs, cross-claims and counter-claims of MWP and KPLLP are all closely connected, as MWP brought its recognition application in the AIFC Court in pursuit of the enforcement of the Judgment Debts under the English and Dutch judgments and orders; and the need for the recognition application was caused entirely by the continued material default of KPLLP and the other judgment debtors.

35. For KPLLP, Mr Tukulov submitted that the attempted set-off is not possible. The alleged debts of KPLLP have never formed part of proceedings before the AIFC Court: the judgments and orders of the English and Dutch courts that are relied on have not been recognised or enforced in the AIFC Court (nor elsewhere in the Republic of Kazakhstan). The costs orders of the AIFC Court were issued against MWP only by reason of MWP's lack of success in the proceedings in the CFI and the CA.

36. Proceeding on the basis of MWP's case that one is concerned here with equitable set-off and that the essential test is that set out in the passage quoted from *Geldof Metaalconstructie NV v. Simon Carves Ltd*, I am not persuaded that the attempted set-off is effective to extinguish the liability of MWP to meet the costs orders imposed by the AIFC Court. It is true that MWP brought its claim for recognition and enforcement in the AIFC Court in pursuit of the Judgment Debts under the English and Dutch judgments and orders. But the claim was refused by the CFI on jurisdictional grounds, and the fact is that the relevant English and Dutch judgments have not been recognised for enforcement purposes within the AIFC. Further, the costs orders made against MWP in the AIFC Court reflected both the initial failure of the claim and the unsuccessful attempts to appeal against that refusal; and they took into account not just the outcome but also the conduct of the case. In the circumstances, although there is obviously some connection between the Judgment Debts and the costs orders of the AIFC Court, I do not consider them to be so closely connected that it would be manifestly unjust to allow KPLLP to enforce payment of the costs orders without taking into account the Judgment Debts.

37. I therefore reject the attempt by MWP and Mr Wilson to defeat KPLLP's costs application on the ground of set-off.

Issue (3): costs against a non-party

38. The AIFC Court has a power expressed in wide terms to award costs in proceedings before it (see, in particular, Regulations 27 and 42 of the AIFC Court Regulations). That this includes the power to award costs against a non-party is recognised in Rule 26.26 of the AIFC Court Rules which provides:

"*26.26 Where the Court is considering whether to exercise its power to make a costs order in favour of or against a person who is not a party to the proceedings:*

(1) that person shall be added as a party to the proceedings for the purposes of costs only; and

(2) he shall be given a reasonable opportunity to attend a hearing at which the Court will consider the matter further."

39. As shown earlier in this judgment, the procedural requirements of Rule 26.26 have been met: by my directions dated 28 February 2025 Mr Wilson was added to the proceedings for the purposes of costs only; and a hearing to consider the matter further was held on 23 April 2025, a hearing which he was given a reasonable opportunity to attend and did attend.

40. Guidance as to the principles applicable in such a case may be derived from the case-law of the courts of the United Kingdom under the corresponding provisions of the law of England and Wales (section 51 of the Senior Courts Act 1951 and Rule 46.2 of the Civil Procedure Rules) or on appeal from jurisdictions with similar rules. The authorities referred to below were cited in KPLLP's costs application or were referred to in cases cited in that application. MWP and Mr Wilson did not address the relevant principles in their written or oral submissions.

41. In *Dymocks Franchise Systems v. Todd* [2004] UKPC 39, a decision of the Privy Council on appeal from New Zealand, Lord Brown of Eaton-under-Heywood summarised the position as follows, at paragraph 25:

> "*(1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.*
> *(2) Generally speaking the discretion will not be exercised against 'pure funders' ….*
> *(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence ….*"

42. Later in the judgment Lord Brown observed that "*The authorities establish that, whilst any impropriety or the pursuit of speculative litigation may of itself support the making of an order against a non-party, its absence does not preclude the making of such an order*" (paragraph 33).

43. In *Goodwood Recoveries Ltd v. Breen* [2005] EWCA Civ 414 Rix LJ, having cited extensively from Lord Brown's judgment in *Dymocks*, summarised matters in this way at paragraph 59:

> "*Where a non-party director can be described as the 'real party', seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances. It may also be noted that in Lord Brown's comments … 'the pursuit of speculative litigation' is put into the same category as 'impropriety'.*"

44. That passage from the judgment of Rix LJ was cited in turn by Longmore LJ in *Petromec Inc v. Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038, at paragraph 11. Longmore LJ added:

> "*For the avoidance of doubt, it may be necessary to add that this principle is not confined to 'directors'. In the present case Mr Efromovich [the relevant non-party] has chosen not to tell who the directors of Petromec are; that does not, of course, mean that the jurisdiction does not apply to him since it is evident that he is its effective controller*."

At the beginning of paragraph 11 Longmore LJ had observed that there was a danger that the exercise of the jurisdiction to order a non-party to proceedings to pay the cost of those proceedings becomes over-complicated by reference to authority. This was picked up by Laws LJ in paragraph 19 of the same case, after expressing agreement that the appeal should be dismissed for the reasons given by Longmore LJ:

> "*I would wish to emphasise my agreement with his statement at paragraph 11 that the exercise of this jurisdiction becomes over-complicated by reference to authority. Indeed I think it has become overburdened. Section 51 confers a discretion not confined by specific limitations. While the learning is, with respect, important in indicating the kind of considerations upon which the court will focus, it must not be treated as a rule-book.*"

45. That thought is also evident in the judgment of Lewison J in *Systemcare (UK) Limited v. (1) Services Design Technology Limited, (2) Khaja Azhar Sharif* [2011] EWCA Civ 546, at paragraph 26:

> "*Lord Brown's words [in Dymocks] are emphatically not a statute. The ultimate question is whether it is just to make the order. It is wrong to treat the reported cases as providing a comprehensive check list of factors which must be present in every case before the discretion can be exercised in a particular case. What may be sufficient to justify the exercise of the discretion in one case should not be treated as a necessary factor for the exercise of the discretion in a different case ….*"

In *Systemcare* a costs order was made against the relevant non-party, Mr Sharif, and was upheld on appeal. Whilst KPLLP seeks to draw some parallel with the case for the purposes of the present application against Mr Wilson, it rightly acknowledges that *Systemcare* was an extreme case on its facts. Mr Sharif was the managing director and 90% shareholder of the defendant company and was described as "the moving spirit" of the company. The claimant was said to be "locked into litigation without merit and without justification" by the defendant company acting through Mr Sharif and to have been put to great expense by the manner in which Mr Sharif chose to act. The entirety of the costs of the litigation would not have been incurred but for his conduct, including the giving of discredited evidence of fact. He would have been the main beneficiary of the litigation. And for all practical purposes the litigation was funded by him.

46. I turn to consider the facts of the present case in the light of the principles set out above.

47. The stance taken by Mr Wilson, as set out in MWP's outline submissions, is that he "has not been and is not a director, officer or shareholder in and of MWP, whether directly or indirectly, and did not and does not own or control MWP" but is, instead, "MWP's employee, solicitor and corporate legal representative". The evidence before the Court does not enable matters to be taken much further. According to a certificate dated 11 April 2023 signed by the company's registered agent in the BVI, the sole director of the company was at that time MWP Corporate Finance Limited, the sole shareholder was WFA-Windsor Fine Arts Establishment, and the company had not appointed any corporate officers. The question of indirect ownership or control was ventilated briefly in cross-examination of Mr Wilson but his answers did not cast any real light on the position.

48. There is historical material suggesting a different picture. For example, paragraph 4 of the judgment of the English Court of Appeal in *Assaubayev and Others v Michael Wilson & Partners Limited* [2014] EWCA Civ 1491 describes Mr Wilson as "managing director" of MWP; and paragraph 8 of the judgment of Master Dagnall dated 15 November 2021 in the English High Court (page 60 of MWP's Bundle of Authorities) describes Mr Wilson as "solicitor and director" for MWP, as do the recitals of an Order of Master Dagnall dated 13 November 2024 (*ibid.* page 171, where "direction" must be a typographical error for "director"). It is not possible on the evidence to say when that changed, if it did, or whether the change reflected an underlying change of substance.

49. There is also some evidence about MWP's Branch in Kazakhstan, known as "Michael Wilson & Partners, Ltd, Legal Consultants in Kazakhstan" and through which MWP's business in Kazakhstan is conducted. In an official information document issued by the Kazakh authorities on 11 December 2024, Mr Wilson is described as "Head" of the Branch and as its "First Director", though Mr Wilson's evidence in cross-examination was that he is employed as Head of the Branch but not as a director, and there is no evidence about the terms of his employment. It is MWP, not the Branch, that is party to the proceedings, but some significance may be attached to the fact that it was the address of the Branch that was given in the Claim Form in the original proceedings in the CFI. (The legal status of the Branch and whether a costs order against MWP can be enforced against the assets of the Branch are questions that arise in the enforcement proceedings but do not need to be resolved here.)

50. Standing back, the existence of a close connection between Mr Wilson and MWP is obvious. The company's name reflects that of Mr Wilson. When he appeared before the CFI in the original proceedings, the link between him and the company was underlined by the Court's reference to "Michael Wilson and Partners, Limited, … represented before the AIFC Court by Mr Michael Wilson himself" (see paragraph 2 of the CFI's judgment of 26 September 2023). The Judgment Debts that form the background to the case relate to unpaid fees for legal services said to have been rendered to the First Defendant and KPLLP by MWP. Mr Wilson appears to have been closely involved in the conduct of the proceedings in the English and Dutch courts for recovery of the debts. So far as concerns the conduct of proceedings brought by MWP in the AIFC Court, he appears to have been the decision-maker at all material times. No other person has been identified as involved in the running of the AIFC Court cases for MWP.

51. KPLLP makes numerous criticisms of the conduct of proceedings in the AIFC Court. Those matters are of greater relevance to the alternative application for a wasted costs order against Mr Wilson as a representative of MWP, but they also have some bearing on the present issue and it is convenient to summarise them here:

    (1) In his costs judgment in the original CFI proceedings, Lord Mance summarised some of the features of the claim in this way:

    "2. … *The attempt [to register or enforce English and Netherlands judgments in or through the AIFC Court] was originally described as a claim within the express heads of the Court's jurisdiction but was later explained as a simple application, needing no such jurisdictional basis. It was accompanied by the filing of extensive documentation, some of no apparent relevance. As against the Third Defendant it had the unpromising feature that none of the English or Netherlands judgments was against the Third Defendant. The claim was accompanied by a number of untenable submissions …'*

3. … the claim has been presented in an expansive and expensive way, with a number of points made proving in reality to lack any real prospect of success from the outset."

(2) Several of the untenable submissions were repeated in the unsuccessful application for permission to appeal.

(3) That was followed by what the Court described as a "misconceived" application for an oral renewal of the application for permission to appeal. It was, however, the first time that the point had arisen, which was the reason why in its subsequent award of costs against MWP the Court declined to award additional costs under Rule 26.12 on the ground of unreasonable behaviour.

(4) The problems concerning enforcement of the Court's costs orders pursuant to the Execution Orders all arose from the initial failure by MWP to include on its Claim/Application Forms its address and other details as a company registered in the BVI, and the provision of the address and other details of its Branch in Kazakhstan. Whether or not this was done, as KPLLP contends, by way of a deliberate attempt to hide MWP's true identity and to shield it from liability for costs, it gave rise to unnecessary complication and expense. (I leave out of account, however, a complaint by KPLLP about active interference by Mr Wilson with the enforcement proceedings themselves, by way of the communication of threats to the bailiffs in order to prevent initiation of those proceedings. That is not a matter on which I am in a position to make any findings.)

(5) KPLLP's other criticisms include the sending of excessive and inappropriate correspondence. Mr Tukulov gives evidence in his witness statement that:

"*Since February 2023 Mr Wilson himself has sent over 90 emails to the AIFC Court Registry and [KPLLP], many of which were repetitive, irrelevant, or inflammatory. For instance, on 14 October 2024, he sent four emails in a single day raising unfounded objections to [KPLLP's] costs submissions and enquiring about his application to amend the Execution Orders. The AIFC Registry itself requested Mr Wilson to cease such behaviour … but he persisted.*"

(6) It is argued by Mr Wilson that all the relevant correspondence comes from, and all Court filings are made by, MWP rather than Mr Wilson himself. Attention is drawn to the fact that communications are in the name of MPW and end with the words "Yours faithfully, Michael Wilson & Partners, Ltd", with a footer bearing MWP's name and the address of its Branch; and it is said that when documents are signed, it is always done on behalf of MWP rather than by way of personal signature. All that may be true as a matter of form, and I accept that Mr Wilson may not write all the emails himself, but I am satisfied that he "runs the show", sets the style and contents of the correspondence and Court filings and must bear personal responsibility for them. The style and content of Mr Wilson's own witness statement, evidence in cross-examination and oral submissions in the present case are all consistent with and supportive of that view.

52. As I have said, those matters have a greater bearing on the issue of wasted costs than on the present issue of costs against a non-party. But what does strike me about them is that Mr Wilson's conduct of the litigation in the AIFC Court has the character of a personal mission, lacking in balance and going well beyond the bounds reasonably to be expected of a person fulfilling the ordinary role and responsibilities of a legal representative. And the manner in which he has chosen to act has undoubtedly involved KPLLP in unjustified expense.

53. This case lacks several of the features that have been held to justify the making of a non-party costs order in some of the cases discussed above. For example, I have referred to the evidence that Mr Wilson has no formal position within MPW beyond that of Head of the company's Branch in Kazakhstan. Further, given the limited evidence about the shareholding structure behind MWP and the absence of evidence of who would benefit ultimately from recovery of the unpaid Judgment Debts owed to MWP, it is not open to the Court to find that Mr Wilson has been pursuing the litigation in the AIFC Court for his own personal benefit. Nor does the evidence admit of a finding that he has funded the litigation. Taking everything into account, however, I do consider it to be a fair inference that Mr Wilson has had and continues to have effective control of MWP's litigation in the AIFC Court and that it is by reason of the decisions and conduct of Mr Wilson himself that KPLLP has had to face the litigation and incur the associated costs, including in particular the costs that were ordered to be paid to it by MWP but are irrecoverable because of MWP's location in the BVI.

54. I have borne carefully in mind the guidance in the authorities that this is a fact-sensitive area, that the ultimate question is whether it is just to make a costs order against a non-party, and that the Court is exercising a discretion not confined by specific limitations. Looking at the matter in the round, including the background to the case, I have reached the conclusion that it is just in all the circumstances to exercise the discretion in KPLLP's favour in this case and to make a costs order against Mr Wilson personally along the lines sought by KPLLP.

55. KPLLP claims the sum of USD 16,000, representing the effective total of the costs that MWP was ordered to pay KPLLP by the Order of the CFI in Case No: AIFC-C/CFI/2023/0002 and by the Order of the CA in Case No: AIFC-C/CFI/2024/0018.

56. Although a sum of about USD 6,000 has been successfully recovered to date by enforcement against the assets of MWP's Branch pursuant to the relevant Execution Order, Mr Tukulov told me that such recovery is being challenged by MWP and he submitted that it would therefore be wrong to make a deduction for it from the amount of costs that Mr Wilson is ordered to pay pursuant to the present judgment. I accept that approach. The risk of double recovery can be avoided by spelling out in the present order that Mr Wilson's liability to pay the costs ordered is joint and several with that of MWP under the existing orders of the Court, which are unaffected by the present order. Mr Tukulov submitted that in any event KPLLP would not attempt to, and would not be allowed to, recover from MWP and Mr Wilson a combined sum in excess of the total payable by MWP under the existing orders.

57. Enforcement of the order now to be made may give rise to problems of its own, having regard for example to Mr Wilson's refusal to accept in cross-examination that he resides in Kazakhstan or to give details of his assets or sources of income. But that is not a relevant consideration at this stage.

Issue (4): wasted costs

58. In the light of my finding in favour of KPLLP on Issue (3), it is unnecessary to consider Issue (4) at any length: a wasted costs order pursuant to Rule 26.28 was sought by KPLLP *in the alternative* to its application for a non-party costs order pursuant to Rule 26.26. In case the matter goes further, however, it may be helpful for me to indicate briefly why I would have found against KPLLP on Issue (4) if it had arisen for decision.

59. Rule 26.28 provides that the Court shall have power to order the "legal or other representative concerned" to meet the whole or part of any "wasted costs".

60. Mr Wilson has acted as a "legal representative" of MPW in the proceedings in the AIFC Court, whatever other role he may also have had.

61. As to an order in respect of "wasted costs", I think it appropriate to apply broadly the same approach as would the English courts under section 51 of the Senior Courts Act 1981, Rule 46.8 of the Civil Procedure Rules and paragraphs 5.1-5.9 of Practice Direction 46, even though the provisions governing the making of an order in the AIFC Court do not contain the same statutory detail. The main conditions are that (i) the legal representative has acted improperly, unreasonably or negligently; (ii) the conduct has caused a party to incur unnecessary costs; and (iii) it is just in all the circumstances to order the legal representative to compensate the party for the whole or part of those costs.

62. The main difficulty facing KPLLP is that the costs of the relevant proceedings determined to date have already been the subject of decision and in my view it is too late to reopen the decisions. Thus:

    (1) In the original proceedings in the CFI, KPLLP applied for and obtained an order for costs against MWP (paragraph 3(1) above). It is too late to go back and argue that some or all of those should be paid instead by MWP's legal representative as wasted costs.

    (2) On the dismissal of the application for permission to appeal (paragraph 3(2) above), KPLLP made no application for costs and no order was made. It is too late to apply now.

    (3) On the dismissal of the application for an oral renewal of the application for permission to appeal (paragraph 3(3) above), KPLLP applied for and obtained a costs order against MPW. Again it is too late to go back and argue that some or all of those costs should be paid instead by MPW's legal representative as wasted costs. Moreover a request by the Third Defendant for additional costs to be awarded under Rule 26.12 on the ground that MPW behaved unreasonably was refused on that occasion. That would leave no scope for a wasted costs order.

    (4) In its decision on the parties' applications concerning the Execution Orders (paragraph 3(4) above), the Court specifically made no order as to costs, holding that neither party emerged as a clear-cut overall winner and that in any event the issues were not ones that made a further award of costs appropriate. There is no room there to go back and make a wasted costs order.

63. Nevertheless I have considerable sympathy with KPLLP's complaint that time has been spent, and costs incurred, in responding to untenable submissions, dealing with excessive correspondence and considering repetitive and irrelevant material emanating from Mr Wilson as the legal representative of MWP. Such conduct on his part appears to me to be capable in principle of amounting to unreasonable behaviour for the purposes of the wasted costs jurisdiction. If such conduct were persisted in, a duly particularised application for wasted costs made in the context of specific proceedings and as an alternative to an award of costs between the parties would have to be given due consideration.

Conclusion

64. For the reasons I have given, KPLLP's application for costs against Mr Wilson personally pursuant to Rule 26.26 of the AIFC Court Rules is allowed and MWP's cross-application is dismissed.

65. As to the form of order, subject to the issue of costs, Mr Tukulov is requested to file and serve within 10 days of the date of this decision a draft Order for the Court's consideration, having regard in particular to paragraph 56 above, and Mr Wilson is to have 10 days thereafter for the making of any comments in writing on the draft. Any application for costs is also to be made in writing within 10 days of the date of this decision, with any response to be made in writing within 10 days thereafter. The Court will then decide the issue of costs on the papers, and will finalise the Order, without a further hearing.

By the Court,

The Rt Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Claimant and the Added Party were represented by Mr Michael Wilson, Partner, assisted by Mr Yermek Aubakirov, Senior Lawyer, both of Michael Wilson & Partners, Ltd, Almaty, Kazakhstan.

The First Defendant was not represented.

The Second Defendant was represented by Mr Bakhyt Tukulov, Partner, assisted by Ms Mariya Petrenko, Associate, both of TKS Disputes LLP, Almaty, Kazakhstan.

The Third Defendant was not represented.