Neutral Citation Number: [2019] EWHC 997 (Ch)

Royal Courts of Justice
Business and Property Courts
of England and Wales
Rolls Building,Fetter Lane
London, EC4A 1NL

Date: 17 April 2019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Before:

MR JUSTICE SNOWDEN

Case No: CR-2012-012276

Between:

JULIE ANNE DAVEY

Applicant

and

(1) JAMES MONEY
(2) JIM STEWART-KOSTER
(Joint Administrators of Angel House Developments Limited)

Respondents/Section 51 Applicants

and

CHAPELGATE CREDIT OPPORTUNITY MASTER FUND LIMITED

Section 51 Respondent

AND

Case No. CR-2015-002261

Between:

DUNBAR ASSETS PLC

Claimant/Section 51 Applicant

and

JULIE ANNE DAVEY

Defendant

and

CHAPELGATE CREDIT OPPORTUNITY MASTER FUND LIMITED

Section 51 Respondent

- -

Justin Fenwick QC and Ben Smiley
(instructed by **Clyde & Co. LLP**) for the **Joint Administrators**
Nicholas Bacon QC and Joseph Curl
(instructed by **Freshfields Bruckhaus Deringer LLP**) for **Dunbar Assets PLC**
Robert Marven QC
(instructed by **Collyer Bristow LLP**) for **Chapelgate Credit Opportunity Master Fund Limited**

Hearing dates: 31 October and 6 November 2018

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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.

.....
MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This judgment principally concerns the potential application of the so-called "*Arkin* cap" to limit the extent of non-party costs orders against a commercial litigation funder.

2. In a lengthy judgment which I handed down on 11 April 2018 ([2018] EWHC 766 (Ch) (the "Judgment")), Mr. Money and Mr. Stewart-Koster (the "Administrators") and Dunbar Assets plc ("Dunbar") (together "the Defendants"), were successful in defending substantial claims and counterclaims brought against them by Ms. Julie Anne Davey ("Ms. Davey").

3. Ms. Davey had made serious allegations of breach of duty against the Administrators and of improper conduct tantamount to dishonesty against officers of Dunbar. Having failed, Ms. Davey was ordered to pay each of the Defendants' costs to be assessed on the indemnity basis. The Defendants claim that their costs amount in total to just short of £7.5 million. Ms. Davey was ordered to make payments on account in the combined amount of £3.9 million. She has not made any payment toward such costs.

4. By applications issued at the time that the costs orders were made against Ms. Davey, the Defendants each seek non-party costs orders under Section 51 of the Senior Courts Act 1981 ("Section 51") against Ms. Davey's commercial funder, namely ChapelGate Credit Opportunity Master Fund Limited ("ChapelGate").

5. ChapelGate accepts that a non-party costs order should be made against it under Section 51, on the same indemnity basis as the order made against Ms. Davey. However, it contends that its total liability to the Defendants should be limited to the overall maximum of the funding that it provided to Ms. Davey, namely £1,275,166.34, because of the application of the so-called "*Arkin* cap" – a reference to the decision of the Court of Appeal in Arkin v Borchard Lines Ltd (Nos 2 and 3) [2005] 1 WLR 3055 ("Arkin").

Background to the Case

6. The detailed background to the case is set out at length in the Judgment.

7. In brief, Dunbar appointed the Administrators to Ms. Davey's company, Angel House Developments Limited ("AHDL") on 27 December 2012. AHDL's main asset was a commercial office property in Docklands ("Angel House") which was charged to Dunbar to secure AHDL's borrowings. Angel House was sold by the Administrators on 9 December 2013 for a price of £17.05 million. After payment of expenses and part satisfaction of Dunbar's secured claim, this left nothing over for AHDL (or for Ms. Davey as its shareholder).

8. In July 2013, prior to the sale of Angel House, Dunbar had obtained summary judgment for £1.6 million plus interest and costs against Ms. Davey on a limited personal guarantee which she had given in relation to AHDL's borrowings. Whilst the judgment was still outstanding, in January 2014 Dunbar commenced further proceedings to recover under the guarantee the further substantial costs of enforcing the guarantee and the judgment against her which had not been recovered in the earlier claim ("the Dunbar Proceedings").

9. Ms. Davey eventually paid the outstanding judgment debt to Dunbar in instalments ending on 18 July 2014. On that day she began proceedings on behalf of AHDL against the Administrators under paragraph 75 of Schedule B1 to the Insolvency Act 1986 ("the Insolvency Act Proceedings"). In these proceedings, Ms. Davey alleged that the Administrators had breached their fiduciary duties and failed to exercise independent judgment in the administration, and had sold Angel House at a substantial undervalue in reliance upon the advice of unsuitable agents ("APAM") that Dunbar had selected for them to use. Ms. Davey also alleged that the Administrators had wrongly frustrated her attempt to mount a "funded rescue" of AHDL which she contended would have led to all AHDL's creditors being paid and the company being taken back out of administration.

10. In November 2014, and after having acquired AHDL's rights of action from liquidators who had been appointed to AHDL at the end of the administration, Ms. Davey served an Amended Defence and Counterclaim in the Dunbar Proceedings, alleging that Dunbar had so interfered with the conduct of the administration as to be vicariously liable for the breaches of duty by the Administrators. Ms. Davey also alleged that Dunbar had conspired with APAM to cause her harm (i) by procuring that Angel House should be sold at an undervalue, and (ii) by the rejection of her funded rescue in order to preserve Dunbar's claim against her under her personal guarantee.

11. In February 2015, the two sets of proceedings were ordered to be case-managed and tried together. Disclosure took place that month, witness statements were served in May 2015 and expert evidence was served on behalf of Ms. Davey in August 2015.

12. At a relatively early stage in the proceedings, the Administrators investigated the question of obtaining security for costs from Ms. Davey. Their solicitors wrote to Ms. Davey's solicitors in June 2014 but did not pursue the matter again until nearly a year later in May 2015, at which time they were told that Ms. Davey had become resident in England and so security for costs could not be sought from her. This assertion was not challenged and no application for security for costs was pursued. It was not until cross-examination of Ms. Davey at trial that it became apparent that she had, in fact, always been resident in Israel.

13. In September 2015, prior to the service of expert evidence on behalf of the Administrators and Dunbar, Ms. Davey received a lengthy written opinion from Stephen Davies QC advising that the Insolvency Act Proceedings had a 75% prospect of success, and that her prospects for success in the counterclaim in the Dunbar Proceedings ranged between 70% in respect of the vicarious liability claim, down to 55-60% for the claim in conspiracy.

14. In his opinion, Mr. Davies QC noted that a proper assessment of quantum could not be made until after receipt of expert evidence from Dunbar and the Administrators. However, Mr. Davies plainly regarded as credible the expert opinion of Ms. Davey's expert, Mr. Wolfenden, that the true value of Angel House at the time of its sale was between £31.6 million and £43.6 million (depending on the grant of planning permission). Mr. Wolfenden had also suggested that even allowing for the fact that in order to procure funding for her attempt to rescue AHDL, Ms. Davey had agreed to part with 50% of the shares in AHDL to her putative backer, a Mr. Bernard Eastwood, Ms. Davey's losses from the alleged rejection of her funded rescue could have been as high as £49 million.

15. On the basis of the more conservative of Mr. Wolfenden's valuations, given that Angel House had been sold for £17.05 million and that AHDL had about £2.5 million of external creditors, this meant that Ms. Davey stood to benefit through her sole shareholding in AHDL to the tune of between £12.1 million and £24.1 million if the Proceedings were successful. Mr. Davies QC therefore opined that, even on the basis of Mr. Wolfenden's lowest valuation for Angel House, Ms. Davey would be left with a claim in excess of £10 million.

16. The evidence of the separate experts instructed by the Administrators and Dunbar was served in December 2015. Those experts disagreed very significantly with the views of Mr. Wolfenden, supporting the Defendants' case that Angel House had not been sold in breach of duty or at an undervalue.

The Funding Agreement

17. In September 2015, and acting via a broker, Ms. Davey approached ChapelGate's investment manager, Orchard Global Asset Management LLP ("Orchard") for funding. This led to various funding proposals being made by Orchard, and to Orchard performing some due diligence, the extent of which is not entirely clear, into Ms. Davey's claims.

18. On 23 December 2015 Ms. Davey and ChapelGate entered into a funding agreement (the "Funding Agreement").

19. By this stage, substantial costs had already been incurred by the Administrators and Dunbar. The Administrators' evidence is that by 23 December 2015 they had incurred just over £1 million out of their total costs claimed of just over £3.13 million. On the figures that I have seen, Dunbar claims to have incurred about £2.15 million of its total costs of £4.35 million by 31 December 2015. The total costs incurred by the Defendants since the date of the Funding Agreement thus amount to about £4.33 million.

20. No distinction was drawn in the Funding Agreement between the Insolvency Act Proceedings and the Dunbar Proceedings, both being collectively referred to as "the Claim". The Funding Agreement contained provisions to the following effect:

    i) ChapelGate's total funding (the "Commitment Amount") was to be £2.5 million.

    ii) Save for an initial £200,000 to cover work-in-progress and counsel's fees, payment of the Commitment Amount was conditional upon: (a) an opinion from Mr. Davies QC satisfactory to ChapelGate, (b) agreement of a costs budget prepared by Ms. Davey's then solicitors, Mishcon de Reya ("MdeR"), (c) confirmation that Ms. Davey had obtained after the event ("ATE") insurance satisfactory to ChapelGate to cover herself for any adverse costs order, and (d) Ms. Davey entering into a conditional fee arrangement ("CFA") with each of MdeR and Mr. Davies QC.

    iii) The order of priority of application (the "Waterfall") of any monies received by Ms. Davey from the Claim (the "Case Proceeds") was:

a) first, to repay the funding provided by ChapelGate (the "Outstanding Principal Amount") including any premium paid in respect of the ATE insurance;

b) secondly, to pay to ChapelGate its "Funder's Profit Share" (as defined in a schedule);

c) thirdly, to pay all outstanding legal and expert fees and disbursements falling within an agreed budget, excluding uplifts;

d) fourthly, to pay any properly incurred legal or expert fees that exceeded the agreed budget, together with any uplifts or other amounts due under the CFAs of MdeR and Mr. Davies QC; and

e) finally, to pay the residual amount to Ms. Davey.

iv) The Funder's Profit Share was calculated on an increasing scale by reference to the stage at which the Claim was won or settled. This would be 30% of the Commitment Amount if the Claim was won or settled prior to 30 January 2016, and increased to the greater of 250% of the Commitment Amount or 25% of the "Net Winnings" (the Case Proceeds less the Commitment Amount) if the case was won or settled after the commencement of the trial.

v) MdeR were to prepare a costs budget to form the basis for payment of fees up to the Commitment Amount. If MdeR informed ChapelGate that the budget would be exceeded, ChapelGate could elect whether or not to increase the Commitment Amount to fund the excess.

vi) MdeR were to be instructed by Ms. Davey to monitor the level of the Defendants' legal costs and to keep ChapelGate fully informed of them, and Ms. Davey was to use her reasonable endeavours to ensure that the level of ATE insurance was increased to ensure that neither she nor ChapelGate was exposed to any risk of an adverse costs order which might exceed the level of cover under the ATE policy.

vii) Although Ms. Davey was obliged to provide information to ChapelGate about the Claim, ChapelGate acknowledged that Ms. Davey would have complete control over the conduct of the Claim and ChapelGate would not have control over the Claim. However, Ms. Davey agreed that the decisions about key steps in the proceedings, particularly relating to settlement, would only be taken after ChapelGate had been given notice and after advice from MdeR. Failure by Ms. Davey to follow MdeR's advice could lead to either (a) termination of the Funding Agreement and repayment of funding plus interest, or (b) continued performance of the Funding Agreement on the basis of an increase in the Funder's Profit Share.

21. As envisaged in the Funding Agreement, agreements were reached under which MdeR agreed to act on a CFA with 25% of their fees at risk, and Mr. Davies QC agreed to act on a CFA with 50% of his fees at risk.

Amendment of the Funding Agreement

22. It is clear from the evidence and the terms of the Funding Agreement that the intention was that up to £1 million of the Commitment Amount provided by ChapelGate would be used by Ms. Davey to purchase ATE insurance against an adverse costs order of up to £2.5 million; and that if the premium for the ATE policy exceeded £1 million, Ms. Davey should provide the necessary further monies.

23. In the event, however, Ms. Davey did not obtain any ATE cover. ChapelGate has adduced very limited evidence as to why this was.

24. A contemporaneous explanation in an internal email from Orchard in February 2016 was that ATE insurers had not been found in time because the broker who was given the task of finding ATE cover in the market,

> "made a mess of timings and sizes, not because of the legal risk of the case".

An alternative view was provided in a non-contemporaneous email from the broker himself, who stated,

> "We had multiple meetings with a range of insurers and there was appetite to underwrite the adverse costs risk, however, no ATE was secured because the costs of any upfront premium, coupled with the costs of deferred premium, were making the claim unattractive economically to both [Ms. Davey] and Orchard."

25. Whatever the reasons, the result was that Orchard made a proposal to resolve the position by an amendment to the Funding Agreement. This was explained in a contemporaneous internal email from Orchard as making "no change to our net risk". The email set out Orchard's proposal,

> "- Waive the requirement that [Ms. Davey] obtain insurance for adverse costs risk.
>
> - Reduce our commitment from £2.5m to £1.25m.
>
> – Keep our profit entitlement the same (i.e. based on a commitment of £2.5m).
>
> – [Ms. Davey] gives us security over her rights in the claim (not strictly necessary but it is an added bonus for us).
>
> Normally we require that the claimant obtain ATE insurance to cover adverse costs risk. This is because if a case is lost and the defendant fails to pay the other side's costs, the funder may be liable to pay an amount of those costs up to the amount it funded i.e. ChapelGate's maximum liability on a case without insurance is equal to 2x the actual amount funded. This is known as Arkin liability (after the case in which the rule was established).

> We originally committed £2.5m in this case, including £1m to pay the premium on the insurance….To ensure we can still run the case, the lawyers have agreed that their fee will be £1.25m. If we fund that entirely then, together with our Arkin risk, we end up back at £2.5m of total risk (i.e. no change). Therefore our fee is still calculated on £2.5m."

26. To give effect to this proposal, on 12 February 2016 ChapelGate and Ms. Davey entered into an Amendment and Waiver Agreement (the "A&W Agreement") by which the Funding Agreement was amended. Under the A&W Agreement, the requirement for Ms. Davey to obtain ATE insurance was waived; the Commitment Amount was halved to £1.25 million; and the definition of the Funder's Profit Share was changed so that references to the Commitment Amount were replaced with references to the "Commitment Amount multiplied by 2".

27. Following the A&W Agreement, on 18 March 2016 ChapelGate obtained ATE insurance for itself to limit its own exposure to an adverse costs order arising out of the Proceedings. The sum insured under the policy was £650,000. The premium was either £487,500 if the Proceedings were settled before trial, or £1.3 million if the trial was won. In either case, however, the premium was only payable to the extent that ChapelGate recovered any monies under the Funding Agreement.

28. On 29 March 2016, Mr. Davies QC gave a further, shorter opinion to supplement his earlier opinion. He reiterated his earlier views on the merits, with the sole exception that he reduced the prospects for success on the conspiracy claim to less than evens. Mr. Davies QC also repeated his views on the quantum of the claims, describing Mr. Wolfenden's valuation report as, on its face, well-prepared and fully-reasoned. Mr. Davies QC also considered that the court would be likely to find "compelling" the evidence of Ms. Davey's prospective factual witnesses as to the sale process for Angel House, a Mr. Andrew Connaughton, a Mr. Jonathan Fenwick and Mr. Bernard Eastwood. Mr. Davies QC referred in particular to the evidence of Mr. Connaughton that a syndicate of investors trading under the name Capital & Oriental would have been prepared to offer up to £28 million for Angel House, which he considered supported Mr. Wolfenden's valuation evidence.

29. The trial commenced on 28 April 2016 and ended on 20 June 2016.

The Judgment and Costs Judgment

30. In my Judgment, I rejected all of the material allegations of breach of duty and misconduct against the Administrators, together with all of the allegations of improper interference in the administration and conspiracy against Dunbar.

31. As to the true value of Angel House, I found that the sales process for Angel House had not been either unsatisfactory or rigged as Ms Davey had contended. I considered that Mr. Wolfenden was an unsatisfactory expert witness, whose evidence was often simply unsupported assertion, and in one important respect obviously re-engineered just before he gave evidence in an unsuccessful attempt to overcome the effect of a serious error which he had spotted in his original report. I also found that Capital & Oriental's highest offer for Angel House had in fact only been £17.5 million and that the Administrators had been justified in rejecting it because of concerns as to its

deliverability. Indeed, contrary to Mr. Connaughton's evidence, Capital & Oriental's funder had never even been asked to consider supporting an offer for Angel House of £28 million. I preferred the evidence of the experts called by Dunbar and the Administrators to the effect that Angel House had not been sold at an undervalue.

32. Of the other witnesses mentioned by Mr. Davies QC in his supplemental opinion, I thought that Mr. Jonathan Fenwick was an unreliable witness who was prone to exaggeration and inaccuracy: and Mr. Eastwood chose to absent himself from proceedings and did not even turn up to give evidence and be cross-examined at the trial. I thought that this was because Mr. Eastwood's witness statement had been discredited and that he had been shown to have misled the Administrators on a number of occasions during the crucial period prior to the sale of Angel House about his access to the necessary finance to support Ms. Davey's funded rescue, and the progress of any due diligence.

33. In giving my rulings on costs following the hand-down of the Judgment, I drew the threads together in the following way,

> "Dunbar's costs
>
> 8. An order for costs on the indemnity basis will be appropriate where the conduct of a party has taken the situation away from the norm, see Excelsior Commercial and Industrial Holdings Ltd v Salisbury Ham Johnson [2002] EWCA Civ 879. For conduct to be out of the norm, it is not necessary to show deliberate misconduct. In some cases, unreasonable conduct to a higher degree will suffice. An award of indemnity costs is, however, to some extent a mark of disapproval of the way in which a case has been fought and lost.
>
> 9. As I set out in the Judgment, serious allegations were made against Dunbar by Ms. Davey. Although the word "dishonesty" was not used in the pleadings or by counsel at trial, in my judgment the case advanced at trial against Dunbar necessarily involved just that. The central allegation was of a deliberate conspiracy between Dunbar and APAM to cause the Administrators inadvertently to breach their duties to the company so as to harm the company and Ms Davey as its shareholder. Among the matters alleged were the production of documents designed to give a false impression of APAM's incentives in the ultimate sale process, and the deliberate rigging of that sale process so as to result in a sale of Angel House to what was described as the "Preferred Bidder" of Dunbar at an undervalue, so as to leave Ms Davey exposed to Dunbar on her personal Guarantee.
>
> 10. Moreover, after disclosure, it must have been apparent to Ms. Davey and her advisers that if their allegations against Dunbar were correct, a large number of internal documents … must also have been concocted by [the Dunbar witnesses] to create a false picture to cover up the conspiracy.

11. These were serious allegations which were wholly unfounded and I rejected them in the Judgment. Moreover, in correspondence before and during the trial as well as through counsel at the outset of the trial, Dunbar invited Ms. Davey and her advisers to withdraw those allegations. Those invitations were not taken up and the case proceeded on the basis of the pleadings alleging such misconduct. As it was, however, many of the allegations of dishonesty and conscious impropriety were not then put to Dunbar's witnesses.

12. Allegations of dishonesty against professional persons and those who operate in regulated industries can have the most serious consequences. Parties who make allegations of this level of seriousness should only do so on the basis of clear evidence, and the appropriateness of continuing with such allegations must be kept under careful review. I simply do not think that is what happened in this case. The serious nature of the allegations made against Dunbar and the inappropriate and unreasonable manner in which they continued to be made, was well out of the norm.

....

The Administrators' Costs

31. I make it clear that I do not think that the case pursued by Ms Davey was completely without merit. She did succeed in showing that the Administrators gave assistance to Dunbar to pursue her on her personal Guarantee, this being assistance that should not have been given. This aspect of the case, coupled with some of the deficiencies in the documentation to which I have referred, could have founded a straightforward case that the process for sale of Angel House was flawed and had resulted in a sale of the property at an undervalue. Whilst I would not describe that case as strong, and I do not think that the identified deficiencies in the documentation were ultimately of any great significance, it was a case that could properly have been made.

…..

33. In my judgment, this was an obvious case in which the range of allegations made against the Administrators could and should have been carefully limited and confined from the outset, and kept under constant review. Instead, Ms Davey sought to attack almost every action of the Administrators throughout the administration, even though I think many of those criticisms could, with an objective eye, have been seen to be unfounded from the contemporaneous documents, and ultimately all of the significant allegations that might have sounded in damages failed. That lack of discrimination in the allegations made significantly increased the burden of the case for the Administrators.

> 34. Further, for reasons that I have already outlined, if a claimant makes allegations against a professional defendant in a case in which she is also making allegations against other defendants that are tantamount to allegations of dishonesty, in my view the claimant must be assiduous in making clear whether or not they are also alleging that the professional was part of that dishonesty. That was not so with the pleadings in this case, and although some clarity was introduced at the pre-trial review, a significant part of the costs had already been incurred by then, and doubts persisted even at the trial, which I was forced to take up with counsel.
>
> 35. In short, if a straightforward claim in professional negligence is accompanied, as this one was, by a welter of other allegations, some of which verged on allegations of complicity in the alleged dishonest conduct of other defendants, in my view a claimant who has lost heavily can have little complaint if at the end of the day the costs order places the burden on him or her to show that the defendant, faced with such a wide-ranging set of allegations, was acting unreasonably in spending money preparing to defend himself against those allegations and the resultant effect upon his professional reputation and livelihood. That must be the more so if those allegations are accompanied, as they were in this case, by an element of speculation and exaggeration of the claim.
>
> ….
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> 37. … standing back and for the other reasons which I have just expressed, I do think that the way in which Ms Davey formulated and pursued this case against the Administrators was out of the norm, and should result in an order for costs to be assessed on an indemnity basis …"

34. Against that background, I turn to the issues raised in the current applications.

Liability and basis of assessment

35. As I have indicated, ChapelGate does not resist costs orders being made against it in favour of the Defendants under Section 51. It also does not resist the orders being made for assessment on an indemnity basis, reflecting the indemnity costs orders made against Ms. Davey.

36. These concessions are plainly correct in light of the decision of the Court of Appeal in Excalibur Ventures LLC v Texas Keystone Inc (No.2) [2017] 1 WLR 2221 ("Excalibur"). In that case, the Court of Appeal upheld a decision of the trial judge (Christopher Clarke LJ as he had become) to award costs against a number of funders on the same indemnity basis as awarded against the unsuccessful claimant (Excalibur).

37. The overall nature the case can be seen from paragraphs [8] and [9] of Christopher Clarke LJ's judgment on costs against Excalibur: [2013] EWHC 4278 (Comm),

> "8. The claim was essentially speculative and opportunistic. It has been advanced at great length and by the assertion of a plethora of causes of action, all of which have been maintained to the last possible moment, no doubt upon instructions. Gulf, and to a lesser degree Texas, have been put to enormous expense in terms of legal costs and Mr Kozel has borne a heavy personal burden in dealing with it.
>
> 9. The litigation has been gargantuan in scope, involving a five-month trial and 373 trial bundles. But it was based on no sound foundation in fact or law and it has met with a resounding, indeed catastrophic, defeat. The fact that it has done so arises in large measure as a result of facts and matters which were known to the Wempens before the case started. As Gloster J put it in JP Morgan Chase v Springwell [2008] EWHC 2848 (Comm) at at [13(iv)]: 'if a party chooses to litigate a commercial case of this sort on such a wide and extravagant canvas, he must take the risk that, ultimately, if unsuccessful, he may have to pay the costs of the exercise on an indemnity basis.'"

Christopher Clarke LJ was no less scathing when summarising the case and awarding indemnity costs against the funders: see [2014] EWHC 3436 (Comm) at [58]-[59].

38. In the Court of Appeal, Tomlinson LJ rejected the argument that it would not be appropriate to order the funders to pay indemnity costs unless they had themselves been guilty of discreditable conduct. Tomlinson LJ observed that the losing party may find himself being made liable for indemnity costs on account of the conduct of those who he has chosen to conduct the litigation on his behalf and then continued, at [24] and [27],

> "24. … The position of the funder is directly analogous. The funder is seeking to derive financial benefit from pursuit of the claim just as much as is the funded claimant litigant, and there can be no principled reason to draw a distinction between them in this regard. I also agree with Mr Waller that the analysis here is not dependent upon rules of agency—expert and factual witnesses are not agents of the party on whose behalf they give evidence any more than they are agents of the funder. The principle is a broader principle of justice. Deployment of lawyers, experts and other witnesses is a necessary part of bringing the claim to a successful conclusion for the benefit of the litigant, and it is equally a necessary part of bringing it to a successful conclusion for the benefit of the funder. The funder chooses which claims to back, whereas, as the judge rightly observed, … a defendant does not choose by whom to be sued, or in what manner. The judge continued: "If, then, the funder's witnesses turn out to be liars or the litigation is conducted unreasonably, so that the court awards costs on an indemnity scale, it is just and equitable that the funder should pay on that scale." I agree. I can see no principled basis upon which the funder can dissociate himself from the conduct of those whom

> he has enabled to conduct the litigation and upon whom he relies to make a return on his investment.
>
> …
>
> 27. … I particularly agree with and wish to associate myself with the judge's general approach, which is to emphasise that the derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs on the basis upon which they have been assessed against those whom he chose to fund. That is not to say that there is an irrebuttable presumption that that will be the outcome, but rather that that is the outcome which will ordinarily, in the nature of things, be just and equitable."

The period of liability

39. The first issue which I have to decide is whether the liability of ChapelGate to the Defendants should be for all of the costs, or only those which the Defendants incurred after 23 December 2015, which was the date of the Funding Agreement.

40. For the Administrators, Mr. Fenwick QC submitted that because of the way that the Waterfall under the Funding Agreement was likely to work out in practice given the value of Ms. Davey's Claims, ChapelGate was in effect the sole beneficiary of the Claims. He suggested that this meant that ChapelGate in effect stood to benefit from all the work done from the start of the litigation, and hence that it should be liable for all of the adverse costs without limitation of time in the same way as an assignee of a claim who became the litigating party by substitution would be liable for all of the costs from the commencement of the action if it failed.

41. I am not convinced that the analogy with the assignee of a claim who is substituted as the claimant is necessarily an accurate one for this purpose, because there is a clear distinction between a person who becomes the litigating party and therefore is primarily liable under the normal rules on costs, and one who simply supports litigation and is pursued for costs under Section 51 when the litigating party does not pay.

42. In any event, however, the question of the timing of the potential liability of a non-party under Section 51 and the arguments addressed by Mr. Fenwick is covered by authority.

43. At paragraphs [139] to [148] of the first instance judgment against the funders in Excalibur [2014] EWHC 3436 (Comm), Christopher Clarke LJ considered a number of authorities which had indicated that there needed to be some causal connection between the involvement of the non-party and the incurring of costs by the successful defendant before a non-party costs order could be made under Section 51. In particular, Christopher Clarke LJ referred to the decision of the Court of Appeal in Hamilton v Al Fayed [2003] QB 1175 in which Simon Brown LJ had said, at [54],

> "proof of causation is a necessary pre-condition of the making of a section 51 order against a non-party – as to which there is ample authority and, as I understand it, no dispute"

44. Christopher Clarke LJ also referred to the decision of the Privy Council in Dymocks Franchise System (NSW) Pty v Todd [2004] 1 WLR 2807 ("Dymocks") which stated, at [20],

> "their Lordships are content to assume for the purposes of this application that a non-party could not ordinarily be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings"

45. Christopher Clarke LJ noted that Dymocks and the need to show causation had then been referred to with evident approval (albeit *obiter*) by Rix LJ in Goodwood Recoveries v Breen [2006] 1 WLR 2723 at [74] when remarking that the correct approach would seem to be to ask,

> "whether the third party had caused the costs in issue and then to leave other considerations for the exercise of a principled discretion in the ultimate interests of justice."

46. Having considered these cases, Christopher Clarke LJ went on in paragraph [150] to consider the same argument advanced by Mr. Fenwick QC that since the funders had sought to benefit from the work done before they commenced funding, they should be liable for all of the costs. He rejected that argument, saying at [151],

> "151. While I see the force of these considerations I do not think it appropriate to make an order the effect of which is that the Platinum funders or Blackrobe will be liable for costs which they have played no part in causing the defendants to incur. The fact that they are, in a sense, inheritors of the work of others is not sufficient reason."

47. In these circumstances, I think that the weight of authority is clearly against the course that Mr. Fenwick QC urged me to take. If Christopher Clarke LJ did not think it appropriate to depart from a simple approach to the requirement for causation under Section 51 on the extreme facts of Excalibur, then I see no reason to do so on the facts of the case before me. The simple point in the instant case is that the Defendants' costs prior to 23 December 2015 had been incurred without the involvement of ChapelGate. I would therefore confine the costs order against ChapelGate under Section 51 to costs incurred after 23 December 2015.

The *Arkin* Cap

48. The second, and more contentious, issue concerns the question of whether the order for costs against ChapelGate should be "capped" by reference to the principles set out by the Court of Appeal in Arkin. As indicated above, ChapelGate contends that Arkin establishes a principle that means that its total liability to the Defendants should be limited to the overall maximum of the funding that it provided to Ms. Davey.

49. The relevant facts of Arkin can be derived from the decisions of Colman J at trial ([2003] EWHC 687 (Comm)), on Part 20 costs ([2004] 2 Costs L.R. 267), and on non-party costs ([2004] 1 Lloyds Rep. 88).

50. The claimant (Mr. Arkin) was the managing director, and, with his wife, the only shareholder in a shipping company which operated container liners on various routes to and from Israel. Mr. Arkin contended that his company was forced out of business by the anti-competitive practices and abuse of dominant position by the members of the two main shipping conferences operating on the routes. After the collapse of his company, Mr. Arkin's financial position was described by Colman J as "bleak". His house had been charged to his bank but had negative equity. He lived on his state pension whilst the bank had been persuaded to stay its hand so that litigation could be pursued.

51. Mr. Arkin received favourable legal advice from counsel and was granted legal aid to pursue a competition claim under Articles 81 and 82 of the Rome Treaty against the members of the two shipping conferences. To that end he took an assignment of the company's rights of action from the liquidator on terms that he would pay 50% of any damages which he recovered to the liquidator for the benefit of the company's creditors.

52. Mr. Arkin's legal aid was withdrawn shortly after the claim was commenced. He obviously could not afford to fund the claim himself, but persuaded his solicitor and counsel to act for him on a conditional fee basis and the claim proceeded. Mr. Arkin did not obtain ATE insurance against an adverse costs order because he could not afford to pay the premium. The claim proceeded in that manner for two years until the stage was reached that expert evidence was required. That could not be obtained on a conditional fee basis. Mr. Arkin then entered into an agreement with a professional litigation funding company (MPC) to provide funding for the expert evidence and litigation support services for the expert.

53. At the time of the funding agreement being entered into, it was envisaged that MPC might have to spend about £600,000 and that the probable settlement range was between US$5 million (about £3.5 million) and US$10 million (about £7 million). The funding agreement provided that in exchange for financing the expert evidence and support, MPC would receive 25% of the total recoveries up to £5 million and 23% above that figure. Those calculations were to be made on the basis of the total recoveries, but funded out of Mr. Arkin's 50% share (the remaining 50% being payable to the liquidator). According to calculations produced to the judge, this meant that MPC could have expected to make only a very modest profit of about £30,000 if the case was settled at the lower end of the predicted range, though that would obviously rise if the settlement was higher.

54. The funding agreement also provided that the funder should attend meetings with counsel and the expert, that Mr. Arkin should fully consult with and pay due note to the opinions of the funder before taking any significant steps, and that he should not compromise the proceedings without the prior consent of the funder (any dispute on significant steps or settlement to be decided by Mr. Arkin's counsel).

55. MPC did not agree to pay any of the defendants' costs or to provide any finance for Mr. Arkin to take out any ATE cover in respect of such costs. That was explained in MPC's evidence on the basis that even if it had been available, the likely ATE premiums required would have been so high that the final settlement figure would have had to be substantially higher before MPC could make a profit. MPC's evidence was that if ATE cover for adverse costs was required in all cases, that would have a negative effect upon

the number of claimants that it could support, or it would have had to withdraw from the market altogether.

56. In the end, the case was lost at trial. The reasons for that loss, and the role played by MPC, were summarised by Colman J in the following passage ([2004] 1 Lloyd's Rep 88 at paragraph [67],

> "67. Counsel's advice was that Mr Arkin had a very strong claim. As matters have emerged at the trial, Mr Arkin had a claim that had real substance in respect of Article 82, some substance in respect of Article 81 and little substance in relation to causation and proof of loss. I have no doubt, whatever, that Mr Arkin received advice from counsel given in good faith with a genuine belief in the strength of his claim. It is not difficult to appreciate that in a case of this size and complexity counsel concentrated on the liability issues. I do not speculate on the extent, if any, to which, in forming his pre-trial optimistic view of Mr Arkin's position, leading counsel appreciated the evidential problems presented by causation of loss in this case…."

57. Following the trial, Colman J ordered Mr. Arkin to pay 90% of the costs of the first defendant, and 80% of the costs of the second to fourth defendants. He also ordered the second to fourth defendants to pay 8% of Mr. Arkin's costs: see [2004] 2 Costs L.R. 267 at paragraph [1].

58. Having failed to recover their costs against Mr. Arkin, the successful defendants sought a non-party costs order against MPC for the entire costs of the proceedings. Colman J considered a number of authorities on litigation funding and non-party costs orders and concluded that support of litigation furthered the important public policy objective of facilitating access to justice. He held that, provided that such support was not attended by adverse features which would offend against the prohibition of champerty, such support was to be encouraged, not discouraged. He took the view that MPC had not acted in a champertous manner, and that making it liable for the defendants' costs would discourage the funding of litigation. Accordingly, he held that no non-party costs order should be made against MPC.

59. The defendants appealed. Before the appeal was heard, the Privy Council delivered its judgment in Dymocks and set out, at paragraph [25], what Lord Brown described as a summary of the main principles that govern the proper exercise of the discretion to order costs to be paid by a non-party,

> "(1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different

> considerations in play, some militating in favour of an order, some against.
>
> (2) Generally speaking the discretion will not be exercised against 'pure funders', described in para 40 of Hamilton v Al Fayed (No.2) [2003] QB 1175, 1194 as 'those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course'. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.
>
> (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence … Nor, indeed, is it necessary that the non-party be 'the only real party' to the litigation … provided that he is 'a real party in ... very important and critical respects' …
>
> (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests."

60. In Arkin in the Court of Appeal, the Court observed, at [37], that if Colman J had had the benefit of the Privy Council's statement of principle in Dymocks, he would not have approached the application against MPC in the way that he did. The Court of Appeal continued, at [38]-[43],

> "38. While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event … In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.

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

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

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

42. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate … Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.

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

61. Although readily adopted by the funding industry, the solution proposed in paragraph [41] of Arkin was controversial. In the Final Report of the Review of Civil Litigation Funding in December 2009, Sir Rupert Jackson referred to Arkin and continued,

> "4.3 The reasoning of the Court of Appeal attracted some criticism during [the consultation]. In their Response to the Preliminary Report the City of London Law Society's Litigation Committee wrote,
>
> > "We consider that the court should have the ability to order the third party funder in an unsuccessful case to pay all of the successful defendant's costs (subject to assessment in the usual way) and its ability to do so should not be circumscribed by the principle in Arkin."
>
> It should be noted that the facts of Arkin were unusual. MPC, the funder in that case, had funded only the claimant's expert evidence and the cost of organising the documents.
>
> 4.4 The Commercial Litigation Association commented that the Arkin approach creates an uneven playing field. The balance is tilted in favour of third party funding, in that the funder is only liable for costs up to the amount of its investment.
>
> 4.5 In my view, the criticisms of Arkin are sound. There is no evidence that full liability for adverse costs would stifle third party funding or inhibit access to justice. No evidence to this effect is mentioned in the judgment. Experience in Australia is to the opposite effect… It is perfectly possible for litigation funders to have business models which encompass full liability for adverse costs. This will remain the case, even if ATE insurance premiums (in those cases where ATE insurance is taken out) cease to be recoverable under costs orders…
>
> 4.6 In my view, it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat. This is unjust not only to the opposing party (who may be left with unrecovered costs) but also to the

> client (who may be exposed to costs liabilities which it cannot meet)."

62. Sir Rupert's recommendation was as follows,

> "4.7 I recommend that either by rule change or by legislation third party funders should be exposed to liability for adverse costs in respect of litigation which they fund. The extent of the funder's liability should be a matter for the discretion of the judge in the individual case. The funder's potential liability should not be limited by the extent of its investment in the case."

63. No relevant rule change or legislation was, however, promulgated in response to Sir Rupert Jackson's Report, and what has become known as the *Arkin* cap has continued to be embraced by the commercial funding community: see per Tomlinson LJ in Excalibur at paragraph [39].

64. In Excalibur, the Court of Appeal decided that monies provided by a funder to enable a claimant to meet an order for security for costs should count towards the *Arkin* cap, and hence would increase the funder's potential liability for adverse costs. It is important to note, however, that on the facts of Excalibur there was no dispute as to whether it was appropriate to apply the *Arkin* cap. Given the numbers involved, the successful defendant stood to recover its outstanding costs from the various funders on any view, and the only issue was as to how those costs should be apportioned between the various funders, each of which was content for the *Arkin* cap to be applied.

65. The most direct comment which Tomlinson LJ made in Excalibur about the *Arkin* cap was in very guarded terms. After setting out in paragraph [27] his reasoning for concluding that costs should ordinarily be assessed against a commercial funder on the same basis as against the funded party (see above), Tomlinson LJ dealt with an argument that such a requirement might have an adverse effect upon access to justice. He continued, at paragraph [28],

> "28. For my part I am sceptical about the argument deployed here by the funders that the imposition of a requirement to pay costs on an indemnity basis will have an adverse impact upon access to justice. I do not myself think that commercial funders are greatly motivated by the need to promote access to justice, and nor do I suggest that they should be. They are, as it seems to me, making an investment and are motivated by largely commercial considerations. Those whose money they invest would no doubt be aggrieved if it were otherwise. However, in so far as the argument has any traction, it has I consider been resolved by the decision of this court in Arkin v Borchard Lines (No 2) [2005] 1 WLR 3055. In that case this court considered, at para 38, that:
>
> > "Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice

> which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed."
>
> The solution fashioned by this court was the *Arkin* cap. We are not on this appeal asked to revisit that decision. I understand that some consider the solution thus adopted to be over-generous to commercial funders, but that is a debate for another day upon which I express no view."

66. Doubts about the *Arkin* cap have continued to be raised in other cases. In Bailey v GlaxoSmithKline UK Limited [2018] 4 WLR 7 ("Bailey"), Foskett J considered an application for security for costs against a litigation funder under CPR 25.14. In setting the amount of security to be provided, Foskett J rejected an argument by the funder that the *Arkin* cap would necessarily be applied at the end of the trial so that he could not order security that would exceed the *Arkin* cap. Foskett J indicated, at paragraph [59], a number of reasons why that was not necessarily so,

> "59. First, the unquestioned imposition of the cap as formulated in *Arkin* would of itself fetter the general discretion that the court would have concerning costs at the conclusion of a trial. Whilst, of course, any trial judge would be obliged to consider with care the impact of *Arkin* in the situation that existed at the end of the trial, there would be various options open to a party who wanted to argue that the cap was not applicable in the particular case. For example, a wholesale attack on the reasoning in *Arkin* might be launched along the lines of the criticisms that have been made and on the basis that the choice made by the funder of the amount of its funding of the litigant should not dictate the amount of costs it should pay to the litigant's opponent in the event the litigation fails. It may be that the issue would have to go to the Court of Appeal for a definitive response to the argument, but that possibility cannot be ignored … Equally, there would undoubtedly be an argument that, notwithstanding the way *Arkin* has (I am told) been applied …, the reality is that the Court of Appeal was addressing only the situation where a professional funder has merely contributed a part of the litigant's costs and not where the whole of those costs has been underwritten. Finally, the argument might be mounted in a particular case … that, by way of what are effectively proviso words ("in a manner which … is not otherwise objectionable") in para 40 of its judgment, the Court of Appeal was leaving open the possibility of disapplying the cap (or not regarding it as applicable) in certain cases where the view was taken that it was inappropriate for it to be applied."

The rival contentions

67. Against that background I turn to the arguments in this case.

68. Whilst reserving their rights to contend on any appeal that Arkin was wrongly decided, Mr. Fenwick QC and Mr. Bacon QC (for the Administrators and Dunbar respectively) contended that the Court of Appeal in Arkin was not intending to lay down a rule or guideline to be applied mechanistically in every case where a third party costs order is sought against a professional funder; and that no such rule or guideline could override or modify the principal requirement under Section 51, which is that the Court should exercise its discretion on costs justly.

69. The Defendants contended that Arkin was distinguishable, and that on the facts of the instant case it would be contrary to justice for the *Arkin* cap to be applied. The Defendants relied, in particular, on the following matters, (i) the allegations made in the Claim had very serious reputational implications for the Defendants who acted reasonably in spending significant sums defending them; (ii) ChapelGate knew of those allegations and had the opportunity fully to investigate the strength of the Claim before funding it; (iii) ChapelGate knew that Ms. Davey could not afford to pay any substantial award of costs against her if the Claim failed; (iv) ChapelGate funded the entirety of the litigation after entering into the Funding Agreement, rather than merely a limited part of it; (v) ChapelGate bargained for the right to be paid a very substantial proportion of any damages that might be recovered in priority to Ms. Davey, and hence was in reality the entity interested in the outcome of the proceedings; (vi) by the A&W Agreement, ChapelGate "greedily" (*per* Mr. Fenwick QC) insisted on maintaining the same level of prospective profit that might be made from the Claim, whilst halving its overall outlay on the Claim; (vii) also under the A&W Agreement, ChapelGate removed the requirement for an ATE policy to be bought to protect the Defendants, but bought an ATE policy to protect itself; (viii) if the *Arkin* cap were to be applied, it would effectively negate the decision to award costs on an indemnity basis against ChapelGate; and (ix) if the *Arkin* cap was applied, the costs awarded would have to be shared between the Defendants who would therefore only recover a fraction of their costs.

70. For ChapelGate, Mr. Marven QC took issue with every aspect of this argument. He contended that the *Arkin* cap served a legitimate purpose in enabling litigation funders to limit their exposure to adverse costs and hence to operate their funding models on the basis of a predictable maximum exposure. Mr. Marven submitted that the principle accepted by the Court of Appeal in Arkin was that commercial funders should not suffer what he described as an "open-ended" exposure to adverse costs because this would deter them from providing finance for litigation - and hence access to justice. He contended that there was evidence to such effect before Colman J in Arkin.

71. Mr. Marven did not dissent from the proposition that ultimately the requirement under Section 51 was that the discretion should be exercised justly, but he submitted that the Court of Appeal in Arkin clearly did intend to prescribe a principle of general application to guide judges in the future exercise of such discretion in the interests of consistency and certainty. Mr. Marven argued that such guidance remains good law and is binding upon me.

72. Mr. Marven also submitted that the principle set out in Arkin was applicable to the facts of the instant case. In particular, he noted that the Court of Appeal suggested that its guidance might be applicable where the funder had funded all of the claim and not just a part. Mr. Marven submitted that the Funding Agreement provided access to justice for Ms. Davey, that the Waterfall under the Funding Agreement was of a type commonly used in the funding industry, and that it did not provide for ChapelGate to obtain a disproportionate share of any damages that might be recovered in the Claim.

73. Mr. Marven also refuted any suggestion that ChapelGate had acted in any way inappropriately in entering into the A&W Agreement or in relation to ATE insurance. He submitted that ChapelGate had no obligation at any time to ensure ATE insurance was in place to protect the Defendants, and he pointed out that the evidence in Arkin was that no ATE insurance was taken out to cover the defendants' costs because the premiums would have been too high and would have made it uneconomic for the funder. Mr. Marven submitted that this was not materially different to the position in the instant case, and that the irrelevance of such matters was apparent from the fact that the position relating to ATE insurance was not referred to by the Court of Appeal.

Champerty

74. Before turning to consider those submissions, I should record that the Defendants also contended in their written submissions that ChapelGate had, by reason of the provisions of the Funding Agreement, the means to exercise control of the proceedings rather than Ms. Davey, and that I should infer that it had done so "in reality". The Defendants contended that this took the instant case into the category of financing of litigation that was "otherwise objectionable" as that expression was used in paragraph [40] of Arkin, so that the *Arkin* cap would not apply.

75. Mr. Marven submitted that, read in context, the reference to funding that was "otherwise objectionable" was intended simply to refer to funding that was champertous. I accept that submission. It is clear to me that champerty was the subject matter of the remainder of the paragraph, and I do not think that the Court of Appeal was intending to refer to or create any other, undefined, category of case.

76. In that regard, on the facts I reject any suggestion that the involvement of ChapelGate in this case was champertous. The modern approach to the doctrine of champerty appears to be concerned with asking whether an agreement with a non-party as regards the conduct of litigation would tend to undermine or corrupt the process of justice; and in that context, the crucial issue appears to be whether the non-party can exercise excessive control or influence over the conduct of the proceedings in such a way as, for example, to suppress evidence, influence witnesses, or procure an improper settlement: see Sibthorpe v Southwark LBC [2011] 1 WLR 2111 at [35]-[36] per Lord Neuberger MR, referring to cases such as Factortame v. Secretary of State (No.8) [2003] QB 381.

77. In this case, the terms of the Funding Agreement are clear that Ms. Davey was to have control over the proceedings, albeit that key decisions could only be taken after notice to ChapelGate and receipt of advice from MdeR. I have no evidence upon which to conclude that the Funding Agreement was not adhered to in practice, and the responsible partner at MdeR (Mr. Michael Armstrong) confirmed by email that there was never any attempt by ChapelGate to exert control or influence over him. He also indicated, for example, that a "without prejudice save as to costs" offer made to Ms.

Davey in February 2016 had simply been rejected by Ms. Davey "out of hand", without any input from ChapelGate. I have no reason to doubt that account of events.

Analysis

78. The starting point for any analysis of Arkin and its potential application in this case must be the decision of the Privy Council in Dymocks, and in particular Lord Brown's statement of principle in paragraph [25] of the judgment which I have quoted above.

79. In that paragraph, Lord Brown first established that the imposition of a third party costs order under Section 51 is ultimately a matter of discretion to be exercised on the basis of what is just in all the circumstances of any individual case. He then went on to describe a number of competing considerations that might be in play, explaining that there is generally a distinction in approach between (i) cases in which the funder does not take a stake in the outcome of the litigation or control it ("pure funding"), and (ii) cases in which the funder does have a financial interest in the outcome or takes control of the litigation ("commercial funding").

80. In the case of pure funding, priority is ordinarily given to the public interest in enabling a party who would not otherwise be able to afford to litigate getting access to justice by arranging funding from an outside source; whereas in the case of commercial funding, the priority is ordinarily that a successful unfunded party should be able to recover his costs and not have to bear the expense of vindicating his rights. As Sir Rupert Jackson subsequently observed in a footnote to his Report, the second principle may also involve an element of access to justice, because if an unfunded defendant faces the prospect that, win or lose, he will end up bearing his own costs, that will inhibit his access to justice.

81. In Arkin it is quite clear that the Court of Appeal expressly adopted and followed Lord Brown's approach in Dymocks. The primary basis for the Court of Appeal's decision was that although access to justice was important, Colman J at first instance had not given "appropriate weight" to the principle that costs against a commercial funder should normally follow the event.

82. Although the Court of Appeal went on to propose a particular approach to cases involving commercial funders, I accept the Defendants' submission that the Court of Appeal should not be taken to have been intending to prescribe a rule to be followed in every subsequent case involving commercial funders. For example, at paragraph [40] of its judgment, the Court of Appeal indicated that it had an "approach" that it was about to "commend", and at the start of paragraph [42] it observed that, "if the course which we have proposed becomes generally accepted…". Against the background of Lord Brown's point in Dymocks that the ultimate question for a Court to answer under Section 51 is what is just in all the circumstances of the particular case, I consider that this indicates that the Court of Appeal was simply setting out an approach that it envisaged *might* commend itself to other judges exercising their discretion in similar cases in the future.

83. That conclusion is further reinforced by the express acknowledgment by the Court of Appeal in paragraph [43] that it was only concerned with a case in which the funder had contributed a limited part of the litigant's expenses, and that it had not "had to

explore the ramifications of an extension of the solution we propose beyond the facts of the present case".

84. I also consider it to be significant that there is no subsequent authority in which the *Arkin* cap has been treated as a principle to be applied automatically in any case involving a commercial funder.

85. The closest authority that Mr. Marven could cite in that respect was the decision of the Court of Appeal in Excalibur. Mr. Marven contended that paragraph [28] of the judgment (set out in paragraph 65 above) indicated that Tomlinson LJ considered the *Arkin* cap to be of general application, and, in particular, that it would be appropriate to impose it in a case where indemnity costs had been ordered against a funder on the "derivative" basis as a consequence of the conduct of the litigation by the funded party.

86. I do not accept that submission. In my judgment, the Court in Excalibur did not express the view, still less decide, that the *Arkin* cap should automatically apply in any case involving a commercial funder. As I read them, Tomlinson LJ's remarks in paragraph [28] merely suggest that the *possibility* of the *Arkin* cap being applied in an appropriate case would be the answer to a policy argument from commercial funders that they would be deterred from funding if they were subjected to the risk of indemnity costs on a derivative basis.

87. Mr. Marven further submitted that notwithstanding Sir Rupert Jackson's criticisms of the decision in Arkin, ChapelGate's arguments for the automatic application of the *Arkin* cap were actually supported by his Report. Mr. Marven submitted that the terms of the Report which I have set out above indicated that Sir Rupert Jackson appeared to believe that the decision in Arkin was of general application and that a rule change or legislation would be necessary to displace it. Mr. Marven drew further support from the fact that no rule change or legislation to reverse the decision in Arkin had been forthcoming notwithstanding that other legislation relating to civil costs had been enacted since the Report had been published in 2009.

88. I do not accept that reading of the Report. The City of London Law Society's Litigation Committee's comment was that the Court's discretion should not be circumscribed by the principle in Arkin, and the Commercial Litigation Association merely commented on the effect of the approach adopted by the Court of Appeal. I do not think that one can extrapolate from Sir Rupert Jackson's agreement with those criticisms that he necessarily thought that the Court of Appeal had set down a rule of general application in all cases. Moreover, given that Sir Rupert's mandate was to make recommendations for reform in his Report, it is hardly surprising that he should advocate changes to the rules or legislation to give effect to his preferred regime.

89. In short, what has become known as the *Arkin* cap is, in my judgment, best understood as an approach which the Court of Appeal in Arkin intended should be considered for application in cases involving a commercial funder as a means of achieving a just result in all the circumstances of the particular case. But I do not think that it is a rule to be applied automatically in all cases involving commercial funders, whatever the facts, and however unjust the result of doing so might be.

90. I therefore turn to consider the various factors urged upon me by the parties in this case.

91. The first, and obvious, point is that although the provision of funding by ChapelGate undoubtedly assisted Ms. Davey to be able to take her case to trial, the evidence to which I have referred clearly demonstrates that ChapelGate approached its involvement throughout as a commercial investment. There is, of course, nothing wrong with that as such, but it brings the case squarely within the observations of Lord Brown in Dymocks to which I have referred, together with those of Tomlinson LJ in paragraph 1 of his judgment in Excalibur, namely,

> "It is true that the facilitation of access to justice is an incidental by-product of commercial funding, but that is not the essential motivation of the commercial funder. The commercial funder is an investor who hopes to make a return on his investment. For that reason, justice will usually require that, if the funded proceedings fail, the funder or funders must pay the successful party's costs."

92. The second feature is that the instant case involved conduct of the litigation by and on behalf of Ms. Davey which I found to be significantly out of the norm, and which warranted an order for indemnity costs. Ms. Davey made some very serious allegations against the Defendants. In the case of Dunbar, these included allegations that they had colluded with APAM to interfere in the conduct of the administration by the Administrators; and in relation to the Administrators it was not clear until a relatively late stage that allegations of personal dishonesty were not being made. I have also set out above the observations that I made to the effect that the lack of discrimination in the allegations that were made, and the elements of speculation and exaggeration which accompanied them, meant that the costs which the Defendants were forced to incur in defending their professional reputations were significantly increased.

93. Whilst, for reasons that I have already given, I do not suggest that ChapelGate itself directed the way that the case was conducted, it nevertheless had every opportunity to investigate and form a view as to the nature of the Claim and the support for the allegations which were being made before choosing to fund it. Specifically, by the time ChapelGate entered into the Funding Agreement, pleadings had long closed, discovery had taken place and witness statements had been exchanged.

94. In such a situation, as Tomlinson LJ remarked in paragraphs [24] and [27] of his judgment in Excalibur to which I have referred in paragraph 38 above, a commercial funder chooses which claims to support, its involvement is derivative, and there is no principled basis upon which the funder can disassociate itself from the conduct of those whom it has enabled to conduct the litigation and upon whom it relies to make a return on its investment. But if the *Arkin* cap were to be applied in the instant case, it would certainly have the effect that ChapelGate would be insulated from my decision that costs should be assessed against it on the indemnity basis to reflect the manner in which the Claim was pursued. That was not a factor that was present or considered in Arkin, where there was no award of indemnity costs. I have also already indicated that I regard Tomlinson LJ's comments in paragraph [28] of Excalibur simply to be a statement that the *Arkin* cap *might* be applied in a case where indemnity costs were awarded on a derivative basis, not that the cap necessarily has to be applied in such a case.

95. Thirdly, it must in any event have been apparent to ChapelGate (i) that Ms. Davey was most unlikely to be able to pay any substantial costs awarded against her, and (ii) that the costs of Dunbar and the Administrators were likely to be very substantial and well in excess of the amount which ChapelGate itself proposed to invest in the litigation. Appreciation of the former doubtless drove the initial requirement for an ATE policy to be taken out by Ms. Davey, and the latter must have been obvious from the fact that the Defendants had instructed separate sets of lawyers and experts to deal thoroughly with the different cases made against them. Given the allegations and the potential professional and regulatory consequences for the Defendants, there is no basis upon which the Defendants could reasonably have been expected to share lawyers; or to have been limited in their selection of lawyers to those who would have been prepared to work on the same contingency basis as Ms. Davey's lawyers. It was equally obvious that the Defendants would be motivated to resist the wide variety of allegations made against them strenuously.

96. Fourthly, and following on from the previous point, is the fact that as a result of the A&W Agreement, ChapelGate effectively halved its commitment to the funding of the litigation from £2.5 million to £1.25 million, whilst retaining the same potential share of the recoveries, and removing the requirement for the purchase by Ms. Davey of ATE protection for adverse costs liability to the Defendants. I have no real frame of reference to express any view on whether that was, when compared to industry norms, "greedy" (as Mr. Fenwick QC suggested). I also accept Mr. Marven's point that there is no legal obligation upon a funder to ensure that an ATE policy is purchased to protect a defendant. Nevertheless, the decision to enter into the A&W Agreement does highlight the fact that ChapelGate was closely focussed on its own self-interest in funding the litigation as a commercial venture, and that there was no correlation between the amount that it chose to invest in the litigation and the costs to which the Defendants were exposed.

97. Both those points illustrate very well the issue that was briefly alluded to by Foskett J in paragraph [59] of his judgment in Bailey, namely that it is not easy to see why the choice of the funder as to the amount of its funding should dictate the amount of costs it should pay to the litigant's opponent if the litigation fails. That is because the amounts provided by a funder to a claimant may have no correlation whatever to the costs which a defendant or defendants are thereby caused to incur in defending themselves.

98. On the specific facts of Arkin, there was likely to be some comparability between the costs incurred by both sides in relation to experts. They were limited in number, there was some sharing of experts between the defendants, and none of the experts could act on a contingency fee basis. The Court of Appeal obviously thought that it was unjust if a funder whose involvement was limited to providing funding for the claimant's expert evidence was made liable for all the defendants' costs of the action. However, I consider that there is an obvious risk of injustice in the other direction if a number of defendants are forced to incur significant costs in defending themselves, but are limited to recovering only a proportion of those costs because of entirely different funding arrangements over which they have no control between the claimant, his funder and his lawyers. The disparity between the amounts that defendants may be forced to incur, and the amount provided by the funder to the claimant, may, as in the instant case, be

accentuated in a case where the claimant's lawyers are prepared to operate on the basis of CFAs, but the defendants' lawyers are not.

99. Fifthly, there is force in the point that ChapelGate negotiated to receive a substantial commercial profit which would have taken priority over any compensation payable to Ms. Davey.

100. The conceptual background to this point is that, as Lord Brown indicated in paragraph [25(3)] of the judgment in Dymocks, a costs order can be made against a commercial funder that stands to benefit from its investment in proceedings because it is, in essence, "the real party" to the proceedings. But Lord Brown went on to make the point that it is not necessary that the funder be the only real party to the litigation provided that it is "a real party … in very important and critical respects". It seems to me that once that threshold requirement has been satisfied, the extent to which a funded party is afforded access to justice by retaining a financial interest in any recoveries from the litigation, and the extent to which the funder seeks to obtain a profit from the litigation, may well be relevant factors in determining both whether to make a costs order against a funder, and if so, for how much.

101. In the instant case, the use of the Waterfall structure in the Funding Agreement meant that ChapelGate had first priority to any recoveries from the litigation. As might be expected, the structure was that ChapelGate was always entitled to be repaid the funding which it had spent on professional fees of up to £1.25 million before any other payments could be taken from any recoveries. There cannot, I consider, be any criticism of that. In addition to recovering its outlay, however, ChapelGate was entitled to a substantial Funder's Profit Share of any recoveries. That profit share increased with time, so that after commencement of the trial, that Funder's Profit Share would have amounted to five times the commitment amount - i.e. £6.25 million. Only once such Funder's Profit Share had been paid would MdeR and counsel have been entitled to receive their CFA uplifts, and only after that would Ms. Davey have been entitled to receive the balance of any compensation recovered in the Claim.

102. Mr. Fenwick submitted that on the basis of Mr. Davies QC's more conservative opinion of the value of the Claim of around £10 million, and given that AHDL had about £2.5 million of external creditors which would have needed to be paid, the use of this Waterfall structure and these levels of profit for ChapelGate meant that Ms. Davey would have been unlikely to see any material proportion of any recoveries. He submitted that the only prospect of Ms. Davey recovering any significant amounts would have been if the Court had accepted a figure at the higher end of the range of valuation figures for Angel House put forward by Mr. Wolfenden. Mr. Fenwick therefore suggested that, in reality, ChapelGate was the only person with a financial interest in the Claim; and he contrasted that situation unfavourably with the sharing structure used in Arkin, under which Mr. Arkin and MPC ranked together and each received a proportion of any recoveries.

103. It is obviously important to avoid assessing these matters with the benefit of hindsight as to how Ms. Davey's case and Mr. Wolfenden's evidence fared at trial. With that in mind, I do not accept Mr. Fenwick's submission that ChapelGate could have been seen from the start of its involvement to be the only person with a financial interest in the Claim. On the basis of the figures and advice obtained before trial, it was possible that Ms. Davey could have obtained a significant part of a higher settlement or award of

compensation, notwithstanding the amounts that would first have been payable to ChapelGate and to Ms. Davey's lawyers.

104. I also do not have any evidence of comparables and am not in a position to form an objective view as to whether the return on its investment for which ChapelGate bargained was out of the norm for the commercial funding industry.

105. That said, there is undoubted force in Mr. Fenwick's submission, which I accept, that the use of the Waterfall structure and the level of ChapelGate's Funder's Profit Share meant that, if measured in terms of her prospects of receiving compensation, Ms. Davey's access to justice came a clear second to ChapelGate receiving a significant return on its commercial investment. In that sense, ChapelGate plainly was the party with the primary (i.e. first) interest in the Claim.

106. Finally, I am not persuaded by the policy argument made by Mr. Marven that if I were not to apply the *Arkin* cap in this case, commercial litigation funders would be discouraged from providing funding in the future, essentially because my decision would signal that they might have an "open-ended" exposure to adverse costs.

107. Mr. Marven essentially invited me to draw that conclusion on the basis of the decision and comments of the Court of Appeal in Arkin. For the reasons that I have endeavoured to explain, I do not think that I am bound to apply the cap which the Court of Appeal suggested on the different facts of this case. Moreover, as the judgment in Excalibur indicates, the litigation funding industry in the UK has developed and moved on significantly since Arkin. For example, the Court in Excalibur had evidence from the Association of Litigation Funders ("ALF") which was formed in 2011 which gave some insight into the likely effect of the decisions of the Court on the litigation funding industry: see paragraphs [2] and [27] of the judgment.

108. In contrast, I had no such evidence to support Mr. Marven's submissions as to the likely effect of my decision on the litigation funding industry in 2019. In particular, I had no evidence to counter the observations of Sir Rupert Jackson in his Report in 2009 that experience in other jurisdictions suggests that litigation funders are not deterred by the potential of full liability for adverse costs, or his assessment that litigation funders can use business models which encompass full liability for adverse costs. In the absence of such evidence, I am not inclined to accept the proposition that, 14 years after Arkin and ten years on from Sir Rupert Jackson's Report, the commercial litigation industry would be unable to factor into its operations the possibility that, in an appropriate case – especially one involving an award of indemnity costs - the *Arkin* cap might not be applied.

109. In that regard it is, I think, also important to note the observations of Tomlinson LJ in Excalibur as to the way in which a commercial funder is entitled to protect its interests and minimise the likelihood of being exposed to the risk of significant adverse costs orders. Tomlinson LJ rejected an argument that funders who took a close interest in the conduct of litigation would run the risk of being accused of champerty. He remarked, at paragraph [31],

> "…champerty involves behaviour likely to interfere with the due administration of justice. Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public

> interest. What the judge characterised as "rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals" is what is to be expected of a responsible funder—as the ALF to some extent acknowledges and as did some of the funders in this case in their evidence presented to the judge—and cannot of itself be champertous. I agree with Mr Waller that, rather than interfering with the due administration of justice, if anything such activities promote the due administration of justice. For the avoidance of doubt I should mention that ongoing review of the progress of litigation through the medium of lawyers independent of those conducting the litigation, a fortiori those conducting it on a conditional fee agreement, seems to me not just prudent but often essential in order to reduce the risk of orders for indemnity costs being made against the unsuccessful funded party. When conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous."

110. In this regard, in the instant case it is also notable that ChapelGate's Funding Agreement included a provision under which Ms. Davey was to instruct MdeR to monitor the Defendants' costs and to keep ChapelGate informed of them. If the possibility that a funder may not be able to take advantage of the *Arkin* cap causes funders to keep a closer watch on the costs being incurred, both by the funded party and the opposing side, and if careful consideration is given to employing the mechanisms in the CPR to limit exposure to adverse costs in an appropriate case, I do not see that as contrary to access to justice or any other public policy.

Conclusion on application of the *Arkin* cap

111. Taken together, the factors that I have identified lead me to conclude that, on the facts of the instant case, the balance between the principle that the successful party should have its costs, and enabling commercial funders to continue to provide the finance to facilitate access to justice, should be struck differently than it was in Arkin. In my judgment, this is not a case in which it would be just to apply the *Arkin* cap.

Summary

112. For the reasons set out, I will make a costs order under Section 51 to the effect that ChapelGate should pay each of the Defendants' costs of the Proceedings incurred after 23 December 2015, such costs to be assessed on the indemnity basis if not agreed.