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Funders on hook for indemnity costs in Excalibur

By Rachel Rothwell | 18 November 2016

Litigation funders will be liable for indemnity costs where these are awarded against their funded client, even if the funder itself has been guilty of 'no discreditable conduct', the Court of Appeal ruled today in *Excalibur Ventures v Texas Keystone and others* [2016] EWCA Civ 1144.

The court also dismissed funders' arguments that their liability should be reduced because the amounts that were provided as security for costs – as opposed to the ongoing funding of the case – should not count towards the *Arkin* cap.

The *Arkin* principle limits a funder's liability at a level equivalent to the amount it put into the litigation.

In December 2013, Excalibur Ventures, represented by Clifford Chance, suffered a crushing defeat in its $1.6bn claim against Texas Keystone over interests in four large oilfields in Iraqi Kurdistan. Ordering indemnity costs against Excalibur, the trial judge described the litigation – which failed on every point – as 'speculative and opportunistic'.

The litigation was financed by five funders to the tune of £31.75m, including £17.5m provided as security for costs.

In today's judgment, Lord Justice Tomlinson said: 'The argument for the funders boiled down to the proposition that it is not appropriate to direct them to pay costs on the indemnity basis if they have themselves been guilty of no discreditable conduct or conduct which can be criticised.

'Even on the assumption that the funders were guilty of no conduct which can properly be criticised, and I accept that they did nothing discreditable in the sense of being morally reprehensible or even improper, this argument suffers from two fatal defects… .

'First, it overlooks that the conduct of the parties is but one factor to be taken into account in the overall evaluation. Second, it looks at the question from only one point of view, that of the funder…. It ignores the character of the action which the funder has funded and its effect on the defendants.'

He added: 'A litigant may find himself liable to pay indemnity costs on account of the conduct of those whom he has chosen to engage – e.g. lawyers, or experts [who] may themselves have been chosen by the lawyers, or witnesses… The position of the funder is directly analogous.'

Tomlinson LJ said it would 'seldom' be necessary for a judge to consider whether the funder knew or ought to have known the 'egregious' features of the case that gave rise to indemnity costs.

‘By funding, the funder takes a risk, a risk as to the nature of which he has the opportunity to inform himself both before offering funding and during the course of the litigation which he funds,’ he added.

Addressing the issue of the extent to which funders were permitted to involve themselves in the litigation they fund without falling foul of the doctrine of champerty and maintenance, the judge said: ‘Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest.

‘What the [trial] 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… and cannot of itself be champertous.’

On the issue of security for costs, Tomlinson LJ said: ‘One question which arises in this appeal is whether funds made available solely for the purpose of enabling a litigant to put up security for costs counts towards the *Arkin* cap, ie. whether such a funder risks losing the amount advanced plus the same amount again, as in the ordinary case of a funder who advances funds to defray the litigant’s own costs.’

He concluded that he agreed with the trial judge’s assessment that ‘money provided to Excalibur [for] security for costs was an investment in the claim just as much as money provided to pay Excalibur’s own costs and should count equally towards the *Arkin* cap’.

The Association of Litigation Funders, which provided evidence to the court, said it welcomed the Court of Appeal’s ‘reaffirmation’ of third-party funding as a judicially sanctioned activity. It noted that the court had drawn a distinction between professional funders, and those who are inexperienced, and had not adopted the professional approach expected of ALF members in assessing the merits of the case.

Susan Dunn, head of litigation funding at Harbour, added: ‘Specifically to *Excalibur* we mustn’t forget that, although the judge upholds the High Court’s decision, he reiterates that awarding costs on an indemnity scale is a departure from the norm.

‘In this particular case, he agreed that the character of the claim, the size and effect justified this specific outcome.

‘It highlights not only the importance of the due diligence process before the decision to fund, but also that it is taken by experienced people who are well versed with the risks of third-party funding and very knowledgeable about the litigation process.’

She added: ‘In our view, the decision also offered peace of mind related to some of the concerns the ALF had made with relation to champerty.’