Neutral Citation Number: [2016] EWCA Civ 1144

Case Nos: A3/2015/0443 & A3/2015/0476

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
LORD JUSTICE CHRISTOPHER CLARKE
[2014] EWHC 3436 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2016

Before :

LORD JUSTICE TOMLINSON
LADY JUSTICE GLOSTER
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

Excalibur Ventures LLC	**Claimant**
- and -	
(1) Texas Keystone Inc **(2) Gulf Keystone Petroleum Limited** **(3) Gulf Keystone Petroleum International Limited** **(4) Gulf Keystone Petroluem (UK) Limited**	**Defendants**

AND BETWEEN

(1) Texas Keystone Inc **(2) Gulf Keystone Petroleum Limited** **(3) Gulf Keystone Petroleum International Limited** **(4) Gulf Keystone Petroluem (UK) Limited**	**Costs Claimants/ Respondents**
- and -	
(1) Psari Holdings Limited **(2) Mr Andonis Lemos** **(3) Blackrobe Capital Partners LLC** **(4) Blackrobe Aeo 1 Investors LLC** **(5) Platinum Partners Value Arbitrage Fund LP** **(6) Hamilton Capital LLC** **(7) JH Funding LLC** **(8) Huron Capital LLC** **(9) Platinum Partners Credit Opportunities Master Fund LP**	**Costs Defendants**

(1) Psari Holdings Limited **(2) Mr Andonis Lemos** **(5) Platinum Partners Value Arbitrage Fund LP**	**Costs Defendants/ Appellants**

(6) Hamilton Capital LLC
(7) JH Funding LLC
(8) Huron Capital LLC
- and -
The Association of Litigation Funders of England & Wales **Intervener**

- -
- -

John Wardell QC and Jamie Carpenter (instructed by **Withers LLP**) for the **First and Second Costs Defendants/Appellants**
Ian Croxford QC and Nicholas Medcroft (instructed by **Orrick LLP**) for the **Fifth to Eighth Costs Defendants/Appellants**
Richard Waller QC and Richard Eschwege (instructed by **Memery Crystal LLP and Jones Day**) for the **Costs Claimants/Respondents**
Peter Kirby QC (instructed by **Olswang Solicitors**) for the **Intervener by written submissions only**

Hearing dates : 19 & 20 July 2016
- -

Approved Judgment

Lord Justice Tomlinson :

1. Third party funding is a feature of modern litigation. It takes at least two forms. The first is so-called "pure funding" of which *Hamilton v Al Fayed (No.2)* [2003] QB 1175 is a well-known example. In that case it was held that pure funders will not ordinarily be made the subject of an order under section 51(3) of the Senior Courts Act 1981 ("the SCA"), to pay the costs of the successful unfunded party. Section 51(3) of the SCA is, as is well-known, the provision which gives to the court a discretion to determine by whom and to what extent the costs of proceedings are to be paid. In *Hamilton v Al Fayed* the Court of Appeal decided that the successful unfunded party's ability to recover his costs had to yield to the funded party's right of access to the courts. The court held that the pure funding of litigation was in the public interest provided that its essential motivation was to enable the funded party to litigate what the funders perceived to be a genuine case. There the genuine dispute surrounded Mr Hamilton's assertion that he had been libelled by Mr Al Fayed. The second form of third party funding is so-called commercial funding. 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. As Lord Brown of Eaton-under-Heywood put it, giving the judgment of the Judicial Committee of the Privy Council in *Dymocks Franchise Systems (NSW) Ltd v Todd* [2004] 1 WLR 2807 at 2815:

> "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 . . ."

2. The present appeals are concerned with commercial funding, but the funding here was not typical of that which is routinely undertaken by members of The Association of Litigation Funders of England and Wales ("the ALF"), a company established in 2011 by the Civil Justice Council of England and Wales. The ALF was given permission to intervene in these proceedings, by way of written submissions only, and did so by way of submissions drafted by Mr Peter Kirby QC. There were here four groups of funders, none of them members of the ALF. Only one of the funders had any experience of funding litigation and this was its first foray into litigation in the UK.

3. The proceedings out of which these appeals spring began on 17 December 2010. On that day Excalibur Ventures LLC ("Excalibur"), a Delaware corporation, began this action against Texas Keystone Inc. ("Texas"), Gulf Keystone Petroleum Limited and other Gulf Keystone companies ("Gulf"), together "the Defendants". In it Excalibur claimed to be entitled to an interest in a number of oil fields in Kurdistan, which are potentially extremely profitable, and of which the Shaikan field is the most important. The claim was for specific performance of a "Collaboration Agreement" pursuant to which Excalibur claimed its entitlement to an interest in the fields or to damages

which, as finally put, were said to be of the order of US $ 1.6 billion. On some unknown date Excalibur entered into some form of conditional fee agreement with Clifford Chance LLP ("Clifford Chance"), its solicitors.

4. Excalibur is nothing more than a brass plate. It has no assets and has never had any assets. This is said to have been the first occasion upon which Clifford Chance had agreed to accept a conditional fee agreement. The understanding at trial (the conditional fee agreement was not disclosed) was that Clifford Chance's fees had been discounted by 40% in return for an uplift in the event of success. That uplift was said to be equivalent to 40% of their undiscounted fees, a further 100% of that 40% and a success fee to be determined by Excalibur in its sole discretion. That would indicate that in the event of success Clifford Chance would recover 140% of its usual fees plus a discretionary success fee.

5. The action could not have been pursued without third party funding. Excalibur was in no position to borrow and the persons behind Excalibur were not wealthy. Between November 2010 and March 2013 the funders advanced £31.75 million to Excalibur (or to Clifford Chance) to enable the claim to be pursued to the conclusion of trial. Of this amount £14.25 million was provided in order to meet Clifford Chance's fees and disbursements, including the fees of counsel and of expert witnesses deployed at trial. £17.5 million was advanced for the purpose of enabling Excalibur to comply with orders requiring it to furnish security for the Defendants' costs of the action.

6. It will be appreciated from these figures that this was complex and expensive litigation. The trial occupied 60 days. Excalibur was represented by one leading and three junior counsel and, of course, by Clifford Chance. Texas was represented by one leading and two junior counsel, instructed by Messrs Jones Day. Gulf, against whom the claim was principally directed as its stake in the Shaikan field was 75% as compared with 5% for Texas, was represented by three leading counsel and two juniors, instructed by Messrs Memery Crystal.

7. The judge announced his conclusions on 10 September 2013. The reserved judgment of the trial judge, Christopher Clarke LJ as he had become by the date of formal hand-down, 13 December 2013, extends to 323 pages of single spaced type. It can be found at [2013] EWHC 2767 (Comm). The claim failed on every point, whether put in contract, which was the primary claim, or in tort, where five causes of action were pursued: interference with contract, interference with business relations, breach of fiduciary duty, fraud by misrepresentation and fraud by concealment. The claim did not fail narrowly or on the basis of abstruse legal doctrine upon which two views might be possible. It failed for rather more straightforward reasons, the first being that Excalibur had no contract with Gulf. This finding can have come as no surprise to anyone. In a reserved judgment of 28 June 2011 ([2011] EWHC 1624 (Comm)) giving her reasons for restraining Excalibur from pursuing a claim against Gulf in arbitration proceedings in New York Gloster J, as my Lady then was, found on the evidence then before her a strong arguable case that Gulf was not a party to the alleged contract with Excalibur ("the Collaboration Agreement") and described the grounds put forward by Excalibur to assert the contrary as not, at least at that stage, legally or evidentially convincing. An equally straightforward reason for the failure of the claim was that whereas Excalibur asserted that it had an entitlement to 30% of Gulf's 75% interest in the Shaikan field, it could not show that it had ever been able to perform the obligations which would have necessarily accompanied that entitlement.

Gulf's costs of exploration and development were of the order of US$500-700 million. An entitlement to enjoy 30% of Gulf's interest would imply an obligation to contribute 30% of those costs of exploration and development. Whether looked at from the standpoint of New York law or of English law, this was fatal to any entitlement to specific performance or damages – either because under New York law Excalibur had never been able and willing to perform, or under English law because any alleged breach of contract had caused no loss. Yet other reasons for the failure of the claim were that large parts of the evidence of Excalibur's witnesses, both factual and expert, with the exception of Judge Bellacosa, its expert on New York law, were rejected, as was Excalibur's attempt to portray as dishonest Mr Todd Kozel, the principal figure involved for Gulf. It was for reasons such as these that the judge described the litigation as having met with "a resounding, indeed catastrophic, defeat".

8. In his costs judgment delivered on 13 December 2013, [2013] EWHC 4278 (Comm), the judge summarised the claim in this way:

> "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):
>
> > "A party who chooses to litigate on such a wide and extravagant canvas takes the risk that if unsuccessful it may have to pay costs on an indemnity basis."
>
> 10. That the claim merits the description I have given to it is apparent for a number of reasons. Excalibur is and always has been nothing but a nameplate for the Wempen brothers, who lacked experience of the oil industry or oil finance and had no technical expertise whatever. Notwithstanding these deficiencies, Excalibur sought what would have been an enormous reward in the shape of an indirect interest in, inter alia, 30 per cent of the Shaikan oil field for what was essentially no more than the introduction of Texas and Gulf to the KRG, important though that was. It did so in circumstances where it had agreed to a bid going forward without Excalibur being a bidder, where it lacked the ability to finance its share, if it had one, and was inherently unlikely to be an acceptable

partner for any financial institution, or acceptable to the Kurdistan Regional Government.

11. The claim was opportunistic. Mr Wempen bade his time until it was apparent that the field was likely to be very profitable before bringing these proceedings. Meanwhile the Defendants, and not Excalibur, had borne the risk and expense.

12. As I observed in my judgment, Mr Wempen was a man long on assertion and confidence, but short on analysis and understanding. He has pursued this litigation as if it was an act of war. He took positive salesmanship beyond the point of acceptability.

13. From the beginning of his relationship with the KRG and for a considerable time thereafter he managed to convey the thoroughly misleading impression that he had financial and other connections, until it became apparent, first to his friend and associate Mr Kinnear, and latterly to Texas and Gulf and the KRG, that he did not. It can truthfully be said that the dispute had its origins and developed as a result of Mr Wempen's misrepresentations about himself.

14. The claims put forward were an elaborate and artificial construct which, as Mr Gaisman, in my view not inaccurately, puts it, were reverse engineered from the position in which the Wempens found themselves on the facts. They were replete with defects, illogicalities and inherent improbabilities. The claims involved asserting that Gulf was a partner to the Collaboration Agreement from the outset. This was inconsistent with the clear terms of the agreement and impossible to square with the absence of any evidence that Gulf ever authorised Texas to enter into the agreement on Gulf's behalf, or that Texas agreed to do so, and of any contemporaneous claim by Excalibur that Gulf was a party.

15. Insofar as an attempt was made to rely on apparent authority it foundered on the fact that on his own evidence Mr Eric Wempen thought that there was a question mark over whether Gulf was a party.

16. The proposition that Gulf was a party was also completely inconsistent with the attitude that Excalibur itself had taken when the question of Texas assigning an interest to Gulf arose in April and May of 2007.

17. The *alter ego* allegation, which led to requests for large amounts of documentation, which was given, was completely untenable, it being plain that Gulf and Texas were two independent companies. It was inconsistent with the documents, and the idea that Gulf dominated Texas and, in

particular, that Mr Kozel dominated his brother was, as I said in my judgment, bordering on the risible.

18. The case on assignment was always unclear, irreconcilable with the contemporaneous documents and in the end only supported by reliance on some passages in the cross-examination of Mr Robert Kozel with the omission of a critical passage.

19. Excalibur also claimed that, although it consented to a bid being made for the Shaikan PSC by Gulf and Texas without it, the Collaboration Agreement entitled it to an indirect interest in the oil field, even if it never became a party to a PSC, having decided not to be one. This proposition was commercially unprecedented and legally implausible. The parties had never agreed on an indirect interest, let alone what form it might take. Even if they had agreed on an indirect interest there was no way in which the court could decide how to give effect to it.

20. The implied term argument failed every test. The alternative contractual claims were contrived and fallacious in many respects. The basis for any claim to an interest in Sheikh Adi and Ber Bahr shifted, was fallacious and would, if true, have had some bizarre consequences.

21. The claim for breach of fiduciary duty faced insuperable obstacles.

22. The numerous tortious claims added considerably to the already heavy burden of what had to be addressed and were based on factual misconceptions or incorrect legal premises.

23. The claim in deceit was such that Mr Wempen, the alleged victim, could not explain how he had been deceived.

24. What I have said is but a summary of the defects in the claims, which are dealt with at considerable length in my judgment. I have not forgotten that failure in respect of one or more causes of action is not a passport to indemnity costs, but, as is apparent from my judgment, Excalibur put forward a range of bad, artificial or misconceived claims which required a great deal of expense, labour and time to refute. The scale of Excalibur's claims and of the fallacies in them springs from the fact that they were fashioned some time after the events and bore little relationship to the facts as I have found them to be, and of which the Wempens must have been aware, and to the true relationship between the parties at the time.

25. A whole swathe of evidence was directed to the assertion that there was a plan to cut Excalibur out of the Shaikan PSC. This was the product of the Wempens' cast of mind, bordering,

in their own words, on paranoia. It was said in the opening to be the reason we are here.

26. The supposed timing of the plan was variously put at dates between July and November 2007. Who exactly the participants were, apart from Mr Kozel, was never clear. The supposed plan was inconsistent with a raft of internal Gulf documents and the way in which Gulf acted. It also ignored the fact that at the relevant time Gulf wanted a partner to share the costs of the exploration.

27. The claim to specific performance was subject to some five fundamental objections, of which laches was one of the most obvious.

28. It has been said that a claimant is fortunate if he wins on every point. In this case the claimant has lost on every material issue. This was more than a misfortune. It arose because of the inherent defects in the claims in the light of the true facts.

29. The quantum of the claim was also grossly exaggerated. It was put at US $ 1.65 billion, when on my findings it was at the very best only $ 3.3 million. That figure was reached without any assistance from Excalibur's own expert, who was not instructed to opine on a figure as at the date of breach. The difference arises because the lesser valuation takes the position as at the date of the breach and assumes that, contrary to my view, an indirect interest could have been modelled which would have the same effect as a direct interest. So even on the most favourable basis that I was prepared to contemplate, but did not agree with, the damages sought were grossly exaggerated.

30. I appreciate that Excalibur was arguing for a valuation at the date of trial and that there was some basis for doing that. But the breach date rule is one clearly established, although arguably not without exception, and peculiarly apposite to meet the justice of the present case.

31. I have little doubt that Excalibur hoped that the making of a claim for specific performance or damages calculated at the date of trial would drive Gulf to settle.

32. All these spurious claims were pursued relentlessly to the bitter end. Moreover the Defendants were presented with a case which changed as the difficulties in its exposition became apparent. There was a differing case on how the money would be raised. The alleged timing of the plan to cut Excalibur out changed from time to time. When the difficulties of the deceit case - which was, originally, that Dr Ashti had said that Excalibur could not participate in the PSC and that this had not

> been relayed to the Wempens - became apparent it was then said that Dr Hawrami had, somewhat implausibly, referred to indirect participation. The motive for the fraudulent concealment also changed: see paragraph 617 of my judgment."

9. Paragraphs 33 to 63 of the judge's costs judgment, which I do not reproduce here, contained many more examples of the egregious manner in which this litigation was pursued, including, it is surprising and depressing to have to report, aggressive and unacceptable correspondence from Clifford Chance, the product of the misplaced zeal with which the partner responsible, Mr Alex Panayides, pursued what the judge aptly termed the war of attrition of which it formed part. Mr Rex Wempen was found to have made false and misleading statements from the outset of the transaction which underlay the litigation, a stratagem which he and his brother Eric perpetuated in evidence at trial.

10. In the circumstances it is unsurprising that the judge directed Excalibur to pay the Defendants' costs on the indemnity basis. That however had the result that the security for costs which had been furnished by way of payment into court, £17.5 million as already mentioned, became inadequate, having been estimated as is conventional on the footing that costs would be recovered on the standard basis. Having determined that costs should be assessed on the indemnity basis, the judge ordered Excalibur to provide additional security for the Defendants' costs in the sum of £5.6 million, failing which he gave leave to the Defendants to join some of the funders of the action to the proceedings with a view to their seeking against them costs orders pursuant to the discretion afforded to the court by section 51(3) of the SCA 1981. That security was never provided and leave was subsequently given to join the remainder of the funders. The shortfall after payment out to the Defendants of the security for their costs is currently estimated at about £4.8 million.

11. The judge heard three days of argument on the question whether costs orders should be made against the funders, and if so on what basis. One group of funders, Mr Andonis Lemos and his wholly-owned company Psari Holdings Ltd ("Mr Lemos" and "Psari") accepted that it was appropriate that they should (both) be held liable to pay the Defendants' costs, albeit only on the standard basis, and subject to "the *Arkin* cap", i.e. to the extent of the funding provided, see *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055. 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, i.e. 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. Psari and Mr Lemos had contributed £9.75 million towards Excalibur's own costs and £4 million to enable Excalibur to comply with an order requiring it to afford security for the Defendants' costs. In view of the shortfall being of the order of £5 million it was of no interest to Psari and Mr Lemos whether the applicable cap in their case was £9.75 million or £13.75 million although it occurs to me that the point could be relevant to any question of apportionment as between funders. Be that as it may, Psari and Mr Lemos did not contend either before the judge or before us that the relevant cap in their case was only £9.75 million.

12. The other represented groups however (one group, Blackrobe, being unrepresented) contended that amounts made available for the purpose of enabling Excalibur to comply with orders to furnish security for costs should not count towards the *Arkin* cap.

13. The judge concluded that all of the funders should be jointly and severally liable to pay the Defendants' costs on the indemnity basis, subject to their only being liable in respect of costs incurred after the date of their first contribution. He concluded that money provided to Excalibur to enable it to provide security for costs was an investment in the claim just as much as was money provided to pay Excalibur's own costs and should equally count towards the *Arkin* cap.

14. Finally, the judge had to deal with the position of three funders who had entered into no direct funding agreement with Excalibur or Clifford Chance but who had provided on back-to-back terms the funds contracted to be provided by related companies, i.e. on the basis that they in return for their advance would receive the rewards due in the event of success pursuant to the contractual arrangements made by the related companies with Excalibur and Clifford Chance. Here the judge looked to the economic reality of the situation. An investment in the litigation was made by the companies who provided the funds and which would have been the ultimate beneficiaries of success. They were jointly and severally liable with their associated companies whom they had put in funds.

15. The reasons for the judge's conclusions are set out in his judgment of 23 October 2014, [2014] EWHC 3436 (Comm). This appeal is against certain parts of the order made on 3 February 2015 in the light of that judgment, and is brought with leave of the judge himself.

16. In order to understand the issues on the appeal it is next necessary to reproduce the judge's description of the funders and the funding:

> "**The funders**
>
> 6. The funders divide into four groups. The initial funder was **Mr Andonis Lemos** ("Mr Lemos"). He is the sole shareholder of **Psari Holdings Limited**, a Cayman Island company, which is the vehicle through which he agreed to provide funds to Excalibur, initially in November 2010. The company was not set up for that purpose but in order to invest in, inter alia, litigation funds, managed by an experienced team.
>
> 7. In March 2012 further groups of funders and their parents appeared on the scene. The second group was **Hamilton Capital LLC** ("Hamilton"), a Delaware corporation formed on 9 January 2009, which is a 99% subsidiary of **Platinum Partners Credit Opportunities Master Fund LLP** ("PPCO"), a Delaware limited partnership, formed on 25 June 2008. (Excalibur was Hamilton's eighth funding engagement). The remaining 1% is shared equally between Mr Jack Simony ("Mr Simony", who is a portfolio manager for Hamilton and other associated legal entities and PPVA (see [9] below) and Mr

Harvey Werblowsky ("Mr Werblowsky"). He was the Chief Legal Officer for PPCO and PPVA (see [9] below) and a Portfolio Manager for Hamilton and JH (see [10] below). PPCO is a master fund, whose partners include feeder funds which themselves are funded by individual investors.

8. The third group was **Blackrobe AEO I Investors LLC** ("Blackrobe"), a Delaware company, which is a fund administered by **Blackrobe Capital Partners LLC** ("Blackrobe Capital"). Blackrobe has acknowledged service but neither it nor Blackrobe Capital has taken any part in the proceedings.

9. In October 2012 a fourth group appeared, consisting of **Huron Capital PLC** ("Huron"), formed on 17 August 2011 as a 100% subsidiary of **Platinum Partners Value Arbitrage Fund LP** ("PPVA"), a Cayman Islands limited partnership, formed on 17 December 2002. PPVA's business is to invest and trade in US and non-US securities on what is described as a "multi strategy basis". It, too, is a master fund like PPCO.

10. Last of all came **JH Funding LLC** ("JH"), a Delaware company, incorporated on 7 March 2013. It is a 99% subsidiary of PPCO with 0.5% being owned by Mr Simony and Mr Werblowsky respectively. Mr Simony acted as Portfolio Manager for it.

11. PPCO and PPVA and their subsidiaries operate out of the same office in New York. PPCO has not acknowledged service although the other Platinum entities (i.e. those in [7], [9] and [10] above) have. The Defendants suspect that the reason why they have not done so is to enable them to attempt to resist enforcement of any order on technical grounds. The Defendants seek a determination against PPCO on the merits and not a judgment in default.

12. The funding was provided in different tranches and for different purposes. I set out below the sequence.

The initial funding – Mr Lemos and Psari

The 1st Psari Funding Agreement

13. By the 1st Psari Funding Agreement of 24 November 2010 Psari agreed with Excalibur to advance, and did advance, US $ 10,000,000 in respect of costs. It also agreed to advance a further $ 5 million for security for costs should that be ordered. In return Psari was, in the event of success, to obtain a 10% working interest in such interest as Excalibur received in the Shaikan field (with the option of monetisation after a certain

period) or 10% of any damages in respect of Shaikan. (Later funders were not to get an interest in Excalibur's interest).

14. The 10% figure was to be increased by a further 2.5% if the $ 5 million was drawn down, and pro rata to any lesser sum. In the event the $ 5 million facility was not utilised. If the proceedings were resolved by settlement Psari was to receive either the 10% figure, or, if it was greater, $ 20 million if the settlement was within 12 months, $ 25 million if it was within more than 12 but less than 24, and $ 30 million if it was more than 24 months after the date of the Agreement. The Agreement contained a definition of "Material Adverse Change" which included the value of the claim falling below $ 350 million. In the event of such a change Psari could call back such of the Advance as remained unspent and uncommitted. Under the Agreement Excalibur undertook to use Clifford Chance until such time as its obligations to Psari were discharged in full.

The first security for costs application

15. In December 2011 Texas and the Gulf Defendants applied for security for their costs. The hearing of the application was scheduled for 14 March 2012.

The 2nd Psari Funding Agreement

16. A letter agreement dated 9 March 2012 between Psari and Excalibur contained a **Security for Costs Facility** and an Expenses Facility. Under the Security for Costs Facility Psari agreed to provide Excalibur with up to £ 7 million for security for costs in respect of the claim as ordered by the court or agreed between the parties, conditional upon Excalibur obtaining a further £ 2 million from alternative sources for security, which was to be used first, come what may. The facility was to be a bridging facility; and Excalibur undertook to use its best endeavours to repay any sums drawn down as soon as possible.

17. Excalibur agreed to increase Psari's recovery under the 1st Psari Agreement by 1% for each further $ 1 million supplied under the Security for Costs Facility and not repaid by 1 October 2012. It may be that an amount of £ 2.5 million i.e. circa $ 4 million was drawn down under this facility on 27 April 2012: see [24] below. If so it was repaid on 6 July 2012. Excalibur also agreed to pay Psari a commitment fee varying in an amount according to when the draw down was repaid. If it was not repaid by 13 June 2012 the fee was to be 150% of the amount drawn down. Whether that fee of about $ 6 million was paid is unknown. The Security for Costs Facility discharged

Psari's obligation to supply the Security Advance under the 1st Psari Funding Agreement.

18. Under the Expenses Facility Psari agreed to provide up to £ 3 million in respect of the expenses of prosecuting the claim to judgment. In return Excalibur agreed to increase Psari's recovery under the 1st Psari Funding Agreement by 1% for each further $ 1 million supplied under the Expenses Facility. If the £ 3 million should prove insufficient then, in the absence of further funding, Clifford Chance, which was a party to the agreement, agreed that it would apply a 100% discount to its fees and Psari and Clifford Chance would meet further disbursements on a 50/50 basis.

19. On 13 March 2012 Clifford Chance entered into a Representation Agreement with Excalibur, which has not been disclosed. It appears that Clifford Chance agreed to provide their services at a 40% discount. In the event of success in the action Clifford Chance would receive an uplift equivalent to 40% of their undiscounted fees, a further 100% of that 40%, and a success fee to be determined by Excalibur in its sole discretion.

Security is ordered

20. On 14 March 2012 Popplewell J ordered Excalibur to provide security to the Defendants in the sum of £ 9.5 million. Mr Lemos was told of the application and that if further funding was refused the claim could not continue.

21. On 28 March 2012 Excalibur drew down £ 3 million (approximately equal to $ 4.8 million) under the Psari Expenses Facility the effect of which was to increase its percentage recovery in the event of success to 14.8%.

The 1st Hamilton Funding Agreement

22. On 30 March 2012 Excalibur and Hamilton entered into the 1st Hamilton Funding Agreement under which Hamilton agreed to provide Excalibur with £ 6.5 million to be used for, and only for, providing security for costs. In return Hamilton was to receive 1.25% of Excalibur's Net Recoveries as defined in an Inter-Creditor Agreement of the same date for each £ 1 million disbursed or 400% of the Hamilton Funding, whichever was the greater, capped at 7 times the funding. I call this "the Hamilton formula". Interest on the funding was to be at 25% per annum with the minimum interest being £ 855,263 (only payable out of Recoveries as defined in the Agreement).

23. PPCO provided Hamilton with the £ 6.5 million by way of a subscription for capital, and the dollar equivalent of that sum

($ 10,419,500) was transferred by PPCO to Clifford Chance on 2 April 2012. An Operating Agreement between Hamilton and PPCO of 30 April 2012 provides that distributions of cash or other assets of Hamilton are to be made at the time(s) determined by PPCO as Managing Member.

The 1st Blackrobe Funding Agreement

24. Also on 30 March 2012 Excalibur and Blackrobe entered into the 1st Blackrobe Funding Agreement under which Blackrobe provided Excalibur with £ 500,000 for security for costs on terms broadly similar to those in the 1st Hamilton Funding Agreement although the minimum interest must have been less. The agreement has only been disclosed in redacted form.

Psari NewCo

25. On 27 April 2012 either Psari or a new company of Mr Lemos, which I shall call Psari NewCo, advanced £ 2.5 million to Excalibur. If it was Psari, it was pursuant to the Psari Security for Costs Facility (see [16] above). If it was Psari Newco (a company whose existence is unclear: see [26] below) it was done pursuant to a new agreement of, or intended to be of, 30 March 2012, as recited in Recital (E) of the Inter-Creditor Agreement of that date (see [26] below). It is said by Withers, Mr Lemos' solicitors, that there is no single document recording the agreement between Excalibur and Psari Newco. The exact payer is unclear because the payment and receipt details in the Psari Expenses Ledger disclosed do not distinguish between Psari and Psari NewCo, its nominee, and, in practice, Mr Lemos, whose companies they were, probably did not do so either.

The Inter-Creditor and Pledge and Security Agreements

26. On 30 March 2012 Excalibur, Hamilton, Blackrobe, Psari, Psari NewCo and Clifford Chance entered into an Inter Creditor Agreement which regulated the order and priorities of distributions to the Funders viz Hamilton, Blackrobe, Psari, and Psari NewCo. Psari NewCo is referred to in the agreement as "a limited liability company or other entity being a nominee of Psari and on whose behalf for all present purposes Psari has executed this Agreement".

27. On the same date Excalibur and the Wempens entered into Pledge and Security Agreements with Hamilton, Blackrobe and Psari granting them security over Excalibur's assets and the Wempens' membership interest in Excalibur in respect of Excalibur's obligations under the 30 March 2012 Facility

Agreements with Hamilton and Blackrobe and under the 24 November 2010 Agreement with Psari.

Novation

28. On 25 June 2012 there was a Novation Agreement between Excalibur, the Funders, Clifford Chance, and the Wempens whereby in effect Blackrobe assumed the rights and obligations of Psari/Psari NewCo in respect of the £ 2.5 million paid by the latter to Excalibur, which Blackrobe repaid to Psari/Psari NewCo.

The 2nd Blackrobe Funding Agreement

29. On the same date Excalibur entered into a 2nd Blackrobe Funding Agreement in relation to the provision by Blackrobe of £ 2.5 million for security for costs. On 6 July 2012 Psari/Psari NewCo was repaid.

30. The effect of all this was that between March and July 2012 Blackrobe provided Excalibur with £ 3 million for security for costs, of which £ 2.5 million had originally been paid by Psari/Psari New Co.

The second funding round

The 2nd Hamilton Funding Agreement

31. On 5 October 2012 Excalibur and Hamilton entered into the 2nd Hamilton Funding Agreement under which Hamilton agreed to provide Excalibur with up to a further £ 3 million in funding to meet litigation expenses. Mr Simony was told that without this funding the claim would not be continued and Hamilton would lose the money already provided. The interest rate payable (25%, minimum £ 375,000) was the same as in the 1st Hamilton Funding Agreement, so also was the return i.e. the Hamilton formula.

The 3rd Blackrobe Funding Agreement

32. On the same day Excalibur and Blackrobe entered into the 3rd Blackrobe Funding Agreement whereby Blackrobe agreed to provide up to £ 1 million in funding. In fulfilment of the Agreement Blackrobe paid Clifford Chance £ 900,000 on 15 October 2012 and £ 100,000 on 16 October 2012. No copy of this Agreement has been disclosed.

The 2nd Inter-Creditor Agreement

33. Also on 5 October 2012 Excalibur, Hamilton, Blackrobe, Psari and Clifford Chance entered into a second Inter Creditor Agreement to reflect the further funding made by Hamilton and

Blackrobe. The Pledge and Security Agreements were also amended.

The Huron Participation Agreement

34. On 10 October 2012 a Participation Agreement was signed whereby Huron agreed to assume Hamilton's rights and obligations to Excalibur under the 2nd Hamilton Funding Agreement. Huron provided £3 million to Excalibur, which sum PPVA had provided to Huron by way of capital contribution. The £ 3 million was paid by Huron on 17 October and 21 November 2012 by payment to Clifford Chance of the dollar equivalent of £ 2 million ($ 3,214,200) and £ 1 million ($ 1,592,700), those sums having been received from PPVA.

35. The Huron Operating Agreement of 17 August 2011 provided that cash of the company not required for the operation or the reasonable working capital requirements of the company was to be distributed from time to time to its Members, i.e. PPVA, in such manner as was determined by the Operating Managers selected by PPVA.

36. On 15 October 2012 the trial started.

The third funding round

January 2013 funding

The 3rd Psari Funding Agreement

37. By December 2012 the action was quite far advanced although there was a long way further to go. Excalibur needed funds to pay counsel. Mr Lemos was again told that, if he refused further funding Excalibur would not be able to continue with the claim and judgment would be entered for the Defendants. The same message was given to him when further funding was sought later. On 25 and 29 January 2013 Psari and Hamilton each provided Excalibur with further funding, being the dollar equivalent of £ 500,000. Hamilton was provided with the funds to do so by PPCO by a capital contribution of the dollar equivalent ($ 880,400) paid direct to Clifford Chance.

The second security for costs application

38. By the beginning of 2013 the trial had lasted beyond the time which had been contemplated when Popplewell J first ordered Excalibur to produce security. On 15 February 2013 I ordered Excalibur to provide further security of £ 8 million. This placed Excalibur and its funders in a dilemma. If the security was not provided the action would be stayed and the past investment lost. If it was to continue, almost the same sum

as had been originally ordered would have to be put up again. Application was made to the funders to come up with the security.

The 4th Psari Funding Agreement

39. A series of agreements and fund transfers were made at the beginning of March 2013. On 7 March 2013 Psari transferred a further £ 4 million to Clifford Chance to finance the security that Excalibur was to provide. On 8 March 2013 Psari and Excalibur entered into the 4th Psari Funding Agreement in respect of that £ 4 million. Under that letter Agreement Psari was to obtain an increase of 1% of Recoveries for each $ 1 million supplied or pro rata.

The Facility Agreement with JH

40. By a Facility Agreement of 8 March 2013 (a date after the hearing but before judgment) between Excalibur and JH, JH agreed to provide Excalibur with £ 4 million for security (only). JH was to be remunerated in the case of success in accordance with the Hamilton formula. Interest was to run at 25% per annum with a minimum of £ 400,000. Mr Simony signed on behalf of JH. PPCO provided it with £ 1 million by way of capital contribution, by transferring the dollar equivalent of £ 1 million ($ 1,525,000) to Clifford Chance on 8 March 2013.

41. The JH Operating Agreement with PPCO of 7 March 2013 provided for JH's cash or other assets to be distributed to Members in accordance with their membership interests at the time(s) determined by the Managing Member i.e. PPCO.

The Agreement between JH and Huron

42. Also on or around 8 March 2013 there was an undocumented agreement between JH and Huron whereby Huron agreed to finance £ 3 million of JH's obligation to Excalibur. On 8 March PPVA provided the dollar equivalent of that sum ($ 4,516,214) to Huron which transferred it to Clifford Chance.

The 3rd Inter-Creditor Agreement

43. On 8 March 2013 Excalibur, Hamilton, Blackrobe, Psari, JH and Clifford Chance entered into a 3rd Inter Creditor Agreement, which superseded and replaced the previous two. Section 5 provided that the Funders were "entitled to require" Excalibur to accept or make any offer of settlement as the Funders deemed appropriate.

The upshot

44. The effect of the above is that the following amounts were provided by the respective funders for the following purposes:

Funder	Costs	Security	Total
Psari	£9.75 m	£4.0 m	£13.75 m
Hamilton	£0.5 m	£6.5 m	£7.0 m
Blackrobe	£1.0 m	£3.0 m	£4.0 m
Huron	£3.0 m	£3.0 m	£6.0 m
JH	£	£1.0 m	£1.0 m
Totals	**£14.25 m**	**£17.5 m**	**£31.75 m**

45. The respective dates and purposes of the funding for each funder were as follows:

Funder	Date	Amount	Purpose
Psari	November 2010	$ 10,000,000	Costs
	March 2012	£ 3,000,000	Costs
	January 2013	£ 500,000	Costs
	March 2013	**£ 4,000,000**	Security
Hamilton	2 April 2012	***£ 6,500,000***	Security
(PPCO)	29 January 2013	£ 500,000	Costs
Blackrobe	March 2012	***£ 500,000***	Security
	July 2012	***£ 2,500,000*** (repaying Psari Newco)	Security
	October 2012	£ 1,000,000	Costs
Huron	October 2012	£ 3,000,000	Costs
(PPVA)	March 2013	**£ 3,000,000**	Security
JH (PPCO)	March 2013	**£ 1,000,000**	Security

46. As is apparent from the above all the security ordered by the Court was provided by the funders (see the entries in bold, of which those italicised are for the first round and the others for the second). In the case of Huron the first £ 3 million for costs was originally Hamilton's responsibility under the 2nd Hamilton Funding Agreement of 5 October 2012 but that was assumed by Huron under the 10 October 2012 Participation Agreement. The second £ 3 million for security was originally JH's responsibility under the Facility Agreement with JH of March 2013 but was assumed by Huron under the Agreement between JH and Huron of March 2013.

47. If you ignore the Huron Participation Agreement, on the footing that those who agreed with Excalibur to bear the costs were Hamilton and JH and not Huron the figures for Hamilton and JH become as follows:

Funder	**Costs**	**Security**	**Total**
Hamilton	£ 3.5 m	£ 6.5 m	£ 10 m
JH		£ 4 m	£ 4 m

48. The economic reality is that PPCO provided £ 8 million of funding to Excalibur of which £ 7.5 million was for security for costs and PPVA provided £ 6 million of funding of which £ 3 million was for security for costs.

What the Funders stood to gain

49. The interest that Psari stood to gain appears to have been 21.6 % calculated as follows:

(i) under the 1st Psari Funding Agreement	10.0%
(ii) under the 2nd Psari Funding Agreement	4.8%
(iii) under the 3rd Psari Funding Agreement	0.8%
(iv)under the 4th Psari Funding Agreement	6.0%
	21.6%

50. So Mr Lemos stood to gain a very large sum if Excalibur won. (He was, of course, also taking the risk of failure and, if he had obtained a working interest, would have had to devote time, resources and finance in the longer term). Excalibur in opening valued its interest in the Shaikan field, after defraying its share of past costs, at $ 1.481 billion. If so Mr Lemos stood

> to gain about £ 308 to £ 320 million – a return of around 1,450% ($ 320m/ $22m) on his investment.
>
> 51. The Funders other than Blackrobe stood to recover up to 7 times their funding. For Hamilton that meant £ 70 million (7 x £ 10m). For JH that meant £ 28 million (7 x £ 4 million). These figures would have to be shared by Hamilton with Huron under the 5 October 2012 Participation Agreement and by JH with Huron under the March 2013 Agreement. In addition they would receive interest at 25% per annum.
>
> 52. Blackrobe has not disclosed unredacted versions of its funding agreements. The unredacted content of the redacted versions is essentially the same as in the Hamilton Funding Agreements. It seems to me overwhelmingly likely that they were on the same terms as to return and interest as applied to Hamilton (but with a different minimum figure for interest)."

The appeals

17. Psari and Mr Lemos appeal simply on the basis that they ought not to have been ordered to meet the Defendants' costs on the indemnity basis, accepting that it is appropriate that they should meet the Defendants' costs on the standard basis. Their argument is that they should not have to "follow the fortunes" of Excalibur.

18. In terms of their Appellants' Notice and the last paragraph of their skeleton argument prepared for use on this appeal, the Platinum funders resist the making of any award of costs at all against them pursuant to section 51(3). However their Grounds of Appeal do not support this optimistic position and I did not understand Mr Ian Croxford QC to address any oral argument directed to it. Indeed I understood Mr Croxford at one point in his argument to concede, in the light of *Dymocks*, that once one has identified a commercial funder like Hamilton, who has provided litigation funding, then no further evidential enquiry will be necessary and that the ground is adequately laid for an order under section 51(3) on the standard basis. This was realistic. The suggestion that these funders, whose stake in this litigation was very substantial, ought not to be responsible for the successful parties' costs is simply hopeless. That is no doubt why the argument was never advanced by Psari and Mr Lemos, whose stake in the litigation was eye-watering. I note however that the position of JH is distinct from that of the other Platinum funders as it provided funds only for the provision of security for costs. The Platinum funders support Psari and Mr Lemos in their contention that they should not be required to follow the fortunes of Excalibur, but their principal distinct point is that funds contributed for the express purpose of providing security for costs should not count towards the *Arkin* cap. If that argument succeeds JH would not be amenable to an order under section 51(3), whilst for other Platinum funders the success of the argument would be measured in the reduction in the cap on their liability.

19. Additionally, PPVA and Huron appeal on the basis that to treat them as funders amounts to an impermissible disregard of the corporate structure. That argument if

successful would also avail PPCO had it acknowledged service and lodged an appeal, but it did not.

Follow the fortunes

20. I agree with Mr Richard Waller QC for the Defendants that there is a short answer to this aspect of the appeal. The judge directed himself separately and correctly as to the principles applicable when exercising the court's wide discretion under section 51(3) to consider making a costs order against a non-party and when exercising its equally wide discretion under CPR 44 to consider on what basis, if any, a costs order should be made. The argument that the judge elided or conflated these two enquiries is simply unsustainable on even a superficial let alone a careful reading of the judge's judgment. At paragraph 74 the judge remarked expressly that the considerations which militated in favour of the making of an order under section 51(3) do not impact on the question whether the costs to which the funders should be required to contribute should be costs assessed on the indemnity basis. The judge considered the two questions separately. The enquiry whether it is appropriate to direct costs to be paid on an indemnity basis is highly fact-dependent. The judge considered the exercise of this discretion in a principled manner, not taking into account irrelevant factors and not omitting to take into account relevant factors. He reached a conclusion which was not just within the ambit of reasonable decision-making but which was plainly and obviously just, correct and appropriate. There is no basis upon which this court could or should interfere.

21. The principles which should guide the court in exercising its discretion as to the basis upon which a costs order should be made are too well known to require restatement. They are accurately summarised in the judge's costs judgment, to which the judge referred at paragraph 60 of the judgment which is the subject of this appeal. CPR 44 makes clear, as the judge noted at paragraph 62, that the conduct of the parties is one, but only one, of the circumstances to be taken into account. The discretion is to be exercised in the light of all the circumstances of the case. To award costs on an indemnity scale is a departure from the norm and one therefore looks for something, whether it be the conduct of the relevant party or parties, or the circumstances of the case, which takes the case outside the norm. The judge cited in his costs judgment some of the many cases which attempt to collect examples of circumstances which may take a case out of the norm – such as his own judgment in *Balmoral v Borealis (UK) Ltd* [2006] EWHC 2531 (Comm), my judgment in *Three Rivers District Council v Governor & Company of the Bank of England* [2006] 5 Costs LR 714 and the judgment of my Lady, Gloster J as she then was, in *Euroption Strategic Fund Ltd. v Skandinaviska Enskilda Banken AB* [2012] EWHC 749 (Comm).

22. I have already reproduced above part of the judge's summary of the conduct of Excalibur and its advisors in pursuing this claim and, equally importantly, of the nature and character of the claim itself. At paragraph 121 the judge remarked that the character of the claim, looked at objectively, its size and effect [scilicet on the Defendants] would, by themselves, justify indemnity costs being ordered against the funders. I entirely agree.

23. The argument for the funders boiled down in essence 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, both of which were identified by the judge. 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. As the judge pointed out at paragraph 125, it ignores the character of the action which the funder has funded and its effect on the Defendants.

24. The argument is yet further flawed in that it assumes that the funder is responsible only for his own conduct. This too is incorrect. As the judge pointed out at paragraph 60, where conduct comes into consideration in this context, the successful party is afforded a more generous basis for assessing which of his costs should be paid by his opponent because of the way in which the latter, or those in his camp, have acted. Thus as the judge pointed out at paragraph 118, 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, which experts may themselves have been chosen by the lawyers, or the conduct of those whom he has chosen to enlist, e.g. witnesses, even though he is not personally responsible for it. 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 at paragraph 125, 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.

25. The judge expressed his conclusions on this point in three passages:

> "97. . . . The pursuit of objectively hopeless claims which required much time, labour and expense to refute is itself a ground for indemnity costs both against the litigant and his funder.
>
> . . .

> 110. In short, in a case of this kind justice requires that, when the case fails so comprehensively, not merely on the facts but because it was wholly bad in law, the funder should, subject to the Arkin cap, bear the costs ordered to be paid by the person whom or which he has unsuccessfully supported, assessed on the scale which the court thinks it just for that person to pay in the light of all the circumstances, including but not limited to that person's behaviour and that of those whom that person engaged. In short, he should, absent special circumstances, follow the fortunes of those from whom he himself hoped to derive a small fortune. To do otherwise would, in my judgment, be unfair to the Defendants and their personnel, who were on the receiving end of claims and actions of the character that I described in the costs judgment.
>
> . . .
>
> 125. The supposed principle looks at the question from only one point of view – that of the funder. It ignores the effect and character of the action which he has funded on the Defendants; whereas the derivative nature of his involvement should, as it seems to me, 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."

I would respectfully rephrase the first part of that last sentence, which has I think escaped the judge's proof reading. The judge plainly intended to refer quite separately to the character of the action funded, and to the effect upon the Defendants of its pursuit.

26. I entirely agree with the judge's approach. I do not accept that, as was suggested, in his reference at paragraph 110 to "a case of this kind", the judge meant to refer simply to a case in which the funded litigant had been ordered to pay costs on an indemnity basis. The judge was plainly referring to a case bearing characteristics similar to those which he had been describing in the preceding 109 paragraphs. I also do not accept that in these three passages from his judgment which I have extracted the judge imposed a fetter upon the essentially discretionary exercise. The judge described the result which was ordinarily, in such circumstances, and absent special countervailing circumstances, to be expected, not a result which should be achieved automatically and without proper consideration of all the circumstances, which consideration in this case was exhaustive and exemplary. Further, I do not accept that the judge wrongly placed the burden upon the funders to show why they should not be liable to pay costs on the indemnity basis. The judge identified countless factors which militated positively and strongly in favour of an award of indemnity costs against the funders.

27. However 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. I am comforted to find that the Chairman of the ALF, Mr Leslie Perrin, agrees with me. Exhibited to his witness statement supporting the application of the ALF to be permitted to intervene in these appeals was an article by Rachael Rothwell in the Law Gazette on 16 November 2015. That article records an interview with Mr Perrin in which he is reported as saying by way of comment on the judge's judgment in this case:

> "Personally, I am quite happy that if the case attracts indemnity costs, then the funder's liability should also be assessed on that basis. The part that concerns me is the security for costs."

I also agree with the judge when he said, at paragraph 129:

> "I entertain some doubt that my decision will send an unacceptable chill through the litigation funding industry, whose aim is not to finance hopeless cases but those with strong merits. If it serves to cause funders and their advisors to take rigorous steps short of champerty, i.e. behaviour likely to interfere with the due administration of justice, - particularly in the form of rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals - to reduce the occurrence of the sort of circumstances that caused me to order indemnity costs in this case, that is an advantage and in the public interest."

In that latter regard Mr Perrin in the same interview recorded his view that in relation to due diligence "the ALF Code of Conduct gets the balance right". He also accepted that funders should review cases thoroughly before they invest and that funders cannot "abandon" the cases that they have invested in but should continue to monitor them, without controlling them. I express no view as to whether the ALF Code of Conduct strikes the right balance, but I merely note that it requires that any Litigation Funding Agreement must state how the Funder may terminate the LFA in the event that the funder reasonably ceases to be satisfied about the merits of the dispute or reasonably believes that there has been a breach of the LFA by the Funded Party.

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 insofar as the argument has any traction, it has I consider been resolved by the decision of this court in *Arkin*. In that case this court considered 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.

29. It follows that I consider it unnecessary for the disposal of this appeal to consider the adequacy of the due diligence undertaken by the funders. Subject to the need always to look at all the circumstances to determine the overall justice of the case, it will seldom be relevant to consider whether the funder knew or ought to have known of the egregious features of the case which, objectively, and having regard to their effect upon the successful party, render an award of indemnity costs appropriate. 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. It is in my judgment both right and inevitable that this should be the approach, for an enquiry into the adequacy of the funder's due diligence is at best difficult and unsatisfactory and often impossible because of the constraints imposed by the likely disinclination of the person funded to waive privilege in relevant communications, as predictably occurred here. Furthermore, an enquiry into the adequacy of the due diligence undertaken gives rise to the prospect of undesirable satellite litigation which will simply serve to increase the cost of, and the delay in achieving, finality in the litigation. In this regard it is salutary to remind ourselves of the following observation of Morritt LJ in *Globe Equities Ltd v Globe Legal Services Ltd and Ors* [1999] BLR 232 at 235:

> ". . . it must be borne in mind that this court has said on more than one occasion that proceedings in respect of orders such as these [which included an application for a non-party costs order under section 51(3) of the SCA] should be dealt with in a summary way, to be measured in hours not days, and not allowed to give rise to substantial satellite litigation: *Ridehalgh v Horsefield* [1994] Ch 205, 238."

30. I should however add that I agree with the judge that the due diligence undertaken by the funders before agreeing to support this claim was inadequate. The judge describes what was done at length and gives his reasons for that conclusion. I do not propose to lengthen this judgment by repeating that exercise. Mr Waller characterised the due diligence here essayed as variously and in some cases cumulatively superficial, feeble and rushed. I agree. I am particularly unimpressed by the Platinum funders' plea that they relied not just upon the advice of one of the best known firms of solicitors in England, Messrs Clifford Chance, but also sought independent advice from Orrick. The advice of the latter was so heavily qualified and expressly dependent upon the analysis conducted by Clifford Chance as to be of very little value. The version of it which we have seen is redacted so as to preserve Excalibur's privilege. The approach of Orrick to proof of the claim asserted amounted, as David Richards LJ memorably pointed out during the argument, to an assertion that they did not know what the evidence was going to be, but assuming that it stood up, all would be fine. Clifford Chance themselves had from the outset an acute conflict of interest, the extent of which worsened as their own investment in the case increased over time. It should

have been obvious to any astute businessman, not least to Mr Lemos, a trained barrister who had undertaken a pupillage in commercial chambers. In any event, as the Privy Council pointed out in *Dymocks*, the existence of encouraging legal advice from a reputable source is not a ground for declining to make an order under section 51(3) and by parity of reasoning it is no more a ground for declining to direct that costs be paid on an indemnity basis. Indeed it would be contrary to all principle that a party should be absolved of liability by reason of receiving legal advice which suggested that he did not attract it. Again I do not think that these conclusions will come as any surprise to the professional funder members of the ALF. Making due allowance for *schadenfreude*, their public comments on the judge's judgment in this case reflect a recognition that the funders here were inexperienced and did not adopt what the ALF membership would regard as a professional approach to the task of assessing the merits of the case.

31. I should also comment on the suggestion of the ALF that "to avoid being fixed with the conduct of the funded party, the funder would have to exercise greater control over the conduct of the litigation throughout and that this runs the risk that the funding agreement would be champertous". I understand why this concern is raised but I consider that it is unrealistic. As the judge pointed out, 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 on-going 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.

Funding for the express purpose of providing security for costs

32. The Platinum funders assert that insofar as they have provided money to Excalibur for the express purpose of Excalibur meeting its obligation to furnish security for the Defendants' costs pursuant to the direction of the court, and insofar as that money has been paid to the Defendants in part satisfaction of the order for costs made against Excalibur in favour of the Defendants at the conclusion of the litigation, they should be under no further liability to pay the Defendants' costs.

33. As a matter of strict analysis there are two questions at issue here. The first is whether those who advance funds to enable a litigant to furnish court-ordered security for costs should be amenable at all to an order under section 51(3) of the SCA. If so, the second question is whether there is a cap on their liability and, if so, what is its nature?

34. Mr Croxford submitted that the mischief addressed by section 51(3) of the SCA is the potential immunity of the funding party from liability to pay the costs of the successful opponent party, and he prayed in aid observations of Lord Denning MR in *Hill v Archbold* [1968] 1 QB 686 and of Millett LJ in *Abraham v Thompson* [1997] 4 All ER 362 at 378. A funder who provides money to enable a litigant to put up security for costs has, he submitted, by definition shouldered a responsibility to meet the costs of the successful opponent party and is therefore outwith the mischief addressed by section 51(3).

35. Putting the point a different way, Mr Croxford submits that a funder who advances money for the provision of security for costs is responding to a request for security by the opponent party, is removing an impediment to the pursuit of the litigation created by the opponent party and furthermore is conferring upon the opponent party a benefit in the shape of the secured funds from which it can recoup itself in the event of successfully defeating the claim. The funder can be taken to assume the risk that the funds he has advanced will be used to defray the opponent party's costs and thus lost, but he does not assume the risk that he will be made liable to meet the costs of the opponent party in an additional amount in excess of the amount advanced for this specific purpose.

36. Mr Croxford referred us to a passage in the judgment of Fisher J, in the High Court of New Zealand, in *Arklow Investments Ltd v MacLean* [unreported] 19 May 2000, cited by Lord Brown in *Dymocks* at page 2816:

> "19. The guiding principle here is that costs orders against third parties are exceptional but that they are warranted in cases where there would otherwise be a situation in which a person could fund litigation in order to pursue his or her own interests and without risk to himself or herself should the proceedings fail or be discontinued."

That rationale, submits Mr Croxford, does not apply to the type of funder who provides money for the specific purpose of furnishing security for costs because he has accepted a risk in the litigation, the risk of the amount advanced being used to defray the successful party's costs. Such a funder ought not, submitted Mr Croxford, to be "lumped in" with all other types of funders. Essentially, the argument is that a funder who advances money to enable the provision of security for costs has paid his whack.

37. I am wholly unpersuaded by these arguments, as was the judge. The judge said this:

> "135. The provision of money to Excalibur in order that it may provide security for costs is not the equivalent of a payment of costs ordered at the end of the case. It was a form of funding of the claim in exchange for a return attributable to the monies provided for that purpose – in effect an investment. If the action was to continue it was, of course, beneficial for the Defendants to have security rather than not. But continuance of the action was the last thing they desired. The provision of money for security was the only means by which that could happen and it

> resulted in the Defendants continuing to incur the costs and suffer the detriment which the action cast upon them.
>
> . . .
>
> 137. If the position were otherwise a funder whose sole contribution was to provide money for security for costs, without which the action would not have continued, would be in the happy position of facing no possible exposure under section 51; whereas those who funded the costs would bear that burden (alone). This would be the position even though, had the claim succeeded, the security for costs provider would have a right to share in the proceeds increased by a percentage reflecting what he had contributed in respect of security. In effect such a provider would have, so far as exposure to an order under section 51 was concerned, a "free ride", on the back of those financing the costs. This could not be just and cannot be right."

38. Mr Croxford was critical of the judge for suggesting that such a provider would have a "free ride" but that of course is simply to restate the question. Should the funder of security for costs be taken to have accepted, or have imposed upon him, the risk equation which Mr Perrin of the ALF acknowledges "ordinary" funders routinely accept, namely "invest one but take two of risk" i.e. the *Arkin* cap?

39. In order to resolve these arguments it is simply necessary to return to first principles. As emphasised in *Dymocks*, the rationale for imposing a costs liability upon a non-party funder is that he has funded proceedings substantially for his own financial benefit and has thereby become "a real party" to the litigation. It is ordinarily just that he should be liable for costs if the claim fails. The pragmatic solution reached in *Arkin*, and accepted by the funding community, is that the funder who finances part of a claimant's costs of litigation should be potentially liable for the costs of the opponent party to the extent of the funding provided, i.e. invest one in the pursuit of the common enterprise and bear the risk of liability in that same amount in the event of failure, in which event by definition the initial investment is already lost. I see no basis upon which a funder who advances money to enable security for costs to be provided by a litigant should be treated any differently from a funder who advances money to enable that litigant to meet the fees of its own lawyers or expert witnesses. Both the provision of security for costs, if ordered by the court, and the payment of the litigant's own lawyers and experts, are costs of pursuing the litigation which, if not met, will result in the litigation being unable to proceed. I do not understand why contribution to different categories of the costs of pursuing the litigation should attract different regimes. All the sums advanced are used in pursuit of the common enterprise and for the benefit of all of the funders.

40. I also agree with Mr Waller that it is muddled thinking, although that is my expression, not his, to consider that the Platinum funders have, to the extent of the security provided, already paid or discharged a liability to pay Excalibur's costs. The proper analysis is that the funders have enabled Excalibur to discharge, *pro tanto*, its own costs liability to the Defendants. The funders gave to Excalibur the use of the relevant funds for a purpose not essentially different from payment of Excalibur's

own costs. It was simply a contribution to the costs which Excalibur had to meet in order to be able to pursue the action, notwithstanding that the money advanced to enable security to be provided was advanced for the specific purpose of meeting one particular cost faced by Excalibur, the cost of providing security for the Defendants' costs when ordered so to do by the court. It was as much an investment in the litigation as was the amount advanced by Psari and Mr Lemos to enable Excalibur to pay its own lawyers.

41. For all these reasons I can discern no principle whether of fairness, justice or otherwise pursuant to which the Platinum funders' investments earmarked for the provision of security should be treated any differently from their or Psari's and Mr Lemos' investment earmarked for the payment of Excalibur's own costs. To do so would subvert the funding model which appears to be accepted by the ALF in consequence of the *Arkin* compromise. No doubt that acceptance is informed in part by recognition that there are, as I have already remarked, those who consider that the *Arkin* cap is unduly generous to funders who, some think, should not have their exposure capped but rather left at large, or perhaps in the discretion of the court.

42. Furthermore, when looking at the overall justice of the case as required by section 51(3), it is highly relevant to note that the terms on which the Platinum funders advanced money to enable Excalibur to provide security for costs were exactly the same as the terms on which they advanced money to meet Excalibur's costs of paying their own lawyers. The return in the event of success was exactly the same.

43. Finally, although I put no weight on these points analytically, it is comforting to note that the Platinum funders were advised that an advance to enable security for costs to be provided gave rise to the same potential exposure as did an advance to enable costs to be paid. Moreover their funding agreement with Excalibur expressly envisaged that they would be liable for costs assessed against them or Excalibur in connection with the litigation "to the extent of disbursements actually made", language which may be thought consciously to echo that of the italicised passage in paragraph 41 of the judgment of Lord Philips in *Arkin*, where he expressed the pragmatic solution as being liability of the funder for the costs of the opposing party *to the extent of the funding provided*.

44. I mention simply to dismiss four further suggestions put forward by the ALF. The first is that to include within the *Arkin* cap funds advanced for the provision of security for costs, when that investment is already earmarked for the Defendants' costs if they win, is double-counting. I do not understand this point. In truth the ALF is contending that where a funder purchases a stake in the litigation by funding the litigant's obligation to put up security for costs, the formula should be invest one but take only one in risk. In fact funding by provision of security for costs does serve to improve the overall investment/risk ratio as the security ordered by the court to be furnished should ordinarily be sufficient to meet the bulk of the funded litigant's costs liability. Security for costs is however assessed prospectively on the standard basis, so where after trial indemnity costs are ordered to be paid there will inevitably be a shortfall.

45. Similarly misguided is the suggestion that inclusion within the *Arkin* cap of funds advanced to provide security results in the successful defendant getting twice the amount of security ordered by the court. The potential liability, or rather the

exposure, of the funder pursuant to section 51(3) is not secured, which is incidentally the point to which the observations of Lord Denning MR and of Millett LJ cited at paragraph 34 above are relevant. The point being there made is that section 51(3) addresses the risk that proceedings might be financed by a person immune from liability for a personal costs order, not the risk of the successful party being unable to enforce a costs order in his favour. That latter risk is dealt with by requiring security for costs at an appropriate stage in the litigation, whereas the section 51(3) jurisdiction is normally exercised after trial.

46. Next the suggestion is made that if funds advanced for the express purpose of putting up security for costs are included in the *Arkin* cap then a funder cannot make a realistic assessment of its possible exposure to adverse costs orders because it does not know whether an application for security for costs will be made. This is with respect an unworthy point. Sophisticated funders can make an educated assessment as to the likelihood of an application for security for costs being made and as to the likelihood and extent of success if it is.

47. Finally, equally unpersuasive is the suggestion that the inclusion within the *Arkin* cap of funds advanced for the provision of security for costs will increase the costs of funding claims so as to restrict access to justice. I adopt verbatim Mr Waller's written answer to this point:

> "Funding in the form of putting up security for costs will ordinarily not materially increase a funder's exposure to adverse costs, as the funding itself will generally cover those costs. It is only in cases involving indemnity costs that there is likely to be a meaningful shortfall. If proper due diligence is carried out, the risk of indemnity costs can be virtually eliminated and, if necessary any residual risk insured. The additional cost charged by a funder for this remote exposure is therefore likely to be negligible. The ALF refer to the "cost of funding to the client": the client does not incur any up-front cost. Any increase in cost to the client would take the form of an increased share of any recoveries for the funder at the end of a case. This will not deter access to justice, at most it will mean that the litigant's recovery may be marginally lower. In a competitive marketplace, even this is highly questionable. Indeed, the reaction of the ALF's members to the judgment does not suggest that there has been any restriction in access to justice following the judgment."

48. In the present case security was provided by paying the required sums into court. Obviously security is sometimes given by way of some financial instrument, whether an insurance policy, bond or guarantee. Whether in such circumstances the funder's exposure is to be measured by reference to the cost of providing the security or by reference to the extent of the security thereby afforded is a question which can be decided when it arises. We did not hear argument on the point.

The position of Huron, PPVA and PPCO

49. Huron is owned by PPVA. JH and Hamilton are sister companies owned by PPCO. As described by the judge Huron assumed the obligations of Hamilton and JH to Excalibur, and assumed the benefit of the corresponding rights enjoyed by Hamilton and JH against Excalibur, to the extent of £3 million in each case. PPVA provided sums to Huron to enable it to discharge those obligations. Huron had no direct contractual nexus with Excalibur but it stood to benefit from the litigation to the same extent, *pro tanto*, as did Hamilton and JH. PPCO provided Hamilton and JH with the balance of the amounts needed to discharge their contractual obligations to Excalibur. Again, in each case PPVA and PPCO provided funds on a basis which entitled them to the benefit from the litigation to which Huron, JH and Hamilton were entitled, but they too entered into no contractual relationship with Excalibur.

50. The position of Huron, Hamilton and JH is I suspect largely academic because they have no source of funds other than their parents and I have no reason to believe that they have either funds or assets. As Gloster LJ pointed out in the course of the argument, if an order under section 51(3) is available only against a funder who has entered into a contractual relationship with the funded litigant, then by use of a special purpose vehicle funders would be able to insulate themselves from exposure to the section 51(3) jurisdiction and thus escape their responsibilities.

51. As Lewison LJ pointed out in *Threlfall v ECD Insight Ltd* [2014] 2 Costs LO 129, in making an order under section 51(3) the court is not fettered by the legal realities but can look to the economic realities. The exercise of the discretion to make a non-party costs order does not amount to an enforcement of legal rights and obligations to which the doctrine of corporate personality is relevant. The non-party has no substantive liability in respect of costs. The single question is whether in the circumstances it is just to make a discretionary order requiring the non-party to pay costs because of the nature of its involvement in the litigation.

52. Thus I reject the contention urged by Mr Croxford that the judge's approach impermissibly disregarded separate corporate existence and, in treating each of Huron, PPVA and PPCO as being litigation funders, in some manner "pierced the corporate veil". In my view the judge's approach did no such thing. The judge's approach gave effect to the proposition that it is just and appropriate to make an order for costs against a person who has provided funding and who in reality will obtain the benefit of the litigation. Mr Croxford further submitted that in approaching this question there should be a principled approach and in particular that what one would expect in order to attract a non-party costs order is some direct involvement by the funding party in the conduct of the litigation, consisting in more than simply "funding of the funder". This submission yet again overlooks the circumstance that it is well-established that justice will ordinarily require a non-party costs order against a funder not just where the funder substantially controls the proceedings but also where the funder stands to derive a substantial benefit from the proceedings.

53. PPCO has not acknowledged the jurisdiction of the court and is not an appellant. However the points put forward on its behalf by Huron and PPVA have no merit and avail none of them.

54. I would dismiss the appeals of all the appellants on all the grounds pursued.

Lady Justice Gloster :

55. I agree.

Lord Justice David Richards :

56. I also agree.