

# Court of Appeal confirms Costs Liability of Unsuccessful Funders

In *Excalibur Ventures LLC v Texas Keystone Inc & Others* [2016] EWCA Civ 1144 the claimant had entered into a conditional fee agreement with its solicitors and obtained third party funding in order to pursue its claim.

The litigation was complex and costly. Groups of funders and their parent companies furnished tranches of funding at various times and for different reasons. £17.5 million had been advanced by some of the funders for security for costs. The claim was dismissed and the claimant was ordered to pay indemnity costs due to its conduct of the claim.

The security was insufficient to meet the defendant's costs and the funders were joined so that the defendant could seek costs from them. The Court of Appeal considered whether professional litigation funders should be jointly and severally liable for the costs of the successful opposing party.

## Court of Appeal Judgement

Lord Justices Tomlinson, Gloster and David Richards held that, whilst the funders themselves had done nothing discreditable, there was no basis upon which they could dissociate themselves from the conduct of those whom they had enabled to conduct the litigation, and upon whom the funders had relied, in order to make a return on their investments.

The derivative nature of a funder's participation in litigation should ordinarily lead to his being required to contribute to the costs on the basis on which they had been assessed against those whom he had chosen to fund. There was not an irrebuttable presumption that that would be so, but, rather, that that was the outcome which would ordinarily be just and equitable.

Commercial funders were making an investment and were motivated by commercial considerations, not access to justice. By providing funding, the funder took a risk - the nature of which he had the opportunity to apprise himself of, both before offering funding, and during the course of the litigation which he was funding.

## Commercial Funding of Litigation: A Public Interest Matter

The funding of litigation was an accepted and judicially sanctioned activity, which was perceived to be in the public interest. Instead of interfering with the due administration of justice, if anything, such activities promoted it. On-going review of the progress of the funded litigation, by lawyers independent of those conducting the litigation, was essential to reduce the risk of orders for indemnity costs being made against the unsuccessful funded party.

That the funder had provided monies to enable security for costs, did not create a distinction between himself and a funder who had provided monies for a litigant to meet the costs of his own lawyers and experts. There was no basis for treating the former differently from the latter. Both models were forms of costs of pursuing the litigation and, in both cases, if such costs were not met, the litigation would be unable to continue.

All the monies provided were used in pursuit of the common enterprise and for the benefit of all the funders (Arkin v Borchard Lines Ltd (Costs Order) [2005] EWCA Civ 655 applied). It was just and appropriate to make an order for costs against a person who had provided funding and who in reality would obtain the benefit of the litigation.

It was trite that justice would ordinarily require a non-party costs order against a funder, not just where the funder substantially controlled the proceedings, but also where the funder stood to derive a substantial benefit from those proceedings.

Bernard Pressman / 22nd Nov 2016

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