CROWN OFFICE CHAMBERS

Litigation funders, non-party costs orders, and security for costs

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Introduction

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(1) Commercial litigation funders: what are they and why are they important?

(2) The *Arkin* Cap and the extent of a funder's liability post *Davey v Money*

(3) Obtaining security for costs against a funder: the *Ingenious Litigation*

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Commercial litigation funding: what is it?

Effectively, buying a slice, and sometimes most of the fruits of the litigation…

In *Davey*, which we shall come to later, the funding arrangement was such that out of assumed damages of £10M, the funder would have taken in excess £6M.

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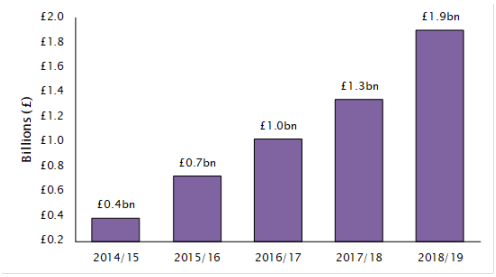
The size and development of the market

- 2009 *"I accept that third party funding is still nascent in England and Wales and that in the first instance what is required is a satisfactory voluntary code, to which all litigation funders subscribe. At the present time, parties who use third party funding are generally commercial or similar enterprises with access to full legal advice. In the future, however, if the use of third party funding expands, then full statutory regulation may well be required, as envisaged by the Law Society."*
  Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report, Ch 11, para 2.4

- 2011 Launch of voluntary code of conduct and formation of the ALF.
  "…satisfactory implementation of recommendation 11… provided that all reputable litigation funders are willing to join…"
  Sir Rupert Jackson, Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, 23 Nov 2011

- 2019 Assets under management at UK Litigation Funders reached £1.9bn.



https://www.rpc.co.uk/press-and-media/uk-litigation-funder-war-chests-hit-record-high-of-2bn-up-46-percent-in-a-year/#

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Liability for adverse costs: jurisdiction

Section 51 Senior Courts Act 1981 provides (insofar as is material):

"*(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in— … (b) the High Court … shall be in the discretion of the court.*

"(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings…

"(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

CPR 46.2: you need to add a funder to the action for the purposes of obtaining a costs order against it (obviously…!)

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Dymocks Franchise Systems

- Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party)* [2004] 1 WLR 2807.
- Lord Brown:

> *"25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as "exceptional:, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order."*

And:

> *"29. In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases…"*

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The Arkin Cap…

Many different decisions about the extent of a funder's liability, including in different permutations of facts between a 'pure' funder who derives no benefit at all through to the funder which provides for a commercial return on its investment, to more nuanced examples where a commercial loan is made, and the interest treated in a particular way. I am focussing only on what I described at the outset as commercial funding.

Arkin v Borchard Lines [2005] 1 WLR 3055:

- Impecunious claimant. Legal aid withdrawn after issue. CFA with solicitors, and later with counsel. Funder contributed to certain disbursements, crucially expert evidence where no CFA was possible. Total outlay about £1.3M. It stood to gain 25% of damages up to USD 5M, and 23% above.
- The Court of Appeal, decided the funder's contribution would be the cap of its liability for adverse costs.
- Paragraphs 38 – 44 are key. In particular (and with my emphasis):

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

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Arkin II

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

…

41 ***We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided****…*

42 If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. ***This should have a salutary effect in keeping costs proportionate.*** *In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.*

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

…

45 …Accordingly, we propose to order that MPC pay £1.3m by way of contribution to defence costs.

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Davey v Money

The Arkin Cap has been applied, for example, in *Excalibur Ventures* [2017] 1 WLR 2221 and *Burnden Holdings v Fielding* [2019] Costs LR 2061

Davey v Money [2020] 1 WLR 1751

- Commercial funder funded a claim in which serious allegations including of breach of fiduciary duty were made, and failed. The funder argued that it should only be liable for adverse costs to the extent of the funding it provided. It had committed £2.5M, but that was on the condition that C obtained ATE, and also that partial CFAs were entered into. When C did not obtain ATE, the commitment was reduced to £1.25M.
- Snowden J declined to apply the Arkin Cap. He ordered the funder to pay on the indemnity basis, with no cap, where Ds had incurred about £7.5M in costs.
- CA:
  - Para 34 - The only immutable principle is that the discretion must be exercised justly, quoting Moore-Bick LJ in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] 4 WLR 17
  - Paragraph 35 – 39…

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Davey v Money II

"35. ***It is, moreover, possible to envisage circumstances in which application of the Arkin cap might not be felt "just" and that even though, as in Arkin , a funder had met only a discrete part of the total costs.*** *Suppose, for example, that the total costs of pursuing a claim for £10m had been £300,000 and that £100,000 of this had come from a funder who would have taken 90% of the net proceeds had the claim succeeded. On that doubtless unlikely set of facts, a judge might very well consider it "just" for the funder to bear more than £100,000 of the defendant's costs. In such a case,* ***a judge might wish to have regard to what the funder had stood to gain, not just to its outlay. The course favoured by the Court of Appeal in Arkin [2005] 1 WLR 3055, however, focuses exclusively on "the extent of the funding provided".***

36. It is also relevant that Arkin was decided when third party funding of litigation was still "nascent" and conditional fee agreements and ATE insurance relatively new…Nowadays, however, commercial funders, conditional fee agreements and ATE insurance are all much more established. The risk of someone with a claim which has good prospects of achieving success without disproportionate cost being unable to pursue it unless the extent to which a funder could be ordered to meet the other side's costs is curtailed will have diminished in consequence. Apart from anything else, a funder should now be able to protect its position by ensuring that either it or the claimant has ATE cover.

*37. That is by no means to say that the approach put forward by the Court of Appeal in Arkin has become redundant…****The Arkin "solution" is particularly likely to be relevant on facts closely comparable to those in Arkin , where the funder had "merely covered the costs incurred by the claimant in instructing expert witnesses"*** *(to quote from para 43 of the Court of Appeal's judgment).*

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Davey v Money III

38. On the other hand, I do not consider that the Arkin approach represents a binding rule. Judges, as it seems to me, retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding. In the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant. The more a funder had stood to gain, the closer he might be thought to be to the "real party" *ordinarily ordered to pay the successful party's costs in accordance with the guidance given in para 25(3) of the Dymocks judgment [2004] 1 WLR 2807 (for which, see para 22 above). In the case of a funder who had funded the lion's share of a claimant's costs in return for the lion's share of the potential fruits of litigation against multiple parties, it would not be surprising if the judge ordered the funder to bear at least the lion's share of the winners' costs, regardless of whether the funder's outlay on the claimant's costs had been a lesser figure.*

39. In short, it seems to me that Snowden J was right to conclude that judges do not necessarily have to adopt the Arkin approach when determining the extent of a commercial funder's liability for costs."

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Security for Costs against a Commercial Funder

Jurisdiction

CPR r 25.14 provides:

"*(1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person if—*

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (b) one or more of the conditions in paragraph (2) applies.

(2) The conditions are that the person—

(a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or

(b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and

is a person against whom a costs order may be made."

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Key principles: is it "just" to make an order?

Summarised at [84] – [86] of Nugee J's judgment in *Rowe v Ingenious Media* [2020] EWHC 235 (Ch), drawing heavily on Hildyard J's judgments in the *RBS Litigation.*

The key points are:

1. The liability of funders under section 51 is not secondary to, or dependent on, the position of the claimants. It is an independent liability: [84(1)].
2. As indicated above, although section 51 orders are exceptional, funded cases are for these purposes exceptional. "A *commercial funder acting in its own commercial interest for gain has no legitimate expectation that it will be treated any differently from any other real party": [84(2)].*
3. This not to say that other means by which a costs order might be satisfied will be irrelevant; they are not. But the matter needs to be considered in the round, and the key question to ask is whether, looked at in that way, there is a "*real and not fanciful risk"* of non-payment of a costs order made at the conclusion of the case: [85(3)], [85(6)] and [86].
4. One can take into account any difficulties in enforcement, including by reason of the number of claimants: [85(7)] and [84(4)].
5. Deliberate reticence in the provision of financial information in relation to the funder can be taken into account: [85(4)].

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Evidence? Is there a "real and not fanciful risk"?

3 sources from which Ds' costs might be paid:

(1) Therium, the funder
(2) Cs (several hundred of them)
(3) ATE

Therium: Jersey-registered cell company. No evidence of capital base, but it was suggested in (its own) evidence that if it needed to put up money, it would need to call on its investors. Relied on its membership of the ALF.

Nugee J: "So far as Therium itself is concerned, I am not persuaded that I can proceed on the basis that Therium will meet any order for costs under section 51. It is striking that no actual financial information about Therium has been adduced in evidence. The evidence is that if Therium had to put up cash, it would need to make a call on its investors. It is not clear from the evidence whether it has any right to call on its investors, or whether the investors' response to that would be voluntary. I am not persuaded that the decision of Mr Justice Roth and the rest of the tribunal in the CAT, in the Trucks case, is sufficient basis for me to be confident that Therium would meet any order for costs made under section 51.

Nor am I confident that its membership of the ALF, and the obvious pressure which that puts on it to comply with the ALF rules, is sufficient to give one enough confidence that if it were facing a large liability for costs at the end of the day, that the money would be forthcoming." (paragraph 106)

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Evidence II

Claimants:

> "Stewarts have provided some information about the net wealth of 33 of the largest investors who are Claimants. This is in the nature of a ballpark figure (£1-3m, £3-5m, £5-10m, £10-20m, £20m+). It is confined to the top 52 (by contribution) but does not include all of those – for example it does not include Claimant 4 whose investment was some £3.4m and who would be responsible for 2.37% of the Ingenious Defendants' costs (assuming that such costs are shared between all Stewarts Claimants), or Claimant 20 whose investment at £1.625m was the largest single contribution of the 11 claiming against SRLV and would be responsible for over 23% of SRLV's costs (again, assuming that liability for such costs was shared between those 11)." (paragraph 108)

In the end, Nugee J was unable to place any material weight on Cs assets / their "wealth".

Paragraphs 109 – 116.

No information as to the types of assets, how assets are held (whether in sole or joint names, corporate vehicles, family trusts), whether they are likely to be realizable and of the said value when they need to be called upon. Also note the overlap with the ATE.

ATE:

Paragraphs 117 – 138.

Note the interplay with the funding agreement: clause 14.8.

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A cross-undertaking from the Defendants?

"In appropriate cases an order for security for costs may only be made on terms that the applicant gives an undertaking to comply with any order that the Court may make if the Court later finds that the order for security for costs has caused loss to the claimant and that the claimant should be compensated for such loss. Such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant."
Commercial Court Guide, Appendix 10, Paragraph 5.

Cs and Therium sought a cross-undertaking in damages from Ds as the "price" for security, based upon the alleged practice set out in paragraph of the CCG.

Sought the multiple. If Therium put up £1M, it was said it would charge Cs £2.5M plus the £1M.

Nugee J refused to order a cross-undertaking for this 'loss'. It was considered a reallocation of the fruits of litigation between the claimant pool. However, Nugee J left open the possibility of a cross-undertaking to cover 'external costs' applied to the claimant pool as a whole, such as the costs of a bank guarantee. No evidence of any such costs at the SFC hearing.

In June 2020, the application for a cross-undertaking was renewed at a CMC…

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Cross-undertaking II

… Nugee J acceded to the application, requiring a cross-undertaking from Ds covering 'external costs' only.

Cs have appealed the refusal to include the 'internal costs' within the scope of the required undertaking. They seek the multiple. Permission was given by Lewison LJ.

Ds have appealed the requirement of an undertaking at all. Nugee J granted permission.

Very real questions as to whether a cross-undertaking can ever be appropriate, where the security ordered is ameliorating a risk from which it has been established that Ds require and are entitled to protection.

Particular issues as regards the position of funders, who buy-into litigation in the hope of profit, and for whom the provision of security is a cost of doing business, if they have chosen not to be appropriately capitalised / prove that they are.

The appeal is set down for a day in the first week of December 2020. Watch this space…

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Questions?

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