



Legal update — May 2019

Commercial Litigation

Anatolie Stati & Ors v Kazakhstan (2019) QBD (Comm) (Cockerill J)



Salient Issue(s)

Summary

Following arbitration proceedings, the Claimants obtained an award and applied to enforce it against the Defendant. The Claimants were not permitted to enforce the award in England and Wales and the application was discontinued. The Claimants were liable to pay the Defendant's costs on a standard basis, for the enforcement proceedings up to the date that they were discontinued under CPR r.38.6. Concerned that the Claimants could not pay a costs award, the Defendant applied for an order requiring the Claimants to disclose the litigation funders used (of which it suspected several), along with the details and terms of any funding arrangements.

The Court was satisfied that it was appropriate to order disclosure of the identity of any funders. The Senior Courts Act 1981 s.51(3) establishes that the court can decide who pays the costs, including third (non) parties, like litigation funders. Such parties can be added to the proceedings and required to disclose their names, following the cases of Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd [2003] EWHC 1381 (Comm) and Abraham v Thompson [1997] 4 All E.R. 362, and the terms and amount of funding, following the case of Latch Systems Ltd v Honeywell International Inc [2008] EWHC 3442 (Comm).

It is important to note this case involved several funders with varying arrangements, which may have required multiple disclosure applications unnecessarily incurring substantial cost. This was circumvented by the court ordering the disclosure of the litigation funders in the first instance.

The court held that it was, in the interests of the overriding objective and saving cost, reasonable for the Defendant to be informed of the party against whom it would proceed going forward.

Commentary

This case is an extension of the risk that litigation funders now face of being potentially liable for the full amount of a successful party's legal costs in an unsuccessful claim (Davey v Money). Funders also face the possibility of their identity and the terms and the amount of any funding arrangement being disclosed.

Funders should consider the terms of any funding arrangement carefully, particularly in light of the risk of disclosure of the same. There may be increased reliance on ATE insurance and funders may need to consider refining the scope of funding for certain cases to combat increased adverse costs risk. Time will tell as to how the funding market responds to this recent case law.

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For more information please contact

Mark Kenkre
Partner
t +44 (0)121 214 8863
e mkenkre@trowers.com

Helen Briant
Partner
t +44 (0)121 214 8867
e hbriant@trowers.com

Elizabeth Mulley
Senior Associate
t +44 (0)121 214 8864
e emulley@trowers.com

Jenna Rennie
Solicitor
t +44 (0)121 214 8843
e jrennie@trowers.com

Published by
Trowers & Hamlin

Trowers & Hamlin LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

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