



Legal update — April 2019

Commercial litigation

Davey v Money and others [2019] EWHC 997 (Ch)

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Go — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communic

Mr Justice Snowden has recently considered the potential application of the so-called "Arkin cap" to limit the extent of non-party costs orders against a commercial litigation funder, which followed the handing-down of his judgment on 11 April 2018 in the case between administrators, Mr Money and Mr Stewart-Kosher, and Dunbar Assets plc (together "the Defendants") and Ms Julie Anne Davey (the "Claimant").

The Claimant had made serious allegations of breach of duty against the Administrators and of improper dishonest conduct against Dunbar. The Defendants were, however, successful in defending the Claimant's claims and counterclaims and Mr Justice Snowden ordered the Claimant to pay each of the Defendants' costs to be assessed on an indemnity basis.

The Defendants applied for a non-party costs order under Section 51 of the Senior Costs Act 1981 against the Claimant's commercial funder, ChapelGate. The Defendants' total costs claimed were in the region of £7.5million. The Claimant had been ordered to pay £3.9million by way of payments on account but had made no payments to date, which had prompted the s.51 application.

Whilst ChapelGate accepted that a non-party costs order should be made against it and that it should be on an indemnity basis, it argued that its total liability to the Defendants should be capped to the overall maximum of the funding that it provided to the Claimant being £1,275,166.34 because of the application of the "Arkin cap". The Arkin cap was determined by the Court of Appeal in the case of *Arkin v Borchard Lines Ltd* (Nos 2 and 3) [2005] 1 WLR 3055 ("Arkin"), which limited a funder's potential liability for adverse costs to the amount of the funding provided.

Whilst Mr Justice Snowden confined the costs order against ChapelGate to costs incurred after 23 December 2015, being the date of the funding agreement between ChapelGate and the Claimant, he

declined to apply the Arkin cap given that he did "not think it was a rule to be applied automatically in all cases involving commercial funders, whatever the facts, and however unjust the result of doing so might be". ChapelGate was ordered to pay each of the Defendants' costs incurred after 23 December 2015, totalling £4.33million, to be assessed on an indemnity basis.



Commentary

Since 2005, commercial litigation funders have been afforded protection from having to pay the full amount of the successful party's legal costs in light of the Arkin cap. As a result, a funder's liability for the costs of the litigation, however, high, could be capped at the level of its actual investment in the claim, which, of course, had significant benefits for funders when undertaking a costs benefit analysis of funding a dispute.

There has, however, been substantial criticism of the Arkin cap since 2005 as the funding industry has grown including whether a funder should be able to escape part of the liability for costs in the event of defeat when they stand to recover a share of the damages in the event of success.

The case of *Davey v Money and others* has clarified that the Arkin cap is not a rule or principle to be applied automatically and that it is an approach to be considered in cases involving a commercial funder as a way of achieving a just result in all the circumstances. Whilst Mr Justice Snowden does not think that funders will be discouraged from providing finance, funders will

Published by
Trowers & Hamblins

Trowers & Hamblins LLP
3 Bunhill Row
London
EC1Y 8YZ

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

www.trowers.com

Trowers & Hamblins LLP is a limited liability partnership registered in England and Wales with registered number OC337852 whose registered office is at 3 Bunhill Row, London EC1Y 8YZ. Trowers & Hamblins LLP is authorised and regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Trowers & Hamblins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamblins LLP's affiliated undertakings. A list of the members of Trowers & Hamblins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamblins LLP has taken all reasonable precautions to ensure that information contained in this document is accurate but stresses that the content is not intended to be legally comprehensive. Trowers & Hamblins LLP recommends that no action be taken on matters covered in this document without taking full legal advice.

still need to take into account that they may be potentially exposed to the full amount of a successful party's legal costs if they fund an unsuccessful claim. Funders will need to ensure that their due diligence is sufficient to ensure that they are comfortable with the merits and risks of a case. There may also be an 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. Funders will, however, need to be mindful not to exert excessive control over the conduct of proceedings. Whilst this may be tempting in light of the decision in *Davey v Money*, doing so is likely to breach the rules of champerty, which occurs when the maintaining party pays some or all of the costs of a party in return for a share of the proceeds of the action.

It will be interesting to see how the funding market responds in light of Mr Justice Snowden's decision.

April 2019 © Trowers & Hamlins

For more information please contact

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