ARE WE SEEING THE END OF THE 'ARKIN CAP' LIMITING A FUNDER'S LIABILITY FOR ADVERSE COSTS?

In a judgment[1] that will be welcomed by many, the English Chancery Court has departed from what has, since 2005, been the established, but often criticised principle that commercial litigation funders should have their adverse costs exposure limited to the amount of their financial contribution, known as the "Arkin Cap"[2].

The decision will be of interest to those who seek funding, or who have a funded counter-party.

1. *Davey v Money & Ors* [2019] EWHC 997 (Ch)
2. *Arkin v Borchard Lines Ltd* (Nos 2 and 3) [2005] 1 WLR 3055

What happened?

In an action to recover costs from a third party funder, the English Chancery Court exercised its discretion and followed the well established principle that funders should pay the costs of the successful defendant, but of interest the court went on to look at whether the funder's liability was limited in terms of the period, or the amount.

What does the judgment say about the date liability accrues and how the amount is assessed?

Taking the two points in turn:

1. The date on which the liability accrued

The court held that the funder would not be liable for the costs incurred prior to it entering into the funding agreement. Noting that a funding agreement was not the same as an assignment of the claim, and that in order to succeed on a s51 Senior Courts Act 1981 claim, there needed to be a causal link between the funder and the costs claimed. The funder could not therefore be responsible for costs incurred prior to its involvement. This reasoning is supported by previous cases.

2. Why was the 'Arkin Cap' not followed?

Since the 2005 Court of Appeal judgment[3] that brought it into being, the 'Arkin Cap' has long been perceived by some as a principle limiting a funder's exposure and which should be applied to all commercially funded cases. However, it is more likely that the Court of Appeal intended to simply offer guidance on the exercise of judicial discretion, rather than imposing a strict rule.

The 'Cap' has received criticism, including from Sir Rupert Jackson in his 2009 Civil Litigation Funding Review, and most recently was not followed in the security for costs context[4].

In *Davey v Money* there were many factors that could easily have persuaded the judge that the funder was not entitled to such a lenient approach, and that in this case the cap did not fit, including:

- unlike in Arkin, a direct link between the financing provided and elements of the case eg the funds were not limited to the payment of the experts' fees;
- the funder may have been perceived as being complicit in the claimant's behaviour, which was such that it led to an indemnity costs order;
- the funder standing to gain more than the claimant had the claim succeeded;
- the funder's contribution being less than any costs order against the claimant; and
- the claimant being unable to satisfy the likely costs order against her.

What does this mean for the future of funding?

This judgment certainly won't discourage funders from the market, the rewards are high enough to encourage many to remain, and the industry needs the positive involvement of funders.

We would however expect to see:

- funders try and limit their exposure by taking a greater interest in cases, in how they are run and on what costs are incurred - without however straying into the realms of champerty, which is to be expected and welcomed;
- funders try and expressly link their financial contribution to an element/elements of the case eg the expert evidence; and
- claimants carefully reviewing the funding agreement, and consider ATE insurance.

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3. See FN 2
4. *Bailey v GlaxoSmithKline UK Limited* [2018] 4 WLR 7

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