THE ENGLISH COURT OF APPEAL CONFIRMS THAT THE 'ARKIN CAP' IS NOT A BINDING RULE IN LITIGATION FUNDING: GOOD NEWS FOR DEFENDANTS.

The Court of Appeal has recently upheld the Chancery Division's decision in Chapelgate Master Fund Opportunity v Money[1], and in so doing confirmed that the 'Arkin cap' is not a binding rule, but merely guidance. This briefing gives an update on the earlier court decision on which we wrote in our briefing entitled: "Are We Seeing The End Of The 'Arkin Cap' Limiting A Funder's Liability For Adverse Costs?"[2]

1 [2020] EWCA Civ 246

2 https://www.hfw.com/downloads/001186-HFW-Are-we-seeing-the-end-of-the-Arkin-Cap-May-19.pdf

In Depth

Chapelgate Master Fund Opportunity v Money, concerned an appeal by Chapelgate (Ms Davey's litigation funder) against the amount of a non-party costs order made against it in the underlying claim Davey v Money[3].

The appeal was not concerned with the jurisdiction of the court to make the non-party costs order, which is well established under s51 Senior Courts Act 1981, but rather that the amount of the costs ordered should be limited to the amount of their financial contribution to the claim, in accordance with what they saw as the rule in Arkin v Borchard anors[4], from which the 'Arkin cap' is derived.

In its judgment the Court of Appeal clarified the status of the 'Arkin cap', holding that it is not "a binding rule", but merely guidance, making it clear that the courts have discretion, in the context of adverse costs, to assess the financial liability of a litigation funder beyond the amount of the funder's financial contribution to the case/ the 'Arkin cap'. It also recognises that the Court of Appeal in Arkin v Borchard anors did not intend their decision in that case, namely limiting a funder's adverse costs liability to the amount they funded the unsuccessful claimant's expert evidence, to be taken as setting a precedent for future cases.

It is worthy of note that in this case, the Court of Appeal took into account that:

- Chapelgate stood to recover a significant sum if the claim had succeeded- and a sum in excess of the claimant's likely recovery;
- its decision to fund the action was purely commercial and motivated by the amount it stood to recover;
- the funding was arranged late in the litigation – post disclosure and exchange of witness statements, and so Chapelgate would have been appraised of the merits of the case, and its costs liability for how the claim was advanced would have been limited under the indemnity principle;
- it would have been apparent that the claimant was not in a position to settle any adverse costs order;
- (ATE) insurance was not taken, and so exposed the defendants in the underlying claim to the possibility of not recovering their costs if successful; and
- the funding was pervasive rather than discrete- that is it was not limited to a specific element of the case.

In relation to Arkin v Borchard anors the Court commented that the Court of Appeal's decision in that case was made at a time when litigation funding and ATE insurance were still in their relative infancy, and the courts were keen to prevent the risk of disproportionate costs orders deterring funders from entering the market. The development of more readily and affordable ATE insurance has changed the landscape, and funders do not require that level of protection.

It did however note that the 'Arkin cap' approach might still be relevant where a funder contributes to a discrete element of the claim – for example to the experts' costs, as was the case in Arkin.

What does this mean for defendants?

This judgment is good news for defendants facing claims backed by funders, who may now, if successful and the claimant is unable to pay, be able to seek their recoverable costs from the funder, without the financial limitation set by the 'Arkin cap'.

What does this mean for funders?

This judgment aims to strike a balance between the need to protect those defending funded backed claims, and the need to ensure that funders are not deterred by the threat of a disproportionately high costs exposure.

As a result of the Court of Appeal's comments, we are now likely to see an increased requirement by funders for ATE insurance to be taken as a condition of their funding, and for funders to seek to fund discrete parts of the claim rather than the claim in its entirety.

Is it the end of the 'Arkin cap'?

For the reasons mentioned above, the 'Arkin cap' is still likely to fit where the funding is discrete, but its application will no longer be automatic, it will come down to the court's discretion.

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3 [2019] EWHC 997 (Ch)

4 [2005] EWCA Civ 655

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