

ENGLAND AND WALES COURT OF APPEAL

Excalibur Ventures LLC v Texas Keystone Inc and others

[2016] FICR 28; [\[2016\] EWCA Civ 1144](#)

Tomlinson, Gloster and David Richards LJ

19, 20 July and 18 November 2016

Litigation Funding – Indemnity costs – Commercial funders, not pure funders – Funders liable for indemnity costs – Follow fortunes of funded party – Conduct only one consideration – Indirect funders liable – Look at economic reality, not strict legal arrangements – Security for costs funders liable – Same benefit as other funders – Senior Courts Act 1981 (UK), s 51(3)

Costs – Litigation Funding – Commercial funders, not pure funders – Indemnity costs – Funders liable for indemnity costs – Follow fortunes of funded party – Conduct only one consideration – Indirect funders liable – Look at economic reality, not strict legal arrangements – Security for costs funders liable – Same benefit as other funders – Senior Courts Act 1981 (UK), s 51(3)

Summary

This was an appeal by litigation funders of a claimant against an order under [s 51\(3\)](#) of the [Senior Courts Act 1981 \(UK\)](#) that they should pay the costs of the respondents on an indemnity basis up to the amounts they had funded: [\[2014\] EWHC 3436 \(Comm\)](#).

Facts

A number of litigation funders had advanced a total of GBP 31.75 million in respect of a claimant's costs, over half of that being for security for costs. The funders fell into three broad groups – those who directly advanced funds for costs and for security; those who only provided funds for security; and those who provided funds for both but indirectly through one of the other funders.

The funders were commercial funders, not “pure funders”, who were funding the litigation in the hope of a return on their investment.

After a 60 day trial and a judgment of 323 pages comprehensively dismissing all claims ([\[2013\] EWHC 2767 \(Comm\)](#)), the trial judge, Christopher Clarke LJ, made an order under [s 51\(3\)](#) of the [Senior Courts Act](#) that the claimant pay the respondent's costs on an indemnity basis, that the claimant provide further security for costs and the respondent have liberty to join the funders if security was not provided: [\[2013\] EWHC 4278](#). Security was not provided, the funders were joined and the judge made an order that the funders be liable for claimant's costs up to the amounts they had funded: [\[2014\] EWHC 3436 \(Comm\)](#).

The funders appealed the last decision, arguing that they should pay on the standard basis but should not have to follow the fortunes of the claimant and pay on the indemnity basis since they were guilty of no misconduct; that the indirect funders should not be treated as funders at all since there was no contract between them and the claimant and to treat them as funders would be to impermissibly disregard the corporate structure; that the amounts contributed for security should not be counted in the amount advanced; and those who only contributed security for costs should not be liable.

[Section 51\(3\)](#) said “The court shall have full power to determine by whom and to what extent the costs are to be paid”.

Held, (per Tomlinson LJ, Gloster and David Richards LJ) agreeing) dismissing the appeal:

- (1) The funders should follow the fortunes of the claimant and pay on the indemnity basis because the conduct of the parties is only one of the considerations in making an indemnity costs order. The discretion is to be exercised in light of all the circumstances. The character of the claim, looked at objectively, its size and effect would, by themselves, justify indemnity costs being ordered against the funders. [21]-[23]

Balmoral v Borealis (UK) Ltd [\[2006\] EWHC 2531 \(Comm\)](#); *Three Rivers District Council v Governor & Company of the Bank of England* [\[2006\] EWHC 816 \(Comm\)](#); [2006] 5 Costs LR 714; *Euroption Strategic Fund Ltd. v Skandinaviska Enskilda Banken AB* [\[2012\] EWHC 749 \(Comm\)](#), referred to.

- (2) In considering these costs orders, the court looks at the way a party and those in his camp have acted, including lawyers, experts, witnesses and funders. This is not on the principle of agency but on broader principle of justice. [24]
- (3) While there is no irrebuttable presumption, the derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs on the basis upon which they have been assessed against those whom he chose to fund. [27]
- (4) Subject to the need always to look at all the circumstances to determine the overall justice of the case, it will seldom be relevant to consider whether the funder knew or ought to have known of the egregious features of the case which, objectively, and having regard to their effect upon the successful party, render an award of indemnity costs appropriate. [29]
- (5) By funding, the funder takes a risk, a risk as to the nature of which he has the opportunity to inform himself both before offering funding and during the course of the litigation which he funds. [29]

- (6) An enquiry into the adequacy of the due diligence undertaken gives rise to the prospect of undesirable satellite litigation which will simply serve to increase the cost of, and the delay in achieving, finality in the litigation. [29]

Globe Equities Ltd v Globe Legal Services Ltd and Ors [1999] BLR 232 at 235, referred to.

- (7) The existence of encouraging legal advice from a reputable source is not a ground for declining to make an order under section 51(3) and by parity of reasoning it is no more a ground for declining to direct that costs be paid on an indemnity basis. [30]

- (8) The rationale for imposing a costs liability upon a non-party funder is that he has funded proceedings substantially for his own financial benefit and has thereby become "a real party" to the litigation. It is ordinarily just that he should be liable for costs if the claim fails. [39]

Dymocks Franchise Systems (NSW) Ltd v Todd (No 2) [\[2004\] UKPC 39](#); [2004] 1 WLR 2807 at 2815, referred to.

- (9) Funder who contribute only towards security for costs are liable to the amount they have contributed. Both the provision of security for costs, if ordered by the court, and the payment of the litigant's own lawyers and experts, are costs of pursuing the litigation which, if not met, will result in the litigation being unable to proceed. It is as much an investment in the litigation as amounts advanced for lawyers' costs. [40]

Hill v Archbold [1968] 1 QB 686; *Abraham v Thompson* [1997] 4 All ER 362 at 378; *Dymocks Franchise Systems (NSW) Ltd v Todd (No 2)* [\[2004\] UKPC 39](#); [2004] 1 WLR 2807 at 2816, considered.

- (10) The terms of the indirect funders were exactly the same as the direct funders and their return was exactly the same. While they had no contractual nexus with the claimant, they stood to gain in the same way. [42]
- (11) [Section 51\(3\)](#) addresses the risk that proceedings might be financed by a person immune from liability for a personal costs order, not the risk of the successful party being unable to enforce a costs order in his favour. [45]
- (12) In making an order under [s 51\(3\)](#) the court is not fettered by the legal realities but can look to the economic realities. The exercise of the discretion to make a non-party costs order does not amount to an enforcement of legal rights and obligations to which the doctrine of corporate personality is relevant. The non-party has no substantive liability in respect of costs. The single question is whether in the circumstances it is just to make a discretionary order requiring the non-

party to pay costs because of the nature of its involvement in the litigation. [51]

Threlfall v ECD Insight Ltd [\[2013\] EWCA Civ 1444](#); [2014] 2 Costs LO 129, referred to.

- (13) It is just and appropriate to make an order for costs against a person who has provided funding and who in reality will obtain the benefit of the litigation. [52]
- (14) Justice will ordinarily require a non-party costs order against a funder not just where the funder substantially controls the proceedings but also where the funder stands to derive a substantial benefit from the proceedings. [52]

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