Neutral Citation Number: [2020] EWCA Civ 246

Case No: A3/2019/1895

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
Mr Justice Snowden
[2019] EWHC 997 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2020

Before:

LORD JUSTICE PATTEN
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

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Between:

CHAPELGATE CREDIT OPPORTUNITY MASTER FUND LIMITED	**Appellant**
- and -	
(1) JAMES MONEY **(2) JIM STEWART-KOSTER** **(Joint Administrators of Angel House Developments Limited)** **(3) DUNBAR ASSETS PLC**	**Respondents**

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Mr Robert Marven QC (instructed by **Collyer Bristow LLP**) for the **Appellant**
Mr Justin Fenwick QC and Mr Ben Smiley (instructed by **Clyde & Co LLP**) for the **First and Second Respondents**
Mr Nicholas Bacon QC and Mr Joseph Curl (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Third Respondent**

Hearing dates: 3-4 February 2020

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Approved Judgment

Lord Justice Newey:

1. The question raised by this appeal is whether Snowden J ought to have applied what has been called the "*Arkin* cap" to an order for costs which he made against the appellant, ChapelGate Credit Opportunity Master Fund Limited ("ChapelGate"). The *Arkin* cap takes its name from the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] EWCA Civ 655, [2005] 1 WLR 3055 ("*Arkin*"). In that case, a company which had provided funding on a commercial basis for an unsuccessful claim was ordered to pay the winners' costs only to the extent of that funding. ChapelGate, a commercial funder which financed the present proceedings, contends that its liability for the respondents' costs should be similarly limited, but the judge declined to do so. ChapelGate appeals against that decision.

Basic facts

2. This section of this judgment draws extensively on the judgment which Snowden J gave on 17 April 2019 ("the Judgment").

3. On 27 December 2012, the third respondent, Dunbar Assets plc ("Dunbar"), appointed the first and second respondents, Mr James Money and Mr Jim Stewart-Koster ("the Administrators"), as administrators of Angel House Developments Limited ("AHDL"), a company owned and controlled by Ms Julie Davey. On 9 December 2013, the Administrators sold AHDL's main asset, a property known as Angel House over which Dunbar held security, for £17.05 million. That figure was not high enough to allow AHDL's indebtedness to Dunbar to be discharged in full.

4. By the time Angel House was sold, Dunbar had already obtained summary judgment against Ms Davey for £1.6 million plus costs and interest on a limited personal guarantee which she had given in respect of AHDL's borrowings. In January 2014, Dunbar issued further proceedings against Ms Davey, to recover costs of enforcing the guarantee and judgment ("the Dunbar Proceedings").

5. On 18 July 2014, Ms Davey began proceedings on behalf of AHDL against the Administrators under paragraph 75 of schedule B1 to the Insolvency Act 1986 ("the Insolvency Act Proceedings"). Snowden J summarised the claim in these terms in paragraph 9 of the Judgment:

> "Ms. Davey alleged that the Administrators had breached their fiduciary duties and failed to exercise independent judgment in the administration, and had sold Angel House at a substantial undervalue in reliance upon the advice of unsuitable agents ('APAM') that Dunbar had selected for them to use. Ms. Davey also alleged that the Administrators had wrongly frustrated her attempt to mount a 'funded rescue' of AHDL which she contended would have led to all AHDL's creditors being paid and the company being taken back out of administration."

6. In November 2014, having acquired AHDL's causes of action from liquidators who had been appointed to the company at the end of the administration, Ms Davey served an amended defence and counterclaim in the Dunbar Proceedings. This alleged that Dunbar had so interfered with the conduct of the administration as to be vicariously

liable for the breaches of duty by the Administrators and also that Dunbar had conspired with APAM to cause her harm (i) by procuring that Angel House should be sold at an undervalue and (ii) by the rejection of her funded rescue in order to preserve Dunbar's claim against her under her personal guarantee.

7. In an opinion dated 16 September 2015, Mr Stephen Davies QC advised Ms Davey on the merits of her claims in the Dunbar and Insolvency Act Proceedings, which were by then being case-managed together. Having observed that, "after allowing for the exigencies of any litigation, 80% is the maximum percentage chance of success", Mr Davies assessed Ms Davey as having a 75% chance of success against the Administrators and, as regards the claims against Dunbar, put the chances of success at 70% on the basis of vicarious liability, 65% as regards procuring the Administrators' breaches of duty and 55-60% as regards conspiracy to injure. Mr Davies noted that Ms Davey's expert had "considerable experience" and had produced a report which was, "on its face, a well-prepared and fully-reasoned document" and concluded that, even if one were to apply a 60% reduction to figures suggested by that report, Ms Davey would be left with a claim valued at in excess of £10 million.

8. On 23 December 2015, ChapelGate entered into an agreement ("the Funding Agreement") with Ms Davey by which it undertook to provide funding for the Dunbar and Insolvency Act Proceedings. The Funding Agreement contained provisions to the following effect:

   i) ChapelGate's total funding (the "Commitment Amount") was to be £2.5 million;

   ii) Save for an initial £200,000 to cover work-in-progress and counsel's fees, payment of the Commitment Amount was conditional upon (a) an opinion from Mr Davies satisfactory to ChapelGate, (b) agreement of a costs budget prepared by Ms Davey's then solicitors, Mishcon de Reya ("MdeR"), (c) confirmation that Ms Davey had obtained after the event ("ATE") insurance satisfactory to ChapelGate to cover herself for any adverse costs order, and (d) Ms Davey entering into a conditional fee arrangement ("CFA") with each of MdeR and Mr Davies;

   iii) The order of priority of application (the "Waterfall") of any moneys received by Ms Davey from the litigation (the "Case Proceeds") was:

      a) first, to repay the funding provided by ChapelGate (the "Outstanding Principal Amount") including any premium paid in respect of the ATE insurance;

      b) secondly, to pay to ChapelGate its "Funder's Profit Share";

      c) thirdly, to pay all outstanding legal and expert fees and disbursements falling within the agreed budget, excluding uplifts;

      d) fourthly, to pay any properly incurred legal or expert fees that exceeded the agreed budget, together with any uplifts or other amounts due under the CFAs of MdeR and Mr Davies; and

e) finally, to pay the residual amount to Ms Davey;

iv) The size of the Funder's Profit Share depended on when the litigation was won or settled. Were, for example, the claim to be won or settled by 30 January 2016, the Funder's Profit Share would be 30% of the Commitment Amount. If, in contrast, the case were won or settled after the trial had begun, the Funder's Profit Share was to be the greater of 250% of the Commitment Amount or 25% of the "Net Winnings" (the Case Proceeds less the Commitment Amount);

v) Although Ms Davey was obliged to provide it with information about the litigation, ChapelGate acknowledged that Ms Davey would have complete control over the conduct of the matter.

9. As contemplated in the Funding Agreement, Ms Davey concluded CFAs with both MdeR and Mr Davies, on the basis that 25% of MdeR's fees and 50% of those of Mr Davies would be at risk. For whatever reason, however, Ms Davey did not obtain any ATE insurance. That led ChapelGate's investment manager to say this in an internal email:

> "We are now proposing an amendment, the effect of which would be no change to our net risk:
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> - Waive the requirement that [Ms Davey] obtain insurance for adverse costs risk
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> - Reduce our commitment from GBP 2.5m to 1.25m
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> - Keep our profit entitlement the same (i.e. based on a commitment of GBP 2.5m)
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> - [Ms Davey] gives us security over her rights in the claim (not strictly necessary but is an added bonus for us)
>
> Normally we require that the claimant obtain ATE insurance to cover adverse costs risk. This is because if a case is lost and the defendant fails to pay the other side's costs, the funder may be liable to pay an amount of those costs up to the amount it funded i.e. ChapelGate's maximum liability on a case without insurance is equal to 2 x the actual amount funded. This is known as Arkin liability (after the case in which the rule was established).
>
> We originally committed GBP2.5m in this case, including about 1m to pay the premium on the insurance …. To ensure we can still run the case, the lawyers have agreed that their fee will be GBP 1.25m. If we fund that entirely then, together with our Arkin risk, we end up back at £2.5m of total risk (i.e. no change). Therefore our fee is still calculated on 2.5m."

10. The proposal was carried into effect by an agreement dated 12 February 2016 between ChapelGate and Ms Davey. Under this agreement ("the A&W Agreement"),

the requirement for Ms Davey to obtain ATE insurance was waived, the Commitment Amount was halved to £1.25 million and "Commitment Amount multiplied by 2" was substituted for "Commitment Amount" in the definition of Funder's Profit Share. Once, therefore, the trial had begun, the Funder's Profit Share would be the greater of 500% of the Commitment Amount or 25% of the Net Winnings.

11. On 18 March 2016, ChapelGate itself took out ATE insurance to limit its own exposure to an adverse costs order. The sum insured under the policy was £650,000. The premium was either £487,500 or £1.3 million, depending on when the proceedings were concluded, but in either case it was payable only to the extent that ChapelGate was due to receive money under the Funding Agreement.

12. On 29 March 2016, Mr Davies provided a supplemental note on the merits of the litigation. He now considered that the claim against Dunbar based on conspiracy to injure had a less than evens chance of success. However, the prospects of success on the main claims against the Administrators and Dunbar had, if anything, strengthened, providing additional support for the percentage chances of success expressed in the September 2015 opinion. Mr Davies saw a finding of breach of duty by the Administrators as "inevitable".

13. The proceedings came on for trial before Snowden J soon afterwards, on 28 April 2016. Giving judgment on 11 April 2018, the judge dismissed Ms Davey's claims. He summarised his conclusions in these terms in that judgment:

> "782. … I conclude that there was no conspiracy between Dunbar and APAM, and that the Administrators acted independently and generally in accordance with the statutory objectives for the administration.
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> 783. I have also found that the Administrators acted with appropriate care to obtain the best price reasonably obtainable in the circumstances for Angel House and that they were reasonably entitled to rely upon APAM's advice in that regard.
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> 784. Further, far from seeking to frustrate Ms Davey's attempts to mount a funded rescue of AHDL, the Administrators did all that could reasonably have been expected of them to facilitate such an outcome without risking loss of the sale of Angel House.
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> 785. I have also found that Angel House was in fact sold for its true market value in December 2013, and that accordingly AHDL suffered no loss for which the Administrators or Dunbar could in any event be liable."

14. At a further hearing on 23 April 2018, Snowden J both joined ChapelGate as a party for the purposes of costs and ordered Ms Davey to pay the Administrators' and Dunbar's costs of the proceedings on the indemnity basis. The judge said this in the judgment he gave on that occasion:

> "Dunbar's costs

…

8. An order for costs on the indemnity basis will be appropriate where the conduct of a party has taken the situation away from the norm, see *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Ham Johnson* [2002] EWCA Civ 879. For conduct to be out of the norm, it is not necessary to show deliberate misconduct. In some cases, unreasonable conduct to a higher degree will suffice. An award of indemnity costs is, however, to some extent a mark of disapproval of the way in which a case has been fought and lost.

9. As I set out in the Judgment, serious allegations were made against Dunbar by Ms Davey. Although the word 'dishonesty' was not used in the pleadings or by counsel at trial, in my judgment the case advanced at trial against Dunbar necessarily involved just that. The central allegation was of a deliberate conspiracy between Dunbar and APAM to cause the Administrators inadvertently to breach their duties to the company so as to harm the company and Ms Davey as its shareholder. Among the matters alleged were the production of documents designed to give a false impression of APAM's incentives in the ultimate sale process, and the deliberate rigging of that sale process so as to result in a sale of Angel House to what was described as the 'Preferred Bidder' of Dunbar at an undervalue, so as to leave Ms Davey exposed to Dunbar on her personal Guarantee.

10. Moreover, after disclosure, it must have been apparent to Ms. Davey and her advisers that if their allegations against Dunbar were correct, a large number of internal documents … must also have been concocted by [the Dunbar witnesses] to create a false picture to cover up the conspiracy.

11. These were serious allegations which were wholly unfounded and I rejected them in the Judgment. Moreover, in correspondence before and during the trial as well as through counsel at the outset of the trial, Dunbar invited Ms. Davey and her advisers to withdraw those allegations. Those invitations were not taken up and the case proceeded on the basis of the pleadings alleging such misconduct. As it was, however, many of the allegations of dishonesty and conscious impropriety were not then put to Dunbar's witnesses.

12. Allegations of dishonesty against professional persons and those who operate in regulated industries can have the most serious consequences. Parties who make allegations of this level of seriousness should only do so on the basis of clear evidence, and the appropriateness of continuing with such allegations must be kept under careful review. I simply do not think that is what happened in this case. The serious nature of

the allegations made against Dunbar and the inappropriate and unreasonable manner in which they continued to be made, was well out of the norm.

The Administrators' Costs

…

31. I make it clear that I do not think that the case pursued by Ms Davey was completely without merit. She did succeed in showing that the Administrators gave assistance to Dunbar to pursue her on her personal Guarantee, this being assistance that should not have been given. This aspect of the case, coupled with some of the deficiencies in the documentation to which I have referred, could have founded a straightforward case that the process for sale of Angel House was flawed and had resulted in a sale of the property at an undervalue. Whilst I would not describe that case as strong, and I do not think that the identified deficiencies in the documentation were ultimately of any great significance, it was a case that could properly have been made.

…..

33. In my judgment, this was an obvious case in which the range of allegations made against the Administrators could and should have been carefully limited and confined from the outset, and kept under constant review. Instead, Ms Davey sought to attack almost every action of the Administrators throughout the administration, even though I think many of those criticisms could, with an objective eye, have been seen to be unfounded from the contemporaneous documents, and ultimately all of the significant allegations that might have sounded in damages failed. That lack of discrimination in the allegations made significantly increased the burden of the case for the Administrators.

34. Further, for reasons that I have already outlined, if a claimant makes allegations against a professional defendant in a case in which she is also making allegations against other defendants that are tantamount to allegations of dishonesty, in my view the claimant must be assiduous in making clear whether or not they are also alleging that the professional was part of that dishonesty. That was not so with the pleadings in this case, and although some clarity was introduced at the pre-trial review, a significant part of the costs had already been incurred by then, and doubts persisted even at the trial, which I was forced to take up with counsel.

35. In short, if a straightforward claim in professional negligence is accompanied, as this one was, by a welter of

> other allegations, some of which verged on allegations of complicity in the alleged dishonest conduct of other defendants, in my view a claimant who has lost heavily can have little complaint if at the end of the day the costs order places the burden on him or her to show that the defendant, faced with such a wide-ranging set of allegations, was acting unreasonably in spending money preparing to defend himself against those allegations and the resultant effect upon his professional reputation and livelihood. That must be the more so if those allegations are accompanied, as they were in this case, by an element of speculation and exaggeration of the claim.
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> ….
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> 37. [S]tanding back and for the other reasons which I have just expressed, I do think that the way in which Ms Davey formulated and pursued this case against the Administrators was out of the norm, and should result in an order for costs to be assessed on an indemnity basis ….”

15. Later in 2018, the applications by the Administrators and Dunbar for costs orders to be made against ChapelGate came before Snowden J. ChapelGate sensibly did not resist the making of such orders and, in the light of the decision of the Court of Appeal in *Excalibur Ventures llc v Texas Keystone Inc (No 2)* [2016] EWCA Civ 1144, [2017] 1 WLR 2221, did not dispute that the orders should provide for assessment on the indemnity basis, in line with the orders that the judge had made against Ms Davey. Two matters were in issue: first, whether ChapelGate's liability should be limited to costs incurred after 23 December 2015, the date of the Funding Agreement, and, second, whether its liability should be capped at the overall total of the funding it had provided to Ms Davey, viz. £1,275,166.34, on the basis of the decision of the Court of Appeal in *Arkin*.

16. In the Judgment, Snowden J resolved the first issue in favour of ChapelGate but the second against it. He therefore ordered ChapelGate to pay the Administrators' and Dunbar's costs on the indemnity basis from 23 December 2015 without any cap.

17. ChapelGate now challenges the judge's decision not to cap its liability at the extent of its funding to Ms Davey. It is to be noted that, between them, the Administrators and Dunbar claim to have incurred costs amounting to some £4.33 million after 23 December 2015 (as well as about £3.15 million before that date).

The Judgment

18. Snowden J concluded in paragraph 89 of the Judgment that “what has become known as the *Arkin* cap” is “best understood as an approach which the Court of Appeal in *Arkin* intended should be considered for application in cases involving a commercial funder as a means of achieving a just result in all the circumstances of the particular case” and that it was not “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”. The Court of Appeal, the judge said in paragraph 82, “should not be taken to have been intending to prescribe a rule to be followed in every subsequent case

involving commercial funders" but was "simply setting out an approach that it envisaged might commend itself to other judges exercising their discretion in similar cases in the future".

19. On the facts, the judge considered that "the balance between the principle that the successful party should have its costs, and enabling commercial funders to continue to provide the finance to facilitate access to justice, should be struck differently than it was in *Arkin*" and the *Arkin* cap should not be applied (see paragraph 111 of the Judgment). In that connection, the judge referred to the following factors:

    i) ChapelGate approached its involvement throughout as a commercial investment (paragraph 91);

    ii) The case involved conduct of the litigation by and on behalf of Ms Davey which was significantly out of the norm and so warranted an order for indemnity costs (paragraph 92). While ChapelGate did not itself direct the way in which the case was conducted, it "nevertheless had every opportunity to investigate and form a view as to the nature of the Claim and the support for the allegations which were being made before choosing to fund it" (paragraph 93) and, if the *Arkin* cap were to be applied, ChapelGate "would be insulated from [the] decision that costs should be assessed against it on the indemnity basis to reflect the manner in which the Claim was pursued" (paragraph 94);

    iii) "[I]t must in any event have been apparent to ChapelGate (i) that Ms. Davey was most unlikely to be able to pay any substantial costs awarded against her, and (ii) that the costs of Dunbar and the Administrators were likely to be very substantial and well in excess of the amount which ChapelGate itself proposed to invest in the litigation" (paragraph 95);

    iv) "[A]s a result of the A&W Agreement, ChapelGate effectively halved its commitment to the funding of the litigation from £2.5 million to £1.25 million, whilst retaining the same potential share of the recoveries, and removing the requirement for the purchase by Ms. Davey of ATE protection for adverse costs liability to the Defendants" (paragraph 96). The decision to enter into the A&W Agreement "highlight[ed] the fact that ChapelGate was closely focussed on its own self-interest in funding the litigation as a commercial venture, and that there was no correlation between the amount that it chose to invest in the litigation and the costs to which the Defendants were exposed" (paragraph 96). The judge went on to say this in paragraph 98:

> "The Court of Appeal [in *Arkin*] obviously thought that it was unjust if a funder whose involvement was limited to providing funding for the claimant's expert evidence was made liable for all the defendants' costs of the action. However, I consider that there is an obvious risk of injustice in the other direction if a number of defendants are forced to incur significant costs in defending themselves, but are limited to recovering only a proportion of those costs because of entirely different funding arrangements over which they have no control between the claimant, his funder and his lawyers. The disparity between the amounts that defendants may be forced to incur, and the

> amount provided by the funder to the claimant, may, as in the instant case, be accentuated in a case where the claimant's lawyers are prepared to operate on the basis of CFAs, but the defendants' lawyers are not";

v) The judge considered there to be "force in the point that ChapelGate negotiated to receive a substantial commercial profit which would have taken priority over any compensation payable to Ms. Davey" (paragraph 99). The judge accepted a submission that "the use of the Waterfall structure and the level of ChapelGate's Funder's Profit Share meant that, if measured in terms of her prospects of receiving compensation, Ms. Davey's access to justice came a clear second to ChapelGate receiving a significant return on its commercial investment" and said that, "[i]n that sense, ChapelGate plainly was the party with the primary (i.e. first) interest in the Claim" (paragraph 105). On the subject of the Waterfall, the judge said this in paragraph 101:

> "In the instant case, the use of the Waterfall structure in the Funding Agreement meant that ChapelGate had first priority to any recoveries from the litigation. As might be expected, the structure was that ChapelGate was always entitled to be repaid the funding which it had spent on professional fees of up to £1.25 million before any other payments could be taken from any recoveries. There cannot, I consider, be any criticism of that. In addition to recovering its outlay, however, ChapelGate was entitled to a substantial Funder's Profit Share of any recoveries. That profit share increased with time, so that after commencement of the trial, that Funder's Profit Share would have amounted to five times the commitment amount - i.e. £6.25 million. Only once such Funder's Profit Share had been paid would MdeR and counsel have been entitled to receive their CFA uplifts, and only after that would Ms. Davey have been entitled to receive the balance of any compensation recovered in the Claim";

vi) The judge was "not persuaded by the policy argument made by [counsel for ChapelGate] that if [he] were not to apply the *Arkin* cap …, commercial litigation funders would be discouraged from providing funding in the future, essentially because [his] decision would signal that they might have an 'open-ended' exposure to adverse costs" (paragraph 106). The judge went on to observe in paragraph 110:

> "If the possibility that a funder may not be able to take advantage of the *Arkin* cap causes funders to keep a closer watch on the costs being incurred, both by the funded party and the opposing side, and if careful consideration is given to employing the mechanisms in the CPR to limit exposure to adverse costs in an appropriate case, I do not see that as contrary to access to justice or any other public policy."

***Arkin* in context**

20. The power to order a non-party to pay costs is derived from section 51 of the Senior Courts Act 1981. That provides:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
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> (a) the civil division of the Court of Appeal;
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> (b) the High Court;
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> (ba) the family court; and
>
> (c) the county court,
>
> shall be in the discretion of the court.
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> …
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> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid …."

21. In *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965, the House of Lords held that there was no basis for implying into section 51 of the 1981 Act a limitation to the effect that a costs order could only be made against a party. Lord Goff said at 975 that it was "not surprising to find the jurisdiction conferred under section 51(1), like its predecessors, to be expressed in wide terms". He continued:

> "The subsection simply provides that 'the court shall have full power to determine by *whom* . . . the costs are to be paid.' Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to a establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised. Such a policy appears to me, I must confess, to be entirely sensible. It comes therefore as something of a surprise to discover that it has been suggested that any limitation should be held to be *implied* into the statutory provision which confers the relevant jurisdiction."

22. The Privy Council considered the circumstances in which a costs order should be made against a non-party in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807. Lord Brown, giving the judgment of the Board, said this:

"25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against 'pure funders', described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as 'those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course'. In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence …. (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. Since this particular difficulty may be thought to lie at the heart of the present case, it would be helpful to examine it in the light of a number of statements taken from the authorities ….

29. In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests."

23. *Arkin*, like the present appeal, concerned the position of a commercial funder. In the immediately preceding years, there had been major changes to the law and practice relating to the funding of litigation. In particular, the Access to Justice Act 1999 had substantially limited the availability of legal aid, but, on the other hand, extended the scope of conditional fee agreements and made it possible for a winning party to recover both success fees and ATE premiums under a costs order. These changes led to "a cultural shift in the role of CFAs as a core method of funding" and ATE insurance, which had been developed during the 1990s, becoming widespread (see Sir Rupert Jackson's "Review of Civil Litigation Costs: Preliminary Report", at paragraphs 1.1 and 1.2 of chapter 14 and paragraph 4.3 of chapter 16). There was also a "sea change in the approach of the courts" to commercial funding of litigation as it was "recognised that many claimants cannot afford to pursue valid claims without third party funding" ("Review of Civil Litigation Costs: Preliminary Report", at paragraph 1.1 of chapter 15). Third party funding was, however, "still nascent" at the date of Sir Rupert Jackson's 2009 "Review of Civil Litigation Costs: Final Report" (see paragraph 2.4 of chapter 11).

24. In *Arkin*, a professional funding company, MPC, had funded the claimant as regards "the employment of expert witnesses, the preparation of their evidence and the organisation of the enormous quantities of documents which became necessary to investigate before the trial" (see paragraph 1 of Colman J's judgment at first instance – [2003] EWHC 2844 (Comm), [2004] 2 Costs LR 231). The claim having failed, and nothing having been paid in respect of costs by the claimant, the defendants sought orders for costs against MPC pursuant to section 51 of the Senior Courts Act 1981. The Court of Appeal held that it was appropriate to make an order in the defendants' favour, but that MPC's liability should be limited to the amount of its funding, £1.3 million. Giving the judgment of the Court, Lord Phillips of Worth Matravers MR said this:

> "38. While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event…. In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.
>
> 39. If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the

necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.

40. The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.

41. We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.

42. If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.

> 43. In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. We have not, however, had to explore the ramifications of an extension of the solution we propose beyond the facts of the present case, where the funder merely covered the costs incurred by the claimant in instructing expert witnesses."

25. Sir Rupert Jackson was critical of the *Arkin* cap in his "Review of Civil Litigation Costs: Final Report", published in 2009. He said this on the subject in chapter 11:

> "4.3 The reasoning of the Court of Appeal [in *Arkin*] attracted some criticism during [the consultation]. In their Response to the Preliminary Report the City of London Law Society's Litigation Committee wrote:
>
>> 'We consider that the court should have the ability to order the third party funder in an unsuccessful case to pay all of the successful defendant's costs (subject to assessment in the usual way) and its ability to do so should not be circumscribed by the principle in *Arkin*.'
>
> It should be noted that the facts of *Arkin* were unusual. MPC, the funder in that case, had funded only the claimant's expert evidence and the cost of organising the documents.
>
> 4.4 The Commercial Litigation Association commented that the *Arkin* approach creates an uneven playing field. The balance is tilted in favour of third party funding, in that the funder is only liable for costs up to the amount of its investment.
>
> 4.5 <u>My view.</u> In my view, the criticisms of *Arkin* are sound. There is no evidence that full liability for adverse costs would stifle third party funding or inhibit access to justice. No evidence to this effect is mentioned in the judgment. Experience in Australia is to the opposite effect…. It is perfectly possible for litigation funders to have business models which encompass full liability for adverse costs. This will remain the case, even if ATE insurance premiums (in those cases where ATE insurance is taken out) cease to be recoverable under costs orders….
>
> 4.6 In my view, it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat. This is unjust not only to the opposing party (who may be left with unrecovered costs) but also to the

> client (who may be exposed to costs liabilities which it cannot meet).
>
> 4.7 I recommend that either by rule change or by legislation third party funders should be exposed to liability for adverse costs in respect of litigation which they fund. The extent of the funder's liability should be a matter for the discretion of the judge in the individual case. The funder's potential liability should not be limited by the extent of its investment in the case."

26. The *Arkin* cap was nonetheless applied in the *Excalibur Ventures* case. The claimants in that case had had funding from a number of commercial funders, referred to as "Psari", "Hamilton", "Blackrobe", "Huron", "JH" and "the Platinum funders", as well as from a Mr Lemos. At first instance, Christopher Clarke LJ ordered both the claimants and the funders to pay costs on the indemnity basis, but on the footing that no funder should be liable for more than the amount it had provided. Christopher Clarke LJ said this in his judgment ([2014] EWHC 3436 (Comm), [2014] 6 Costs LO 975):

> "72. It seems to me that it is appropriate to apply the Arkin cap in the present case. The position might be different if a funder had behaved dishonestly or improperly or if, as the court put it in Arkin, 'the funding agreement falls foul of the policy considerations which render an agreement champertous' e.g. if the funder has taken complete control over the litigation. In such a case it may be that there should be no cap at all.
>
> 73. On the facts of the present case the Arkin cap is not relevant in respect of Psari/Lemos since the likely shortfall (£4.8 million) is less than their contribution to costs of £9.75 million. The same is so in the case of the Platinum funders, taken as a whole, where their contribution to costs of one form or another is £14 million (or £8 million if you exclude the costs ultimately borne by Huron). But the position is different if you take Hamilton and JH separately, or if you distinguish between contributions towards security for the defendants' costs and towards Excalibur's costs. In the case of Blackrobe (contribution £4 million) the effect of the cap is relatively small."

27. The funders appealed on the ground that they should not have been ordered to pay costs on the indemnity basis and also, in the case of the Platinum funders, on the ground that funds contributed for the express purpose of providing security for costs should not count towards the *Arkin* cap. The appeal was, however, dismissed: see [2016] EWCA Civ 1144, [2017] 1 WLR 2221. With regard to whether the indemnity basis was appropriate, Tomlinson LJ, with whom Gloster and David Richards LJJ agreed, considered that "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" (see paragraph 27). In paragraph 28, Tomlinson LJ expressed scepticism about whether the

imposition of a requirement to pay costs on an indemnity basis would have an adverse impact on access to justice. He continued:

> "I do not myself think that commercial funders are greatly motivated by the need to promote access to justice, and nor do I suggest that they should be. They are, as it seems to me, making an investment and are motivated by largely commercial considerations. Those whose money they invest would no doubt be aggrieved if it were otherwise. However in so far as the argument has any traction, it has I consider been resolved by the decision of this court in *Arkin v Borchard Lines (No 2)* [2005] 1 WLR 3055. In that case this court considered, at para 38, that:
>
> > 'Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.'
>
> The solution fashioned by this court was the *Arkin* cap. We are not on this appeal asked to revisit that decision. I understand that some consider the solution thus adopted to be over-generous to commercial funders, but that is a debate for another day upon which I express no view."

28. Turning to whether money provided as security for costs should count towards the *Arkin* cap, Tomlinson LJ said in paragraph 41:

> "For all these reasons I can discern no principle whether of fairness, justice or otherwise pursuant to which the Platinum funders' investments earmarked for the provision of security should be treated any differently from their or Psari's and Mr Lemos' investment earmarked for the payment of [the claimant's] own costs. To do so would subvert the funding model which appears to be accepted by the [Association of Litigation Funders of England and Wales] in consequence of the *Arkin* compromise. No doubt that acceptance is informed in part by recognition that there are, as I have already remarked, those who consider that the *Arkin* cap is unduly generous to funders who, some think, should not have their exposure capped but rather left at large, or perhaps in the discretion of the court."

29. The *Arkin* cap was also applied in *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 2995 (Ch), [2019] Costs LR 2061. In that case, the judge, Zacaroli J, observed in paragraph 59 that the "essential question", as regards both whether to make an order at all and whether one should be subject to a cap, was "whether it is just in all the circumstances to make the order". On the facts, he "concluded that in all the

circumstances of this case the just course is to apply a cap on [the funder's] liability equal to the amount of funding it contributed, namely in the amount of £478,265" (see paragraph 60).

30. In *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, [2016] 4 WLR 17, Moore-Bick LJ, giving the Court of Appeal's judgment, warned at paragraph 62 that exercise of the jurisdiction to make costs orders against non-parties "is in danger of becoming over-complicated by authority". Moore-Bick LJ went on to "emphasise that the only immutable principle is that the discretion must be exercised justly".

The significance of *Arkin*

31. Mr Robert Marven QC, who appeared for ChapelGate, took issue with Snowden J's approach to *Arkin*. Contrary to the judge's view, Mr Marven submitted, the Court of Appeal was not merely setting out an approach which "might commend itself" to other judges or "be considered for application" in similar cases. *Arkin*, Mr Marven argued, is binding authority establishing the correct "solution" to be applied in respect of commercial funders where the criteria set out in the decision are met. While, moreover, Sir Rupert Jackson may have criticised the *Arkin* cap, he envisaged either a rule change or legislation and, ten years on, there has been neither. It is not for this (or any) Court to seek to undo what has been settled since *Arkin*, the more so when there is next to no evidence before the Court about the funding market. Departing from *Arkin* would both be wrong in principle and, self-evidently, tend to deter commercial funders and so inhibit access to justice.

32. In support of his submissions, Mr Marven pointed out that in *Arkin* the Court of Appeal spoke of the need to devise a "just solution" and considered that it had found it in the principle expounded in the first sentence of paragraph 41 of its judgment, viz. that "a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided". Mr Marven also drew attention to the fact that in paragraph 43 of its judgment the Court of Appeal could "see no reason in principle" why its "solution" should not be applicable where the funder has contributed the greater part, or all, of the expenses of the litigation. That passage, Mr Marven argued, showed that, as regards a case in which a funder has contributed only part of the costs, the Court was intending to expound something definitive and also suggested that the Court's approach should be applied more generally, in situations where funders have financed litigation either largely or entirely.

33. As, however, was submitted by Mr Justin Fenwick QC, who appeared for the Administrators with Mr Ben Smiley, and Mr Nicholas Bacon QC, who appeared for Dunbar with Mr Joseph Curl, there are also indications in the Court of Appeal's judgment in *Arkin* that it was not attempting to lay down a binding rule. The Court spoke in paragraph 40 of "commend[ing]" an "approach" and in paragraph 43 of "suggest[ing]" and "propos[ing]" a "solution". More than that, in paragraph 42 it foresaw certain consequences "[i]f the course we have proposed becomes generally accepted". Those words seem to imply that the Court was proceeding on the basis that judges dealing with similar situations in the future would not strictly be obliged to adopt its approach, albeit that that course might become "generally accepted".

34. The terms in which the Court of Appeal expressed itself may well reflect its perception that a decision as to what, if any, costs order to make against a commercial funder is in the end discretionary. That would accord with section 51 of the Senior Courts Act 1981, which, as can be seen from paragraph 20 above, is framed in entirely general terms. Mr Marven stressed that in *Aiden Shipping Co Ltd v Interbulk Ltd* Lord Goff referred to the possibility of appellate Courts "establish[ing] principles upon which the discretionary power may … be exercised" (see paragraph 21 above), but, as Moore-Bick LJ noted in *Deutsche Bank AG v Sebastian Holdings Inc*, "the only immutable principle is that the discretion must be exercised justly" (see paragraph 30 above).

35. It is, moreover, possible to envisage circumstances in which application of the *Arkin* cap might not be felt "just" and that even though, as in *Arkin*, a funder had met only a discrete part of the total costs. Suppose, for example, that the total costs of pursuing a claim for £10 million had been £300,000 and that £100,000 of this had come from a funder who would have taken 90% of the net proceeds had the claim succeeded. On that doubtless unlikely set of facts, a judge might very well consider it "just" for the funder to bear more than £100,000 of the defendant's costs. In such a case, a judge might wish to have regard to what the funder had stood to gain, not just to its outlay. The course favoured by the Court of Appeal in *Arkin*, however, focuses exclusively on "the extent of the funding provided".

36. It is also relevant that *Arkin* was decided when third party funding of litigation was still "nascent" and conditional fee agreements and ATE insurance relatively new. Such matters will have highlighted the desirability of ensuring that commercial funders were "not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed" (to quote from the judgment in *Arkin*). Nowadays, however, commercial funders, conditional fee agreements and ATE insurance are all much more established. The risk of someone with a claim which has good prospects of achieving success without disproportionate cost being unable to pursue it unless the extent to which a funder could be ordered to meet the other side's costs is curtailed will have diminished in consequence. Apart from anything else, a funder should now be able to protect its position by ensuring that either it or the claimant has ATE cover.

37. That is by no means to say that the approach put forward by the Court of Appeal in *Arkin* has become redundant. There will, I am sure, continue to be cases in which judges decide that it is right to follow the course espoused in *Arkin*, as Zacaroli J did in *Burnden Holdings (UK) Ltd v Fielding*. The *Arkin* "solution" is particularly likely to be relevant on facts closely comparable to those in *Arkin*, where the funder had "merely covered the costs incurred by the claimant in instructing expert witnesses" (to quote from paragraph 43 of the Court of Appeal's judgment).

38. On the other hand, I do not consider that the *Arkin* approach represents a binding rule. Judges, as it seems to me, retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding. In the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant. The more a funder had stood to gain, the closer he might be thought to be to the "real

party" ordinarily ordered to pay the successful party's costs in accordance with the guidance given in paragraph 25(3) of the *Dymocks* judgment (for which, see paragraph 22 above). In the case of a funder who had funded the lion's share of a claimant's costs in return for the lion's share of the potential fruits of litigation against multiple parties, it would not be surprising if the judge ordered the funder to bear at least the lion's share of the winners' costs, regardless of whether the funder's outlay on the claimant's costs had been a lesser figure.

39. In short, it seems to me that Snowden J was right to conclude that judges do not necessarily have to adopt the *Arkin* approach when determining the extent of a commercial funder's liability for costs.

The present case

40. Mr Marven submitted that, even if (contrary to his primary contention) Snowden J had a discretion as to whether to apply the *Arkin* cap, he was wrong not to do so. The various factors which the judge mentioned did not provide a sufficient basis for departing from the approach which the Court of Appeal took in *Arkin*. On top of that, the judge failed to take into account the respondents' failure to apply for security for costs, something which, Mr Marven suggested, pointed strongly against imposing unlimited liability on ChapelGate.

41. In contrast, Mr Fenwick and Mr Bacon each maintained that there was no basis for interfering with the judge's exercise of discretion. In this connection, Mr Bacon referred us to *G v G* [1985] 1 WLR 647 to remind us that an appellate Court "should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible" (to quote Lord Fraser, at 652).

42. I have summarised in paragraph 19 above the factors which the judge identified as leading him to conclude that the *Arkin* cap should not apply. Mr Marven said of factor (i) that a commercial funder's motivation will always be commercial and so the fact that that was the case with ChapelGate could not be a reason not to follow *Arkin*. With regard to factor (ii), Mr Marven pointed out that ChapelGate became liable for indemnity costs only on a derivative basis and that the judge made no finding that it had itself either departed from the norm or failed to carry out due diligence. In fact, Mr Marven observed, ChapelGate had the benefit of very strong advice from leading counsel. Coming on to factor (iii), Mr Marven submitted that it would typically be the case where there was a question as to whether to apply the *Arkin* cap that it had been apparent that the funded party might not be able to meet a costs award and that the opponent's costs might be in excess of the funder's funding. Such matters could not, accordingly, warrant departure from the *Arkin* approach. Further, to proceed on the basis that a funder should ensure that, through ATE insurance or otherwise, money would be available fully to discharge any adverse costs order would inhibit access to justice for those most in need of help. With regard to factor (iv), Mr Marven argued that the judge was wrong to say that the A&W Agreement meant that ChapelGate "effectively halved its commitment to the funding of the litigation". From ChapelGate's point of view, its intended exposure remained £2.5 million because, absent the ATE cover which it had originally been anticipated that Ms Davey would

obtain with money from ChapelGate, it was vulnerable to an order requiring it to pay costs up to the limit of the *Arkin* cap. ChapelGate's total exposure and potential rewards were thus unchanged. So far as the factor (v) is concerned, Mr Marven said that, had Ms Davey's claims proved to be worth as much as had been hoped, she would have retained the majority of the recoveries from the respondents. The Funder's Profit Share under the Funding Agreement as amended by the A&W Agreement was to be the greater of five times the Commitment Amount or 25% of Net Winnings. If, therefore, Ms Davey had been awarded, say, the £49 million which had been said to have been lost as a result of the Administrators' failure to proceed with a funded rescue, ChapelGate would have been entitled to some £12.25 million, but Ms Davey would have kept upwards of £36 million. Ms Davey remained, moreover, in control of the litigation. As for factor (vi), Mr Marven argued that the judge ought to have recognised that disapplying the *Arkin* cap would have the effect of deterring funding.

43. For their part, Mr Fenwick and Mr Bacon each submitted that the significance of factor (i) was simply that ChapelGate was a commercial funder rather than a "pure" one and so within Lord Brown's third category in *Dymocks* (a non-party who "not merely funds the proceedings but substantially also controls or at any rate is to benefit from them") and hence a person whom justice would "ordinarily require" to pay the successful party's costs (see paragraph 22 above). As for factor (ii), Mr Fenwick and Mr Bacon argued that the misconduct of the litigation that had given rise to the order for indemnity costs was relevant, particularly in the light of Snowden J's observation that ChapelGate had had "every opportunity to investigate and form a view" on the allegations of serious misconduct which Ms Davey was making. With regard to factor (iii), it was pointed out that, given the nature of the claims being advanced by Ms Davey, the Administrators and Dunbar were bound to be separately represented and to incur very large costs with the result that limiting ChapelGate's liability to the amount of its own funding would have unusually severe consequences for the winning parties. Moving on to factor (iv), it was said that ChapelGate had indeed halved its commitment to £1.25 million, albeit that a further £1.25 million had been held as a provision, while the respondents had lost the benefit of ATE cover. As Mr Fenwick put the contention, "ChapelGate had managed to divide its investment by half, and maintain the same potential profit, while depriving the Respondents of ATE protection". In relation to factor (v), the Waterfall meant that Ms Davey could not possibly benefit from any award of less than £6.25 million, that she would have kept £3.75 million or less of the £10 million assumed in Mr Davies' opinion (see paragraph 7 above) while ChapelGate would have been entitled to £6.25 million, and that recoveries would have had to exceed £25 million for ChapelGate's share to fall below 25%. Snowden J was thus right to see ChapelGate as "the party with the primary (i.e. first) interest in the Claim" and to consider that Ms Davey's access to justice "came a clear second to ChapelGate receiving a significant return on its commercial investment". Turning finally to factor (vi), the judge's approach to the "policy argument" put forward by ChapelGate was justified in the light of such matters as Sir Rupert Jackson's "Review of Civil Litigation Costs: Final Report" and developments in relation to ATE insurance, commercial funding and costs control.

44. In my view, Snowden J's exercise of his discretion cannot be impugned. This was not a case, as *Arkin* was, of a funder funding only a distinct part of a claimant's costs. From the date of the Funding Agreement, all payments in respect of Ms Davey's costs

appear to have been made with money provided by ChapelGate. Further, ChapelGate stood to receive in return a profit amounting to a multiple of what it had spent. In fact, Ms Davey had to recover from the respondents more than five times ChapelGate's expenditure to have any prospect of keeping anything for herself. ChapelGate would, moreover, have derived far more than she would from an award of the £10 million projected in Mr Davies' opinion. In the circumstances, this was a case in which it was legitimate for a judge to attach importance to the funder's prospective gains as well as to its outlay. The judge was entitled, too, to have regard to the extent to which the *Arkin* cap would leave the respondents out of pocket. The litigation which ChapelGate chose to facilitate involved very serious allegations against more than one party and, beyond that, parties who could not be expected to share legal representation. As a result, it was inevitable that the respondents would incur costs greatly in excess of the funding which ChapelGate provided to Ms Davey, yet the respondents were not to have the protection of any ATE cover. ChapelGate may not have seen the A&W Agreement as reducing its own exposure, but, with its waiver of the requirement for ATE insurance, it very much increased that of the respondents. This was also, as it seems to me, something which the judge could properly take into account.

45. In short, a different judge might or might not have arrived at the same conclusion as Snowden J, but that is not the point. The order he made was plainly one that was reasonably open to him and his decision cannot be said to have been founded on irrelevant considerations.

46. That leaves Mr Marven's contention that the judge wrongly failed to take into account the respondents' failure to apply for security for costs. As Mr Marven pointed out, the Administrators' solicitors raised the question of security for costs in a letter to Ms Davey's then solicitors of 12 June 2014 on the basis that she was resident in Israel. The Administrators' solicitors returned to the subject in a letter to Ms Davey's solicitors of 11 May 2015 in which they referred to the fact that Ms Davey's solicitors had "suggested that any award of Security for Costs would be limited to the additional costs of enforcing a costs order in another jurisdiction, over and above the costs which would be incurred in this jurisdiction", a point as to which it was said that the Administrators made "no concessions" but which would not be disputed for the purposes of the letter. Ms Davey's solicitors replied on 28 May 2015 that Ms Davey had "once more become resident in England" and so none of the conditions in CPR 25.13 was satisfied. At trial, however, it appears to have emerged that Ms Davey had always been resident in Israel, and Mr Marven argued that that would in all probability have emerged in 2015 had the Administrators pressed the point then. In that event, Mr Marven said, Ms Davey's claims would have been at an end.

47. In my view, however, the judge was not obliged to attach any significance to these matters. I do not see that the respondents can be criticised for failing to challenge what they had been told by the solicitors acting for the party whom ChapelGate later chose to fund. In any case, the authorities indicate that, even if they had been able to establish that Ms Davey was resident in Israel, security for costs would have been available only in respect of any additional costs of enforcing a judgment there, on which there is no evidence. It is by no means apparent that an award of security for costs on that basis would have prevented Ms Davey from pursuing the proceedings.

48. In all the circumstances, it seems to me that the judge was entitled to make the order he did.

Conclusion

49. I would dismiss the appeal.

Lord Justice Moylan:

50. I agree.

Lord Justice Patten:

51. I also agree.