Neutral Citation Number: [2019] EWHC 2995 (Ch)

Case No: HC-2017-002760

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

Before :

The Honourable Mr Justice Zacaroli

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Between :

(1) BURNDEN HOLDINGS (UK) LIMITED (IN LIQUIDATION) **(2) STEPHEN JOHN HUNT (AS LIQUIDATOR OF BURNDEN HOLDINGS (UK) LIMITED)**	**Claimants/ Respondents**
- and -	
(1) GARY JOHN FIELDING **(2) SALLY ANNE FIELDING**	**Defendants/ Applicants**
-and-	
(1) PROJECT APPLEDENE PC (A CELL OF A PROTECTED CELL COMPANY INCORPORATED IN JERSEY) **(2) GRIFFINS (A FIRM)**	**Respondents**

Christopher Parker QC and Caley Wright (instructed by **Enyo Law LLP)** for the Claimants
James Potts QC and Matthew Parfitt (instructed by **Addleshaw Goddard LLP**) for the Defendants
Simon Browne QC (instructed by **Clyde & Co LLP**) for the Respondents

Hearing dates: 22 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. This is a second consequential hearing following the hand-down of judgment in this matter on 19 June 2019, when I dismissed the claimants' claims. I refer to that judgment ([2019] EWHC 1566 (Ch)) for the detailed background to this matter. As a result of earlier agreement between the parties, and the resolution of certain matters at the first consequential hearing (on 31 July 2019):

    i) The first claimant ("BHUK") was ordered to pay the defendants' costs of the action, to be assessed on the standard basis;

    ii) BHUK was ordered to pay £1.2 million on account of that costs liability;

    iii) Interest is payable on those costs at the rate of 3% above base rate from the date(s) on which the costs were paid by the defendants until 19 September 2019 or earlier payment and interest is payable at the Judgments Act rate from 19 September 2019.

2. Matters relating to the liability of the second claimant, Mr Hunt (the liquidator of BHUK), in respect of costs, and the liability of third party funders were left over to be dealt with at the second consequential hearing.

3. In the intervening period, the parties have reached agreement on certain issues such that:

    i) It is agreed that Mr Hunt is to be ordered to pay 15% of the defendants' costs of the action;

    ii) Further interim payments on account of costs are to be made by BHUK (in the sum of £450,000) and by Mr Hunt (in the sum of £350,000);

    iii) The costs ordered to be paid by Mr Hunt will bear interest at the same rates in respect of the same time periods as in respect of BHUK's costs;

    iv) It is agreed that the third party who funded the claimants' costs of the action from August 2017 until the conclusion of the trial, Project Appledene PC (a Cell of a Protected Cell Company incorporated in Jersey) ("Appledene") will (in addition to having already funded the interim payment of £1.2 million) pay a further sum of £1m to the defendants in respect of BHUK's liability for costs. In addition, an indemnity from Appledene to BHUK for a further £800,000 of its costs liability will be made available to the defendants. This will be used to fund the further interim payments referred to at (ii) above.

4. There remains for determination, therefore, the following issues:

    i) Whether Griffins (the firm in which Mr Hunt is a partner) should be liable to pay any part of the defendants' costs of the action on the grounds that it was a third-party funder;

ii) If so, whether it should be required to make a payment on account and in what amount, and what rates of interest, for what periods, should apply to those costs; and

iii) The appropriate costs award to make in respect of the first consequential hearing, as between the claimants and the defendants.

It is agreed that resolution of the second group of issues will need to await my decision in relation to the first group. In this judgment, accordingly, I deal only with the first and third issues.

Griffins' liability for costs

The law

5. The jurisdiction to award costs against a third party is found in the general power to award costs in s.51 of the Senior Courts Act 1981.

6. It is common ground between the parties that the principles to be applied are to be found principally in the opinion of Lord Brown of Eaton-under-Heywood in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC) at [25], and may be summarised as follows:

i) Although costs orders against non-parties are 'exceptional', this means no more, in this context, than that the case is outside the normal run of cases which parties pursue for their own benefit and at their own expense.

ii) The ultimate question in any such exceptional case is whether in all the circumstances it is just to make the order.

iii) Generally the discretion will not be exercised against 'pure funders', described as those with no 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.

iv) "*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 such a case is "*not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes*".

v) In such a case, the funder is a "real party" to the litigation, although it does not have to be the only real party.

7. The fact that security for costs has been awarded (and obtained) as between the main parties does not preclude an award against a third party: see *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2007] 2 Costs LR 212 at [14]; although the absence of the availability of security may be an important factor in favour of making a costs order against a third party: *Dolphin Quays Developments Ltd v Mills* [2008] 1 WLR 1829, at [61]-[62]. In this case, I accept that the fact that security awarded to the defendants

at earlier stages of the action fell significantly short of the actual costs incurred by them ought not to preclude the court from awarding costs against a third-party funder.

8. There are two potential limitations on an award of costs against a third-party funder.

9. First, where a person funds litigation for a specific period of time which is less than the period of the whole action, that person ought not to be made liable for the other side's costs incurred during any other period of time. This stems from the principle of causation, itself clearly stated in, for example, *Hamilton v Al Fayed* [2003] QB 1175, per Simon Brown LJ at [54]:

> "proof of causation is a necessary pre-condition of the making of a section 51 order against a non-party".

10. In *Excalibur Ventures LLC v Texas Keystone Inc (No.2)* [2017] 1 WLR 2221, Christopher Clarke LJ, having cited *Hamilton* and other cases where the causation principle had been applied, rejected an argument that since funders who came into proceedings half way through sought to benefit from the work undertaken prior to that (by, for example, obtaining a share of the proceeds of the action if successful) they should be liable for all the costs of the action. He said (at [151]):

> "While I see the force of these considerations I do not think it appropriate to make an order the effect of which is that the Platinum funders or Blackrobe will be liable for costs which they have played no part in causing the defendants to incur. The fact that they are, in a sense, inheritors of the work of others is not a sufficient reason."

11. This approach was recently endorsed and followed by Snowden J in *Davey v Money* [2019] Costs LR 399, at [47]. The defendants dispute that this limitation applies to costs incurred *after* a funder has ceased to fund the litigation. I address this issue below.

12. The second limitation is derived from the case of *Arkin v Borchard Lines Ltd (Nos 2 & 3)* [2005] 1 WLR 3055, and has become known as the "Arkin" Cap. In *Arkin*, a third-party funder had funded the cost of necessary expert evidence (in the sum of £1.3 million) in return for a 25% share of any damages recovered up to £5 million and a 23% share of any damages in excess of that amount. The judge dismissed an application for costs against the funder on the grounds that litigation support by professional funders further the important objective of facilitating access to justice and that the court ought not to discourage such support, provided it was not champertous, by making adverse costs orders against them. The Court of Appeal reversed that decision, on the basis that while it was right to have regard to the need to ensure access to justice, the judge had failed to give appropriate weight to the general rule in CPR 44.3 that a successful party should recover its costs. It adopted a solution which struck a balance between these opposing factors, as explained by Lord Phillips MR at [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."

13. Although *Arkin* concerned a funder that contributed a discrete part of the costs of the action, at [43] Lord Phillips MR stated that he saw no reason in principle why the solution suggested by the Court of Appeal should not apply where the funder has contributed the greater part, or all, of the expenses of the action.

14. The *Arkin* cap was the subject of considerable scrutiny in *Davey v Money* (above) at [48] to [111]. In particular, Snowden J had to consider whether the Court of Appeal had prescribed a new rule to be followed in cases involving commercial funders, or whether it had proposed an approach which "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." He concluded (at [89]) that it had done the latter. In this case, Mr Browne QC, for Griffins, did not suggest that the *Arkin* cap was a hard and fast rule. He accepted that the ultimate question in every case is whether in all the circumstances it is just to make the order sought. (In any event, as Mr Potts QC submitted, notwithstanding that there is a pending appeal against the decision in *Davey v Money*, I should follow it unless – which I do not – I considered it was clearly wrongly decided.)

15. In *Davey v Money*, the funder provided funding to the claimant after substantial costs had already been incurred by her. It initially agreed to provide £2.5 million of funding in return for (in addition to repayment of the principal amount) 30% of the committed funding (if the case settled before a certain date) and the greater of 300% of the committed funding or 25% of the winnings if the case was won or settled after commencement of the trial.

16. Snowden J concluded that it was not appropriate to apply the *Arkin* cap, taking into account in particular the following factors:

    i) The funder had approached its involvement throughout as a commercial investment.

    ii) The litigation was sufficiently out of the norm to warrant the making of an indemnity costs award against the claimant. While the funder had not itself directed the way the case was conducted, it had sufficient opportunity to investigate and form a view as to the nature of the claim and the support for the allegations being made before choosing to fund it.

iii) The funder must have known that the claimant was most unlikely to be able to pay any substantial costs awarded against her.

iv) The funder had halved its commitment to funding but retained the same potential share of recoveries, which highlighted the commercial self-interest motivating it.

v) The funder had negotiated to receive a substantial commercial profit which would have taken priority over any compensation payable to the claimant.

17. Snowden J also had regard to the fact that, while in *Arkin* there was likely to have been some correspondence between the amount of the funding and the amount of costs incurred by the other side, that was not so in *Davey v Money*. He said, at [97]

> "…it is not easy to see why the choice of the funder as to the amount of its funding should dictate the amount of costs it should pay to the litigant's opponent if the litigation fails. That is because the amounts provided by a funder to a claimant may have no correlation whatever to the costs which a defendant or defendants are thereby caused to incur in defending themselves."

18. Where the funding arrangement is objectionable on the grounds that it is champertous, then the funder is likely to find itself liable for the opposing party's costs without limit: see *Arkin*, per Lord Phillips MR at [40]. There was no suggestion, in this case however, that the arrangement with Griffins was champertous.

19. The fact that funding is provided in order to enable the claimant to meet an obligation to provide security for costs neither precludes an award of costs against the funder, nor requires the amount of such funding to be excluded from the *Arkin* cap: see *Excalibur Ventures LLC v Texas Keystone Inc (No.2)* [2017] 1 WLR 2221, per Tomlinson LJ at [32] to [41]. Mr Browne submits that it is different, however, where funding from the third party has been used to discharge interlocutory costs orders. Such funding, he submits, should be excluded for the purposes of calculating the level of the *Arkin* cap. I will address this point after having identified the precise uses to which Griffins' funding was put in this case.

The facts

20. Mr Hunt was appointed liquidator of BHUK on 11 December 2012, after the company had already completed the process of administration and liquidation. He sought out his appointment. The action against the Fieldings was commenced on 15 October 2013. By that time, the only material asset in the liquidation was the claim against the Fieldings.

21. Funding was initially provided by BHUK's landlords (being creditors in the liquidation), who also provided an indemnity against adverse costs.

22. In November 2014 the action was struck out on limitation grounds. BHUK was ordered to pay £50,000 on account of the defendants' costs. The landlords refused to

fund the payment of those costs, and Mr Hunt chose not to pursue them under the indemnity.

23. BHUK obtained permission to appeal to the Court of Appeal. On 19 May 2015, Griffins advanced £135,000 for the purposes of (1) paying the £50,000 ordered to be paid on account of the defendants' costs; (2) paying £70,000 security for costs ordered against BHUK in respect of the appeal; and (3) as to the remaining £15,000, funding BHUK's own costs.

24. There is no documentary record of the terms upon which Griffins advanced the funding in May 2015. Mr Hunt's evidence is that the funding was advanced on the basis that Griffins would be repaid the amount of the funding plus an additional amount equal to the amount of the funding. He says that he was concerned that he had received negligent advice in relation to the limitation issue and he did not want the claim to fail as a result of that incorrect advice. While the claim stood struck out it was impossible to obtain commercial litigation funding, or any after-the-event insurance. Accordingly, he says that:

> "Griffins took the decision that it would provide limited funding to BHUK in order to allow an appeal to be brought against the striking out of the claim. My expectation was that most (if not all) of the advance to BHUK would be repaid from a costs order from the Court of Appeal if BHUK was successful. Then, with the case restored and properly pleaded, I would be in a position to approach commercial litigation funders to take the proceedings forward."

25. The funding arrangement was formalised in December 2015 by a resolution passed at a meeting of creditors of BHUK. By this time, however, a further £67,641 had been advanced by Griffins, in order to cover the costs of BHUK's solicitors. The resolution was in the following terms:

> "That the Liquidator be entitled to additional remuneration being the set amount of £202,641."

26. Although the resolution did not expressly say so, it is common ground that it was intended to ensure that Griffins were entitled to recover the funding advanced, and an additional sum in the same amount. This follows from the explanation given in the minutes of the creditors meeting that the "additional remuneration … is in recognition of risk taken by the Liquidator's firm in advancing loans of £202,641 toward the company's legal costs in respect of the summary judgment awarded in favour of Mr and Mrs Fielding". In his report to creditors for the period ending 24 November 2015 Mr Hunt described this as "third party funding".

27. The reason for the resolution framing this entitlement as "additional remuneration" is explained by Mr Hunt as follows:

> "Whilst technically the remuneration would have been paid to me, I would have passed those funds on to Griffins when received."

28. At the same meeting, a further resolution was passed in the following terms:

> "To approve that the Liquidator be remunerated at the rate of 50% of realisations, being 50% of net realisations after costs of the action and litigation against Fielding."

29. Over the course of the next 13 months, Griffins advanced further sums totalling over £25,000 to fund BHUK's costs (although it received a repayment of nearly £7,000 from costs orders made in favour of BHUK).

30. In June 2016 the Court of Appeal allowed BHUK's appeal against the striking out of the action. In January 2017, by order of HHJ Raynor QC, amendments were allowed to the claim.

31. In April 2017, the defendants applied for security for costs. In June 2017, BHUK cross-applied for summary judgment against the defendants. In July 2017, the summary judgment application was dismissed and the defendants were awarded security for costs.

32. Griffins advanced further funding, in the sum of £75,000 (on 8 June 2017) and £175,000 (on 22 August 2017), both in respect of adverse costs awards made in favour of the defendants. Mr Hunt explained that he was forced to ask Griffins to advance the final amount (notwithstanding the funding agreement by this stage agreed with Appledene) because Appledene were not prepared to fund these historic costs liabilities, and the alternative was to allow the claim to be struck out.

33. Following the Supreme Court dismissing the defendants' appeal against the Court of Appeal's decision on the limitation issue, Griffins recovered the £70,000 provided in May 2015 as security for the costs of the appeal.

34. The total amount of funding provided by Griffins was, therefore, £478,265. Of that sum, £300,000 had been used to fund interlocutory costs orders in favour of the defendants and £70,000 had been used to provide security for costs and was subsequently recovered.

35. Due to an oversight on the part of Mr Hunt, no further resolution of creditors was obtained in relation to the additional funding from Griffins until 29 August 2018 when, according to a decision report of that date, "the Liquidator's additional remuneration previously fixed as a set amount of £202,641.00 be replaced with a set amount of £504,502.02". There is no explanation of the discrepancy between this sum and the amount of funding actually provided (approximately £478,000). The consequence was that, in the event that sufficient recoveries were made in the action against the Fieldings, Griffins would have been entitled to recover (according to the figures provided by Mr Browne at the hearing of this application) approximately 2.25x the amount advanced by them.

36. In August 2017, the claimants entered into a funding agreement with Appledene, pursuant to which Appledene has advanced £1.354 million to the claimants for the purposes of the proceedings. It also provided an indemnity to the claimants of £2 million in respect of adverse costs. In return, it was entitled (in summary) to (1) the return of the sums advanced; (2) 40% of the level of the adverse costs indemnity; and

(3) the higher of (a) a 300% uplift on the sums advanced and (b) 30% of the damages recovered.

37. Mr Hunt was joined as a claimant in January 2017, in order to advance claims under s.423 of the Insolvency Act 1986.

Application of the law to the facts

"Pure" or "commercial" funder

38. Mr Potts QC contends that Griffins should be liable, on a joint and several basis with the claimants, for all of the defendants' costs of the action, save only for the costs incurred prior to May 2015 (on the basis that he accepts that Griffins did not cause any of the defendants' costs prior to that date to be incurred by them).

39. He submits that Griffins must be regarded as a commercial funder. They entered into a commercial funding arrangement under which they stood to gain a very substantial benefit. On the basis of recoveries of £21 million (being a sum anticipated at the time of the first creditors' resolution) Griffins would have stood to receive a return on investment of 33x (on the assumption that no funding arrangement had been reached with Appledene) or 14.4x (with Appledene's involvement). This included both the entitlement to liquidator's remuneration at the rate of 50% of net recoveries and the set additional amount approved by creditors. As to the latter sum, this alone represented a return on investment of 2.25x and was payable in priority to any return to creditors. Moreover, he submits, Griffins directed and controlled the litigation throughout (through Mr Hunt).

40. Mr Browne QC, on the other hand, contends that there ought to be no order for costs against Griffins at all, because it is wrong to characterise them as commercial funders. He submits that the defendants have failed to distinguish between the roles of Mr Hunt, the liquidator, and Griffins, the third-party funders. The appointment as liquidator is personal to Mr Hunt. His entitlement to remuneration calculated as 50% of net recoveries in the liquidation is separate from, and not to be considered as, the return to Griffins on their funding investment. Griffins' return is therefore limited to the set additional amount of remuneration (equal to a return of approximately 2.25x).

41. In considering whether Griffins are to be characterised as "mere" or "commercial" funders, the essential question is whether, in all the circumstances, they are to be regarded as having done more than merely facilitate access to justice by BHUK (for the benefit of its creditors) and become a "real party" to the litigation. In my judgment, for the reasons which follow, they are to be characterised as a real party, but not on the basis, or in the manner, submitted by the defendants.

42. First, in agreement with Mr Browne, I consider that the defendants' contention that Griffins stood to achieve a rate of return of between 14x and 33x fails to distinguish properly between Mr Hunt, as liquidator, and Griffins, the firm. It is Mr Hunt alone, and not the firm, that is appointed to the office of liquidator. While it is true that Mr Hunt is one of the two equity partners of Griffins, the firm is a separate entity and, importantly, any liability imposed on the firm falls on the other partners in addition to Mr Hunt.

43. In particular, I consider that, on a proper analysis, Mr Hunt's entitlement to remuneration calculated as 50% of net recoveries in the liquidation was reward for his acting as liquidator, whereas the additional remuneration of 2.25x the funds advanced by Griffins was reward for the funding by Griffins. As Mr Potts pointed out, this was described by Mr Hunt in his report to creditors as "third party funding". Although the creditors approved a resolution describing it as "additional remuneration" for the liquidator, it was made clear by Mr Hunt that this amount would be passed straight on to Griffins. Accordingly I do not think that this description altered the substance of the matter, namely that it was indeed funding from a third party.

44. So far as Mr Hunt's remuneration as liquidator is concerned (being 50% of net recoveries in the liquidation) that covered all of his work as liquidator (and was instead of his remuneration being calculated either by reference to time spent, or as a set amount). In circumstances where there was no realisable asset in the liquidation other than the claim against the Fieldings, and no creditor willing to fund the liquidator's own fees, it is not surprising that Mr Hunt's remuneration was set as a percentage of recoveries. While in a loose sense, it might be said that Mr Hunt was "funding" his own work as liquidator by agreeing to be paid only from recoveries in the event that there were any, Mr Potts did not suggest that this would justify a liquidator being made liable for the costs of another party in litigation brought by the company in liquidation. It was common ground among Counsel that there is no reported case of such an order being made. There was no evidence as to what an appropriate percentage share of recoveries might be, so far as a liquidator's remuneration in an equivalent liquidation is concerned. Mr Potts did not suggest that the level of recovery was *per se* objectionable in that sense.

45. Accordingly, I reject the characterisation of Griffins' involvement as an investment of approximately £478,000 in return for a 50% share of net recoveries in the action on top of the fixed sum of £504,502.02.

46. I also reject, for similar reasons, the contention that Griffins exerted control over the litigation. Since the appointment of liquidator is personal to the individual, it is wrong to characterise that individual's firm as asserting control over the liquidation merely by reason of the fact that the individual is a partner in the firm. There is no evidence to suggest that any of Mr Hunt's partners in fact asserted any control over Mr Hunt as liquidator, or otherwise over the liquidation. Mr Goldfarb's evidence is to the contrary, and no evidence has been adduced to contradict it.

47. It was at one point suggested that Griffins are commercial funders because they have funded litigation in other insolvency proceedings. That was based, however, on a misreading of a paragraph in Mr Hunt's witness statement, where his reference to funding "other proceedings" was intended to be to a different aspect of the liquidation of BHUK. Aside from that, Mr Hunt's unchallenged evidence is that the type of low-level funding which Griffins undertakes in relation to other insolvency estates is limited in nature and common within the profession.

48. I nevertheless also reject Mr Browne's contention that Griffins were akin to a pure funder facilitating access to justice. That characterisation is inapposite in circumstances where: (1) Mr Hunt sought his appointment and commenced the action knowing that the only asset in the liquidation was the claim against the Fieldings; (2) at the time of seeking funding from Griffins, there was no further funding from the

creditors, for whose benefit the litigation was ostensibly being brought; (3) Mr Hunt already had a vested interest in the litigation succeeding, because the only source of funding for his own fees would be the recoveries in the action; (4) that vested interest was substantially increased by the terms of Mr Hunt's entitlement to remuneration as liquidator; (5) while, as I have already noted, a distinction is properly to be drawn between Mr Hunt and Griffins, the fact remained that the firm stood to gain financially from Mr Hunt's remuneration; and (6) in addition, Griffins negotiated an uplift of 2.25 times the funding advanced by them.

49. I accept Mr Browne's submission that the uplift of 2.25x was justified given that there was no certainty as to repayment of the funds advanced and no interest payable, but that does not detract in my judgment from the conclusion, reached in light of all the factors mentioned in the previous paragraph, that Griffins had a sufficient interest in the proceedings to warrant characterising them as a real party for the purposes of the third-party costs jurisdiction.

Limitation by reference to the period of funding

50. Mr Potts submits that there should be no limit in terms of the time period during which Griffins funded the claimants, because (a) they maintained thereafter an interest in the upside and (b) but for their funding up until August 2017 there would have been no action to be continued thereafter. Had Griffins wished to avoid a continuing liability for adverse costs, they should have procured that their funding was repaid at the point they ceased providing funding.

51. I reject that submission. The essential question (as demonstrated by the authorities I have cited above) is to what extent the costs incurred by the defendants were caused by Griffins' funding of BHUK. The fact that Griffins maintained after August 2017 their potential upside, in the event that the proceedings – now funded by others – succeeded did not cause either the continuation of the proceedings or the incurring of any further costs by the defendants. While it is true that the proceedings could not have continued after August 2017 if they had ceased to exist prior to that, and that Griffins' funding had ensured they remained in existence up to that point, I do not accept that a "but for" test of causation is sufficient to fix a funder with liability. The predominant cause of the action continuing beyond August 2017 was the funding by Appledene and it is to Appledene that the defendants should look for the costs incurred in that period. If the defendants are still out of pocket in respect of the costs incurred after August 2017, that is a result of the settlement they have reached with Appledene, not the result of Griffins' funding during the earlier period.

Limitation by reference to the Arkin Cap

52. Before considering whether it is appropriate to apply the *Arkin* cap, I first need to determine whether the cap includes amounts advanced by Griffins to fund the payment of costs ordered in favour of the defendants.

53. Mr Browne submits that it should not. He relies on the reasoning of Tomlinson LJ in *Excalibur*, in that passage of his judgment in which he held that the *Arkin* cap *includes* amounts used to fund security for costs. In my judgment, however, Tomlinson LJ's reasoning supports the conclusion that (at least on the facts of this case) the cap should include the amounts advanced in order to pay costs awards in

favour of the defendants. The core of his reasoning is at [39] to [40] of his judgment. Having noted that the rationale for imposing costs liability upon a non-party is that he has funded proceedings substantially for his own financial benefit and has thus become a "real party", he said that he saw:

> "…no basis upon which a funder who advances money to enable security for costs to be provided by a litigant should be treated any differently from a funder who advances money to enable that litigant to meet the fees of its own lawyers or expert witnesses. 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. I do not understand why contribution to different categories of the costs of pursuing the litigation should attract different regimes. All the sums advanced are used in pursuit of the common enterprise and for the benefit of all of the funders."

54. At [40] he analysed the position as follows:

> "The proper analysis is that the funders have enabled Excalibur to discharge, pro tanto, its own costs liability to the defendants. The funders gave to Excalibur the use of the relevant funds for a purpose not essentially different from payment of Excalibur's own costs. It was simply a contribution to the costs which Excalibur had to meet in order to be able to pursue the action, notwithstanding that the money advanced to enable security to be provided was advanced for the specific purpose of meeting one particular cost faced by Excalibur, the cost of providing security for the defendants' costs when ordered so to do by the court. It was as much an investment in the litigation as was the amount advanced by Psari and Mr Lemos to enable Excalibur to pay its own lawyers."

55. In the present case, as I have noted above, I consider that payment of the costs awards in favour of the defendants was necessary in order to enable the action to continue. Mr Hunt expressly accepts that this is the case, in relation to the costs awards funded by Griffins in August 2017 (see paragraph 32 above). In those circumstances, I consider that the logic of Tomlinson LJ's reasoning extends to the payment of the costs awards in this case.

56. Mr Potts rejected any application of the *Arkin* cap. His overall submission is that in all the circumstances of this case justice requires there to be no cap. Every case must be considered on its own facts, but he points to the following factors (which were among those that persuaded Snowden J not to apply the cap in *Davey v Money*): (1) the enormously high rate of return obtained by Griffins (much greater than that obtained by Appledene or the amounts obtained by commercial funders in other reported cases); (2) the fact that Griffins knew from the outset that BHUK had no other means of satisfying an adverse costs awards; and (3) at least part of Griffins' return took priority over the interests of creditors.

57. For the reasons which I have set out above, I do not think it is fair to characterise Griffins as having bargained for a potential (in the event of success) enormously high rate of return on their investment. Although they are to be characterised as a "commercial" rather than a "pure" funder, the return on investment for which they bargained was a fair reflection of the credit risk they took in advancing funds on an interest-free basis.

58. The fact that Griffins knew from the outset that BHUK had no other means of satisfying an adverse costs order is a relevant factor, but far from determinative. It serves to highlight the tension which lies at the heart of the Court of Appeal's reasoning in *Arkin*, between the principle that costs should follow the event (which is practically engaged in the context of costs orders against funders precisely where the party to the litigation is unable to pay) and the concern not to discourage funding which facilitates access to justice.

59. I remind myself that the essential question is whether it is just in all the circumstances to make the order. This applies equally to the decision to make an order at all and to the decision whether it should be subject to a cap.

60. I have concluded that in all the circumstances of this case the just course is to apply a cap on Griffins' liability equal to the amount of funding it contributed, namely in the amount of £478,265. I reach this conclusion on the basis of the following considerations:

    i) The funding was for the limited purpose of getting the action (at that point struck out and inadequately pleaded) back on track so that funding could be obtained from a professional funder.

    ii) To the extent that the funding was advanced to enable the appeals to the Court of Appeal and Supreme Court to be pursued, the claimants were successful.

    iii) While I have concluded that Griffins were a real party, I have not accepted the defendants' claim that they did so on the basis of the enormous levels of potential return on investment. The level of fixed return (on an interest-free basis) was reasonable given the credit risk being assumed.

    iv) Moreover, notwithstanding the liquidator's entitlement to 50% of net recoveries, Griffins' funding stood also to benefit the creditors of the insolvency estate.

    v) While I have rejected the contention that the cap should be reduced by the extent to which the funding was used to pay costs awards in favour of the defendants, I nevertheless think that this is a factor – on the facts of this case – to be taken into account in deciding whether there should be a cap. That is principally because once the amount used to fund costs awards, and security for costs, is put to one side, Griffins expended in the region of only £100,000 on the claimants' costs of pursuing the action. While accepting that a funder cannot assume that the opposing party's costs will be the same as those of the party it is funding (as Snowden J pointed out in *Davey v Money*), the discrepancy in the present case is enormous: according to figures contained in correspondence from the defendants' solicitors, the costs incurred by them

during the period during which the defendants were funded by Griffins are in excess of £1 million (including a success fee). That is more than ten times the amount of the claimants' costs funded by Griffins.

vi) I consider that the just solution, taking all of the above into account and striking a balance between the entitlement of the defendants, as the successful party, to be paid their costs and the risk of discouraging funding which facilitates access to justice, is to order Griffins to pay costs limited to the amount of their funding.

Costs of first consequential hearing

61. The order of 9 August 2019, which was drawn up by the parties, makes no provision for the costs of the first consequential hearing. Mr Parker contends that in those circumstances it is too late to make any order as to the costs of that hearing. He relies on CPR 44.10(1) which provides that "where the court makes an order which does not mention costs, [subject to presently immaterial provisions] the general rule is that no party is entitled … to costs ... in relation to that order." Neither counsel was able to refer to any authority as to whether or not this was to be interpreted as an absolute rule subject only to the exceptions contained in it. As a matter of principle, I consider that it does not impose an absolute rule, but that the general rule may be departed from in appropriate circumstances.

62. Mr Potts candidly accepted that it had been his understanding at the time of the making of the order of 9 August 2019 that the provision in it for the defendants' "costs of the action" to be paid by BHUK was intended to cover the costs of the first consequential hearing.

63. In these circumstances, and in particular when it was always intended that there would be a second consequential hearing to determine further issues as to costs, I consider it is open to me to consider afresh what order as to costs would be appropriate in respect of the hearing on 31 July 2019.

64. Four matters were determined at that hearing. First, I rejected the claimants' application that there should be a percentage reduction (to 55%) as regards the defendants' costs entitlement, to reflect aspects on which the claimants had been successful. Second, I rejected the defendants' application that costs should be awarded on the indemnity basis. Third, I concluded that the rate of interest to be applied to the costs should be 3% above base (which was significantly closer to the rate contended for by the defendants than that contended for by the claimants). Fourth, I refused the claimants' application for permission to appeal.

65. Mr Potts contends that the defendants were substantially the successful party, and so should be entitled to all of their costs. Mr Parker contends there should be no order for costs, on the basis that the result was substantially a draw (particularly once the permission to appeal aspect is excluded, in respect of which, it being a matter as between the claimants and the court, the defendants should not be entitled to costs).

66. The issue which took up most of the time was costs and I consider that the balance of the argument was equally split between the two applications. Mr Potts contends that insofar as there were aspects of the argument that were common to both applications,

the defendants should have the costs of those common aspects because they would have to have been incurred anyway in relation to the claimants' application for a reduction in the costs, on which the defendants were successful. I do not accept this, since the same can be said in the opposite direction. As for interest on costs, this issue occupied far less time and neither party was a clear winner.

67. Accordingly, I consider the fair outcome to be no order as to costs so far as the costs issues are concerned.

68. In relation to the application for permission to appeal, I accept that the defendants were entitled to be present and to make submissions. This was an important issue for them. On the other hand, it would be wrong to deprive the claimants of their costs if they were to be ultimately successful on an appeal. Accordingly, I will order that the costs of the application for permission to appeal will follow the outcome of the appeal (or, if the Court of Appeal refuses permission, of the application to the Court of Appeal for permission).