Safety first

Georgina Squire summarises a recent caselaw with potential impact on ATE funding

Georgina Squire is a partner at Rosling King LLP

'The financial standing and resources of the claimants and their third-party funder were scrutinised closely by the court in this case and it should be expected in future cases.'

In *Bailey v GlaxoSmithKline UK Ltd* [2017] the defendant applied to the court for security for costs from the claimants' litigation funder, Managed Legal Solutions Ltd (MLS), in order to ensure that MLS could meet its costs (estimated at approximately £6.8m) if the claim failed. The claimants were able to rely upon a policy of ATE insurance which provided £750,000 of cover as part of the mix. However, the defendant contended that MLS may be unable to meet this potential liability on the basis that it was balance sheet insolvent; its liquidity depended upon a sole shareholder; it had no capital and would need to borrow to provide any security ordered; and it was not a member of the Association of Litigation Funders (the voluntary regulatory body).

The *Arkin* cap

In the key decision of *Arkin v Bochard Lines Ltd (Nos 2 and 3)* [2005], the Court of Appeal decided that it was:

> ... 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.

However, the court tempered that view, stating that:

> ... a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for costs of the opposing party to the extent of the funding provided.

This limit has subsequently been referred to as the '*Arkin* cap'.

Argument

MLS argued that the ATE policy and cover would be sufficient security for the defendant's recoverable costs. In the alternative, they contended that the amount of any security ordered should be limited by the *Arkin* cap to the funding facility available to the claimants, in the sum of £1.2m, plus a cross-undertaking as to damages. The basis for the latter requirement was said to be that MLS would need to borrow funds to provide security and it should therefore be compensated for those borrowing costs if the security proved to have been unnecessary or excessive.

The defendant argued that *Arkin* was not a case concerning the quantum of security and was therefore not binding. Further, the defendant contended that applying the *Arkin* cap would give rise to substantial injustice in view of the discrepancy between the potential costs of the action and the financial position of the claimants.

Decision

The court scrutinised the financial position of MLS and concluded that:

> ... it follows that whatever contractual arrangement there is between the Claimants and MLS, it is an arrangement with an insolvent company that depends for its funding on another insolvent company which itself is kept afloat by (apparently) the goodwill of [the sole shareholder].

Arkin v Bochard Lines Ltd & ors (Nos 2 and 3) [2005] EWCA Civ 655

Bailey & ors v GlaxoSmithKline UK Ltd [2017] EWHC 3195 (QB)

Excalibur Ventures LLC v Texas Keystone Inc & ors [2016] EWCA Civ 1144

Further, the court drew attention to the failure by the claimants to comply with a previous adverse costs order on time. On balance, the court found there was a:

> ... justifiable concern... about the intrinsic stability of the financial arrangements made for funding [the] litigation.

Foskett J decided that the application of the *Arkin* cap would fetter the general discretion of the court when deciding matters in relation to costs. He pointed out that the Court of Appeal had, in the judgment in *Arkin*, alluded to the possibility of removing the cap if it was inappropriate. The court concluded that the cap was only one factor to be considered in the context of a security-for-costs application.

In assessing the quantum of the security to be provided, Foskett J took a broad-brush approach and took 66% of the £6.8m claimed by the defendant to arrive at the working figure of approximately £4.5m. He ordered security for half of the working figure, ie £2.25m subject to any adjustment in light of the ATE policy. It was held such an approach would do 'broad justice' to the competing considerations present in the case. Finally, Foskett J considered the ATE policy and deducted £500,000, being two thirds of the policy from the security ordered. He explained that the deduction would reflect the risk that the policy could be avoided at some stage. This calculation resulted in an order that MLS must provide £1.75m by way of security for costs plus a cross-undertaking as to damages.

The courts will take a broad approach when exercising their discretion in relation to security for costs.

Comment

The courts will take a broad approach when exercising their discretion in relation to security for costs. The financial standing and resources of the claimants and their third-party funder were scrutinised closely by the court in this case and it should be expected in future cases. It may be that the absence of membership for MLS to the Association of Litigation Funders counted against it in the final analysis (as it seemed to in the recent decision in *Excalibur Ventures LLC v Texas Keystone Inc* [2016]).

At least in the context of security for costs, the *Arkin* cap, or the amount invested in the case by a funder, is only a factor to be considered by the court, which will try to ensure that the ultimate discretion to award costs is not affected at the end of the case. ■