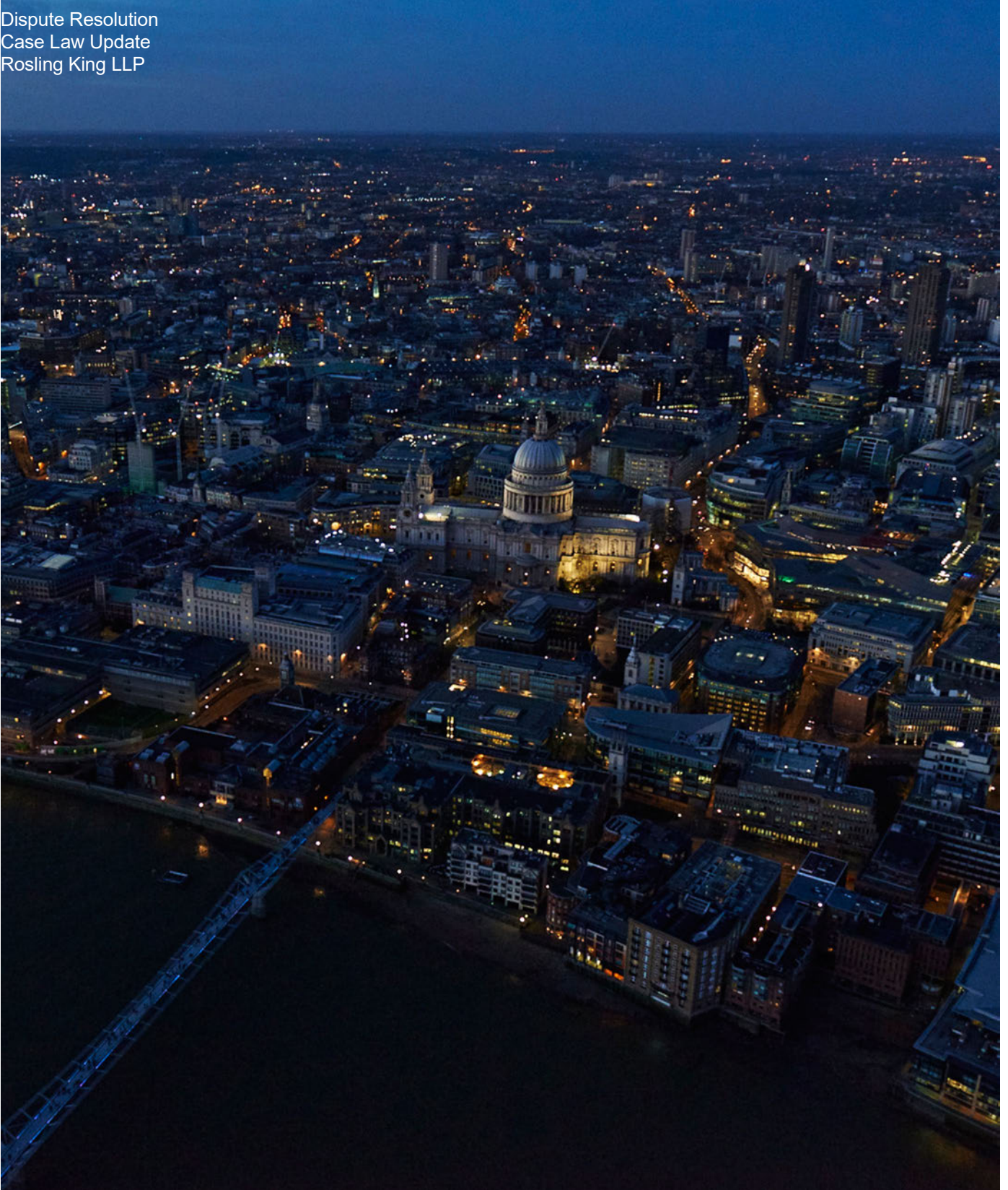


Dispute Resolution  
Case Law Update  
Rosling King LLP



### Background

The Second Claimant (“**Mr Hunt**”) was appointed liquidator of the First Claimant (“**BHUK**”) on 11 December 2012. The action against the Defendant was commenced on 15 October 2013. By this time BHUK had already completed the process of administration and liquidation and the only material asset in the liquidation was the claim against the Defendant.

BHUK’s creditors initially funded the claim, however the claim was struck out on limitation grounds and BHUK was ordered to pay £50,000 on account of the Defendant’s costs. This decision was appealed by BHUK and by end of 2015 the firm in which Mr Hunt was a partner (“**Griffin**”) advanced £202,641 to BHUK for the purposes of funding the claim. Griffin advanced this funding on the basis that it would be repaid the amount of the funding plus an additional amount equal to the amount of the funding. In the report to the creditors Mr Hunt described this as “third party funding”. The funding arrangement was formalised by a resolution passed at a meeting of creditors of BHUK in the following terms: “That the Liquidator be entitled to additional remuneration being the set amount of £202,641.”

Over the course of the next 13 months, Griffin advanced further sums totalling over £25,000 to fund BHUK’s costs and in June 2016 the Court of Appeal allowed BHUK’s appeal against the striking out of the action. In 2017 the Defendants applied for security for costs and BHUK cross-applied for summary judgment against the Defendants. The summary judgment application was dismissed, and the Defendants were awarded security for costs. Griffin advanced further funding, in the sum of £250,000 in respect of adverse costs awards made in favour of the Defendants. The total amount of funding provided by Griffin was, therefore, £478,641 of which £70,000 had been used to provide security for costs and was subsequently returned.

No further resolution of creditors was obtained in relation to the additional funding from Griffin until August 2018 when, the creditors decided, “the Liquidator’s additional remuneration previously fixed at a set amount of £202,641.00 be replaced with a set amount of £504,502.02”. There was no explanation as to 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 Defendants, Griffin would have been entitled to recover approximately 2.25 times the amount advanced by them.

### The Decision

The Court made non-party costs orders against Griffin, limited to the amount of its funding. Considering the circumstances of the case, Mr Justice Zacaroli made this order considering the following factors:

- 1 Whether Griffin was a real party or pure funder to the litigation for the purposes of non-party costs order;
- 2 Limitation to non-party costs order by reference to the period of funding; and
- 3 Limitation by reference to Arkin cap.

Zacaroli J said that Griffin was not a pure funder facilitating BHUK access to justice on the basis that:

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- 1 Mr Hunt commenced the action knowing that the only asset in the liquidation was the claim against the Defendants;
- 2 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;
- 3 Griffin stood to gain financially from Mr Hunt's remuneration as at the time of seeking funding from Griffin, there was no further funding from the creditors, for whose benefit the litigation was mainly being brought;
- 4 Griffin negotiated an uplift of 2.25 times the funding it advanced concluding that it had a sufficient interest in the proceedings.

These factors were enough to regard Griffin as a "real party" to the litigation having done more than merely facilitate access to justice by BHUK.

The final consideration by the Zacaroli J in making the non-party costs order was the Arkin cap. Zacaroli J concluded that in all the circumstances of the case, the just course, 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, was to apply a cap on Griffin's liability equal to the amount of funding it contributed, namely £478,265.

#### Commentary

The Court's decision is a rare example of the application of "but for" test and the Arkin cap to a non-party costs order.

This judgment confirms that insolvency practitioners risk being pursued for non-party costs order if they provide commercial funding for claims brought by parties in liquidation. The funding firm should not have a vested interest in the proceedings and should merely seek to facilitate access to justice for the insolvent company's creditors. It seems likely that a more arms' length and better documented approach to providing such funding (and the terms of repayment) would reduce such firms' likelihood of being found to be a "real party" to the litigation..

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.