SIX PUMP COURT

LITIGATION FUNDING: A NEW REALITY FOR ENGLAND & WALES, AND FOR IRELAND POST-*CHAPELGATE* (in 2000 words)

The new reality for litigation funders in the courts in England & Wales is that they must be prepared to pay a defendant's costs in full if the funded claimant loses. Paradoxically, perhaps, the reasons which judges have now articulated to support this outcome may also help open the door to the introduction of litigation funding into Ireland.

This article, then, is intended mainly to summarise the position of funders in the courts of England & Wales post-*Chapelgate* (25 February 2020), a case which has unequivocally lifted the automatic protection of the *Arkin* 'cap' on the recoverability of defendant's costs. The article also seeks to say something about grounds for introducing litigation funding in Ireland (notwithstanding strong Supreme Court objections to date).

England & Wales and funders' potential liability for full costs

The key background relevant to the question of costs recovery from a funder is (i) the principle that a litigant is ordinarily entitled to make a claim even though impecunious, (ii) the 'cost shifting' rule applies (loser pays), (iii) the courts of England & Wales (as in Ireland) have a very wide discretionary power to make an award of "the costs of and incidental to" any civil proceedings (costs against a non-party).

When funding first arrived in the UK, it was welcomed as a means of providing access to the courts to claimants who might not otherwise be able to prosecute their claims. (Lord Bingham used to make a point of referring to "access to the courts" rather than "access to justice".)

The factual bases for the claims which were first considered by the courts in London were fortuitous and they helped to protect funders from full costs orders. Now that a number of claims with much more speculative aims have reached their conclusion, the same courts have started to see funders as a resource to meet the costs of the successful defendants. In that sense, funders fulfil a wider role in satisfying the obligations of a balanced system of justice. They are not just a means of securing access to the courts.

As to the key authorities which apply in the context of litigation funding and the recovery of costs, the first is *Factortame Ltd (Costs) (No.2)* (2002). This case is taken to have established the proposition that a litigation funding agreement is not in principle champertous.

The facts of that case worked to the advantage of funding industry.

The claimants were members of the Anglo-Spanish fishing fleet which had effectively been excluded from UK waters by the actions of the State. The State had made changes to the Merchant Shipping Act which excluded them from the British Registry of Shipping. The

claimants' finances had fallen into a parlous state whilst the issue was being resolved in Luxembourg.

The accountants instructed to assist the claimants realised that if they did not enter into some arrangement for the preparation of papers to go to an independent expert (in exchange for 8% of the damages), then they would not recoup the £200,000 in fees already outstanding. It was this agreement which was held not to have been contrary to public policy and champertous. The percentage was modest, the claimant had full control of the litigation, the expert remained independent, the claimants were impecunious and there had been a serious breach of EU law which had been fought hard by the State.

The second case is *Dymocks* (2004). In this case the Privy Council listed the main principles relevant to an order of costs against a non-party. These include the following:

"(3) Where … 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".

The third case is *Arkin* itself (2005). That case concerned a litigation funder which had provided limited funding on a commercial basis in an unsuccessful claim. The defendant's challenge was not made on the basis that the agreement was champertous, but that, if properly applied, the principles set out in *Dymocks* (i.e. the third party costs order principles) should have led to the result that the defendant recouped its costs from the funder.

The Court of Appeal in *Arkin* agreed in principle with the defendant's challenge, but applied what has been styled the *Arkin* 'cap'. The Court of Appeal sought to achieve what it considered was a balanced and just result, reasoning that the extent of the funders' exposure to adverse costs should be limited to the amount of funding which the funder had made available. At this stage in the development of the business, the court was anxious not to deter funders from providing funding for fear of having to pay 'disproportionate costs'.

Since *Arkin,* there have been a number of calamitous funded claims, not the least of these being *Excalibur Ventures* (2016) (in which funders provided funding for security for costs) and now *Chapelgate*. In both of these claims the courts made awards of indemnity costs since they were 'significantly out of the norm'. The funders were required to pay up.

In *Chapelgate* the funder sought, in argument, to elevate the *Arkin* cap to the status of "binding authority" (rather than an "approach which might commend itself"). This did not find favour either with the trial judge or with the Court of Appeal.

Significantly, the trial judge, reflecting on the risk identified by the Court of Appeal in *Arkin* (that funders could be deterred from providing funding if they were at risk of paying costs), said that:

"I consider that there is an obvious risk of injustice *in the other direction* if … defendants are forced to incur significant costs in defending themselves, but are limited to recovering only a proportion of those costs".

There is an obverse side to the overarching principle of access to justice for a claimant, and this is that there could be a chilling effect on a defendant's own inclination to defend itself, should a defendant have reason to suppose that the full costs of the defence might never be recouped.

A similar position was adopted in *Excalibur Ventures*. In both cases the judges considered that significant factors making the funders liable were the following: (i) the commercial nature of the speculations, (ii) the way in which they were prosecuted (without any restraint by funders) and (iii) the significant potential benefit to the funders placed at the top of the potential recovery tree. (See further the Summary below).

Ireland

Some lessons can surely be used from these cases in the Irish context. This is said with a considerable degree of diffidence by the writer, given all the consideration which has gone into the possibility of litigation funding both before and since the judgments of the Supreme Court first in *Persona* (2017) and then in *SPV Osus Limited* (2018).

First, when it comes to the factual circumstances, *Persona* itself was an unfortunate case on which to found a principle. Seeking funding in a claim against the State was bound to come up against the firm objection that the State had taken the decision to keep champerty as a criminal offence when making the Statute Law Revision Act 2007. The State had chosen only ten or so years beforehand to retain the Maintenance and Embracery Act 1634.

Secondly, *Excalibur Ventures* and *Chapelgate* in England & Wales have demonstrated very clearly the substantial benefits to defendants from the involvement of funders, examining the costs position from both sides and not just that from that of a claimant requiring assistance. Whilst funders can enable a party's access to court, these two cases show that funders must now expect to pay out if the funded party fails. They are caught by what is recognised under principle (3) in *Dymocks* (as set out above). Ordinarily, funders stand significantly to benefit from the litigation which they fund, the quid pro quo being a degree of confidence to the advantage of defendants as well as to claimants.

It is surely better that a defendant should have proper recourse to a solvent commercial funder than that it runs the risk of losing to an insolvent claimant / plaintiff. Moreover, the judges in *Excalibur Ventures* and *Chapelgate* clearly thought that the funders should have been in a position to have provided some restraint on the runaway litigation which they were funding. 'Access to justice' carries with it concomitant obligations to successful defendants.

Thirdly, the lessons to be drawn from recent cases in England & Wales could be used to good effect in any constitutional challenge.

Denham CJ in *Persona* commented on the place of Ireland on the international stage and speculated about the various means which might be employed to assist plaintiffs (as indeed have other judges). On first blush, the judgment of Denham CJ can read as though she intended positively to encourage a constitutional challenge.

There is plenty in the jurisprudence of both Strasbourg (under Art.6, ECHR) and Luxembourg (under Art.47 of the Charter) to suggest how a constitutional claim might be fashioned. The potential benefits to successful defendants and the potential restraints which

might be brought about by litigation funders, could surely form part of a challenge based on the disproportionate effects of the 17th century statute.

It was said by judges in both *Persona* and in *SPV Osus Ltd* that it is for the legislature to resolve the position in relation to champerty, given the various policy issues and the separation of powers (although Clarke CJ has reiterated that there may come stage when the courts have no option but to intervene).

The lower courts in both *Thema International Fund* (2011) and *Greenclean Waste Management Limited* (2014) showed that judges in Ireland are fully prepared to make robust and practical case management orders ancillary to funding. Hogan J in *Greenclean Waste* provided a solid ground for ATE insurance (without any legislative provision at all).

Importantly, therefore, the lower courts in Ireland have shown themselves willing to establish conditions which would secure the advantages of litigation funding for all parties. In England & Wales there is no legislative basis for litigation funding agreements of any sort, the critical move having been the abrogation of champerty as a criminal offence by the Criminal Law 1967. Indeed the courts of England & Wales are inclined disparagingly to dismiss disputes about any funding arrangements as 'satellite' litigation.

It is difficult to see why anything other than the removal of the statute is required to move the position in Ireland forward (should the courts conclude that litigation funding is in keeping with the proper administration of justice). Further, any principles or rules then laid down by the courts to provide safeguards, would inevitably be much more adaptable to individual circumstances than equivalent legislative provisions, whilst at the same time being sufficiently robust.

These are issues primarily for the administration of justice and are therefore the preserve of the courts and not the legislature. *Excalibur Ventures* and *Chapelgate* show that, with the guidance of the courts (and on a case-by-case basis as necessary), litigation funding can protect both defendants and plaintiffs.

<u>Summary on the issues of principle as they apply in England & Wales</u>

The headlines from *Chapelgate* are as follows:

(1) The *Arkin* 'cap' is an approach which was recommended by the Court of Appeal and not a rule intended to restrict the payment of costs by funders in all circumstances;
(2) Factors relevant to the payment of more than the 'cap' are the following - (i) the commercial nature of the funding, (ii) the opportunity on the part of the funder to investigate the merits and to restrain any excesses in the litigation, (iii) the extent to which the funder hoped to be insulated from any order to pay costs, (iv) the impecuniosity of the claimant, (v) the extent of the funder's commitment when compared with the extent of its potential return, (vi) the benefit in terms of access to justice when compared with the commercial advantage to the funder, (vii) whether or not the funder had the primary (i.e. first) interest when compared with the funded party, (viii) whether or not the successful party had the benefit of ATE insurance taken out by the claimant;
(3) The potential for full exposure to adverse costs is not likely to stifle the funding market.

Authorities

R. (on the application of Factortame Ltd) v. Secretary of State for Transport, Local Government and the Regions (Costs: Champertous Agreement) [2002] EWCA Civ 932, [2003] Q.B. 381

Dymocks Franchise Systems (NSW) Pty Ltd v. Todd [UKPC 39, [2004] 1 WLR 2807

Arkin v. Borchard Lines Ltd (Nos.2 & 3) [2005] EWCA Civ 655, [2005] 1 WLR

Thema International Fund PLC v. HSBC Institutional Trust Services [Ireland] Ltd [2011] IEHC 357, [2011] 3 IR 654

Greenclean Waste Management Ltd v Leahy p/a Maurice Leahy & Co. Solicitors (No.2) [2014] IEHC 314, 5 June 2014

Excalibur Ventures llc v. Texas Keystone Inc & Ors (No 2) (Association of Litigation Funders of England and Wales intervening) [2016] EWCA Civ 1144, [2017] 1 W.L.R. 2221

Persona Digital Telephone Ltd v. Minister for Public Enterprise [2017] IESC 27

SPV Osus Limited v. HSBS Limited & Ors [2018] IESC 44

Chapelgate Credit Opportunity Master Fund Limited v. Money & Ors [2020] EWCA Civ 246

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