

COURT OF APPEAL CONSIDERS COSTS ORDERS IN THIRD PARTY FUNDING CASE

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

Introduction

On 18 November 2016, the Court of Appeal handed down its decision in *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144 in which it dismissed an appeal against the first instance Judge's finding that litigation funders were to be liable for their contributions to the funding in addition to their contributions provided for security for costs.

Background

The present appeal arose out of proceedings between Excalibur Ventures LLC ("Excalibur"), a Delaware corporation, and Texas Keystone Inc., Gulf Keystone Petroleum Limited and other Gulf Keystone companies. Excalibur claimed to be entitled to an interest in a number of oil fields in Kurdistan and sought specific performance of a "Collaboration Agreement" pursuant to which Excalibur claimed its entitlement to an interest in the fields or to damages which, as finally put, were said to be of the order of US\$1.6 billion.

The action could not have been pursued without third party funding. The claim was funded by various groups of funders, none of which were members of the Association of Litigation Funders of England and Wales (a company established in 2011 by the Civil Justice Council of England and Wales). Only one of the funders had any experience of funding litigation, and this was its first experience of litigation in England and Wales. Between November 2010 and March 2013 the funders advanced £31.75 million to enable the claim to be pursued to the conclusion of trial.

The reserved judgment was handed down by the trial judge, Christopher Clarke LJ (as he had become by the date of formal hand-down) on 13 December 2013. The claim failed on every point. In a costs judgment, delivered on 13 December 2013, the Judge described the claim as "speculative and opportunistic", "based on no sound foundation in fact or law", and "met with a resounding, indeed catastrophic, defeat". The claims were "an elaborate and artificial construct" and "replete with defects, illogicalities and inherent improbabilities".

Subsequently the Judge heard three days of argument on whether costs orders should be made against the funders, and if so, on what basis. The Judge ordered (*Excalibur Ventures LLC v Texas Keystone Inc* [2014] EWHC 3436 (Comm)) that each of the litigation funders was to be liable for their contributions to the funding in addition to their contributions provided for security for costs. Liability was assessed from the date that each had begun to provide funding.

The funders appealed against this decision.

Decision

The Court of Appeal dismissed the appeal.

Lord Justice Tomlinson (with whom Lady Justice Gloster and Lord Justice David Richards agreed) delivered the leading judgment.

At the outset, Lord Justice Tomlinson differentiated between “pure funding” (which was in the public interest provided that its essential motivation was to enable the funded party to litigate what the funders perceived to be a genuine case) and “commercial funding” (while the facilitation of access to justice is an incidental by-product of commercial funding, that was not the essential motivation of the commercial funder who was an investor who hoped to make a return on his investment).

The first instance Judge had directed himself separately and correctly as to the principles applicable when exercising the court's wide discretion under section 51(3) of the Senior Courts Act 1981 to consider making a costs order against a non-party and when exercising its equally wide discretion under CPR Part 44 to consider on what basis, if any, a costs order should be made.

Lord Justice Tomlinson observed that the funders’ argument was, in essence, that it was not appropriate to direct them to pay costs on the indemnity basis if they have themselves been guilty of no discreditable conduct or conduct which can be criticised. This argument was flawed as the conduct of the parties was only one factor to be taken into account in the overall evaluation; it assumed that the funder was responsible only for his own conduct; looking at it only from the perspective of the funder ignored the character of the action which the funder has funded and its effect on the Defendants.

Lord Justice Tomlinson particularly agreed with the Judge’s general approach – 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. It did not constitute an irrebuttable presumption, but was an outcome that would ordinarily be just and equitable.

Concluding observations

As Lord Justice Tomlinson observed in the first sentence of his judgment, “*Third party funding is a feature of modern litigation.*” Parties engaged, or prospectively engaged, in litigation or arbitration involving third party funders should be aware of the implications of this decision, and that of *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) (15 September 2016) in which the English Commercial Court declined to set aside an arbitration award in which an arbitrator awarded third party funder costs to the successful party in ICC proceedings.

4th December 2016