Security for costs ordered against a funder in excess of the *Arkin* cap: *Sandra Bailey & Others v GlaxoSmithKline UK Limited* [2017] EWHC 3195 (QB)

By Malcolm Sheehan QC, Henry Warwick and Reanne MacKenzie

Summary

1. The High Court (Foskett J) has today given an important judgment awarding a defendant security for costs against a third-party litigation funder in a sum greater than the amount committed by the funder to fund the litigation. The award was accordingly in excess of the cap on the adverse costs liability of professional funders applied in *Arkin v Borchard Lines (Nos 2 and 3)* [2005] 1 WLR 3055 (the '*Arkin* cap').

2. This is the first time the Court has had to consider the extent to which the *Arkin* cap should be applied to limit the sum a funder can be ordered to give by way of security for costs pursuant to CPR r.25.14.

3. The Court found that whether the *Arkin* cap should ultimately be applied is properly to be determined at the conclusion of the case. At the security for costs stage, the *Arkin* cap is only one of the factors to be taken into account in the exercise of the court's broad discretion. The Court also accepted, on the facts of the case, that the *Arkin* cap may not ultimately be applied and was willing to order security in a sum in excess of that figure to do justice in the circumstances.

The claim and its procedural history

4. This is the latest in a series of judgments relating to the case management of the Seroxat Group Litigation, in which a number of Claimants allege a prescription antidepressant to be defective within the meaning of the Consumer Protection Act 1987.

5. In 2010, the original Claimants had their public funding certificate revoked and a considerable number of claims were discontinued. The action was revivified in August 2015 by a residual number of Claimants with the support of third-party litigation funding. The continuing Claimants are also said to have the benefit of ATE insurance responsive to adverse generic costs of £750,000.

The issue

6. It was common ground between the parties that: -

    a. The Defendant had a right to apply for security against the third-party funder;

    b. The court had jurisdiction to make an order under CPR r.25.14 and it was likely that such an order would be made;

    c. The Claimants' litigation funder, Managed Legal Solutions Limited ('MLS') was not a member of the Association of Litigation Funders ('ALF'); and

    d. MLS was balance sheet insolvent and reliant upon a shareholder for its liquidity. Further, it had no capital and would need to borrow to provide security.

7. The key issue arising upon the application was therefore the appropriate quantum of any security to be ordered and whether, in particular, security could be ordered in a sum in excess of the *Arkin* cap.

The Parties' Submissions

8. MLS made three primary submissions, each in the alternative: -

    a. The ATE cover, combined with an appraisal of the Defendant's recoverable costs, would be sufficient security, so no order as to security should be made;

    b. Any amount ordered to be given as security should be limited to the amount provided as funding: the *Arkin* cap would apply after trial and the court should not order security in excess of the amount that the litigation funder would ultimately be ordered to pay;

    c. In the event that the *Arkin* cap was held not to apply, the security ordered should be less than that sought by the Defendant, and should only relate to future costs.

9. In summary, the Defendant submitted that: -

    a. The circumstances of the case justified the grant, in exercise of the Court's broad discretion under CPR r.25.14, of security for its costs up to trial;

    b. In the absence of an adequate assurance that the Claimants' ATE insurance would not be avoided, it should be disregarded, alternatively given limited weight;

    c. *Arkin* was not a case concerning the quantum of security to be ordered pursuant to CPR 25.14, was not binding upon the Court, and should not be followed in the circumstances of the case; and

    d. Applying *Arkin* would give rise to a substantial injustice in this case.

Discretion under CPR 25.14

10. As a starting point, the Court accepted that it had a broad discretion under CPR 25.14 whether to order security for costs against a funder, and in what sum. The Court referred to and approved the factors identified in the judgment of Mr Justice Hildyard in *The RBS Rights Issue Litigation (No 2)* [2017] EWHC 1217.

11. The Court also accepted that that availability of ATE insurance was relevant to the exercise of its discretion. After the hearing, but before judgment, the Court of Appeal gave its judgment in *Premier Motorauctions v PwC LLP & another* [2017] EWCA Civ 1872 and further submissions in the light of that judgment on the approach to be taken to ATE insurance in this context were taken into consideration.

MLS' financial status and third-party funding

12. MLS' financial status was in issue in the application. It was initially stated that MLS was a member of the ALF and abided by the Code of Conduct for Litigation Funders (the 'Code'). The Court was only informed in the context of the application that MLS was balance sheet insolvent and reliant upon another insolvent company and its sole shareholder.

13. The Court found there was no evidence of any legal obligation on the part of the sole shareholder to maintain the funding arrangements. The court held that there was a justifiable concern about the intrinsic stability of the financial arrangements made for funding the litigation and for dealing with the adverse consequences that may arise.

14. The Court doubted that the arrangements satisfied the requirement in the Code for "*immediate access* [to funds]" given that "*…the money is neither within the company nor demonstrably capable of being forced out of the hands of the ultimate funder or funders"*.

The *Arkin* Cap

15. The Court considered the various criticisms that have been made of the *Arkin* cap, including the observations of Sir Rupert Jackson in the Review of Civil Litigation Funding: Final Report. Sir Rupert stated that there was *"no evidence that full liability for adverse costs would stifle third party funding."*

16. The Court did not go on to state a final view on whether the *Arkin* cap should ultimately be applied as it was held that this was a matter for consideration after trial. Whether the *Arkin* cap would apply was, nevertheless, a factor to be taken into consideration in exercise of the Court's wide discretion to order security for costs at an interim stage under CPR r.25.14.

17. The Court found that it would "*be wrong to ignore the possibility that the cap may not be treated as applicable in the circumstances of this case*" not least because without doing so there would be a risk that the security ordered would be insufficient.

18. It also accepted that it may be argued that in *Arkin* the Court of Appeal was only addressing the situation where a professional funder has contributed a part of the litigant's costs. Likewise, it was arguable that the Court of Appeal's proviso that the approach commended in *Arkin* would apply where funding had been provided "*in a manner which… is not otherwise objectionable*" may not apply on the facts of this case. Indeed, the Court went on to accept that those words are to be taken as allowing for a more flexible approach where there was something objectionable about the funding arrangements in question.

19. Accordingly, the Court was not bound to find that the *Arkin* cap served to limit the quantum of security to be given upon an application under CPR r.25.14. The cap was just one factor to take into account in the overall exercise of the judge's discretion.

ATE insurance

20. Following the Court of Appeal in *Premier Motorauctions*, the Court held that the Defendant was entitled to some assurance both as to the scope of the ATE cover and as to the risk of it being avoided for misrepresentation or non-disclosure.

21. In the circumstances of the case, and upon the terms of the relevant ATE policy, the Court did not consider it possible to discount as illusory the prospect of avoidance. Taking that into account, in the broad exercise of its discretionary power, the Court discounted two thirds of the total ATE cover from the sum ordered by way of security. This was said to reflect the Court's assessment that it is more likely that not that the policy would remain intact and available for payment of part of the Defendant's costs but also took account of the risk that it would not.

Amount of Security

22. Overall, having made a broad assessment of the Defendant's likely recovery of its estimated costs upon assessment, the Court reduced the resulting figure by 50% to

reflect the foregoing considerations relevant to the exercise of his discretion and to do broad justice in the case. The court did not limit the order for security to future costs.

Comment

23. The ever-increasing use of for profit litigation funding in commercial litigation, group actions and beyond has prompted a reconsideration of the costs position and exposure of such funders.

24. The finding in this case that the Court is not limited by the *Arkin* cap at the security for costs stage will be of keen interest to litigation funders, their clients and those litigating against them. While Sir Rupert Jackson found that there was no evidence that disapplying the *Arkin* cap would stifle the market in third party funding, litigation funders will have to be prepared for the possibility of orders that they should provide security in excess of the *Arkin* cap during the course of the litigation even if the *Arkin* cap is applied at the conclusion of the litigation.

25. Significantly, the judgment also includes some observations that are likely to be relevant in other cases where there is a challenge to the application of the *Arkin* cap following judgment. The Court accepted in this case that the cap in *Arkin* may not ultimately be applied on a number of grounds including that *Arkin* may only apply to professional funders funding part of a litigant's costs. The Court also noted that the Court of Appeal had left open in *Arkin* the possibility that its approach would not apply in cases where funding arrangements were found to be objectionable.

Malcolm Sheehan QC, Henry Warwick and Reanne MacKenzie (pupil)

8 December 2017

Charles Gibson QC, Malcolm Sheehan QC, and Henry Warwick of these Chambers and Nicholas Bacon QC acted for the Defendant/Applicant