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Calunius' chairman Leslie Perrin comments on the recent Excalibur judgment, which clarifies certain aspects of a litigation funder's liability for adverse costs.

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The Excalibur case continues to generate excitement in all parts of the global litigation market. Various commentators have described the costs judgment by Lord Justice Christopher Clarke in that case as a "clear warning", effectively "changing the playing field" for the litigation funding industry. That's not how I read it.

In fact, recognised funders are taking much comfort from the judgment.

- It was not news to any established funder that section 51 of the Supreme Courts Act 1981 means that funders could be held directly liable for the defendants' costs if one of the funder's funded cases was unsuccessful.
- Personally, I had always made what seemed like a prudent assumption that in such a case, if the funded party was held to be liable for indemnity costs then the funder's liability would also be on that scale, which is precisely what Lord Justice Christopher Clarke ordered.
- I was pleased to see a particularly useful clarification in the judgment that where two or more funders make their funding contributions at different times, then their overall adverse costs liability will be time apportioned accordingly.
- I have always relied though on the protection offered to funders by what has become known as the Arkin Cap; namely that in normal circumstances, the funder's costs liability in these circumstances could not exceed the amount of the funder's investment. We were glad to see the Arkin Limit taken as a given in the Excalibur judgment, notwithstanding Lord Justice Jackson's view in his famous report, that Arkin should "by rule change or by legislation" be overturned.
- I was also glad to see Lord Justice Christopher Clarke suggesting that funders should take independent legal advice and not simply rely on what they are told by the claimant's team of advisers and that funded cases should be carefully monitored by the funder as they unfold, but without taking any degree of control over the proceedings. This mirrors established practice exactly.

If there is an element at which we are surprised, it is the placing of funding for legal costs on exactly the same basis as funding for security for costs. Thus if a funder puts £5mm into Court as security for the defendants' costs, it will have to assume that it is taking £10mm of risk. Funders accept this form of "invest 1 but take 2 of risk" equation when they are funding legal costs but it seems hard for the same maths to apply to the provision of security when that investment is already earmarked for the defendants' costs if they win.

Taking this point one step further, if a Funder does not put actual cash into Court to satisfy an order for security but uses instead some form of financial instrument, typically a bond or insurance policy,

then the cost of doing so will be some fraction of the £5mm required, say £2.5mm. On the logic of the judgment, the Court awarding costs against the funder would look to the value of the security provided rather than its cost. So the funder in this situation would have to assume that it was taking £10mm of risk which is on these numbers 4 times its investment. Can that really be right?

These are my personal views and not those of the Association of Litigation Funders of England & Wales of which I am the Chairman.

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