CITATION: Davies v. The Corporation of the Municipality of Clarington, 2021 ONSC 6449
COURT FILE NO.: CV-00-1075-00CP
DATE: 20210928

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
BONNIE DAVIES Plaintiff	Jeffrey Strype and Jason E. Brown, for the Class Member Zuber and the Non-Party Yorkfund Investments Inc.
– and –	
THE CORPORATION OF THE MUNICIPALITY OF CLARINGTON, VIA RAIL CANADA INC., CANADIAN NATIONAL RAILWAY COMPANY, TIMOTHY GARNHAM, THE BLM GROUP INC., APACHE SPECIALIZED EQUIPMENT INC., APACHE TRANSPORTATION SERVICES INC., BLUE CIRCLE CANADA INC., and HYDRO ONE NETWORKS INC. Defendants	Thomas J. Hanrahan, for VIA Rail Canada Inc. and Canadian National Railway Company Alon Barda, for The BLM Group Inc. James M. Regan and Angelo G. Sciacca, for Apache Specialized Equipment Inc., Apache Transportation Services Inc. and Timothy Garnham Stephen J. Macdonald and Weston Pollard, for Hydro One Networks Inc. Amanda Bafaro and Dylan Augruso, for the Non-Party Bridgepoint Financial Services Inc. Ron Aisenberg, for the Non-Party Seahold Investments Inc. Louis-Pierre Gregoire, for the Non-Party Lexfund Inc.
	HEARD: March 22 and 23, 2021

REASONS FOR DECISION
RE COSTS AGAINST NON PARTY LITIGATION LOAN COMPANIES

M.L. EDWARDS R.S.J.:

Overview

[1] After a liability trial in this class action lasting in excess of 40 days and a damages trial for Mr. Zuber lasting in excess of 100 days, the Defendants were successful in beating their offers to settle, and as a result obtained a costs award reflected in earlier reasons that now totals in excess of $3,434,000. The Defendants now seek to recover those costs against four litigation loan providers who advanced funds either directly to Mr. Zuber or to his counsel. The principal amount of those litigation loans totals approximately $500,000. With interest, it is estimated that the outstanding litigation loans have an accrued principal and interest owing now in excess of $6,000,000.

[2] The Defendants were entirely successful at trial in exceeding their offer to settle, with the result this court awarded costs against Mr. Zuber who I will interchangeably either refer to as Mr. Zuber or the Plaintiff. The costs were fixed in the amount of approximately $3,434,000.00. While I have no evidence that those costs will ever be paid (this matter being presently under appeal), it is probably not an unfair assumption that the Plaintiff, being a resident of Poland with no connection with Ontario, will never pay the costs awarded to the Defendants. With that assumption in mind, one can appreciate why the Defendants now move to recover those costs against non-parties who the Defendants undoubtedly believe have an ability to pay the costs award. Those non-parties are litigation loan providers who provided litigation loans to Mr. Zuber during the course of these proceedings.

[3] While our courts have begun to address issues arising out of the greater prevalence of litigation loans in the civil justice system - and in particular in the context of class actions, there does not appear to be any direct authority in Ontario, or for that matter in Canada as a whole, where a Defendant has either sought, let alone obtained an order against a non-party litigation loan provider to pay a costs award ordered against a party in a civil action.

[4] The costs of civil proceedings in this province and the country at large present a massive impediment to the ability of most Canadians to access justice. Trials which were once only a few days in length now take many weeks to resolve. Between the time an action is commenced to when an action gets to trial can take many years, which in and of itself is an access to justice issue. As I indicated in my reasons, this action which had its genesis in a railway accident that took place in 1999 and which required 106 trial days to complete, is a poster child for what our civil justice system can no longer accommodate. Part of why this action never settled lay in the expectations of the Plaintiff – expectations that bore no resemblance to the evidence. More importantly, part of why this action never settled can also be found in the quantum of money advanced to the Plaintiff as litigation loans which, with interest, created a massive impediment to resolution.

[5] These reasons will explain why on the facts of this case, this court declines to make any award against the non-party litigation loan providers. These reasons do, however, provide obiter reasons about the potential for such an award in the future.

The Facts

[6] There have been numerous published decisions of this court that outline the facts of this case. I propose to provide a summary of those facts in order to bring context to these reasons for anyone reading them in the future.

[7] This action began as a class action which arose as a result of a train derailment which occurred on November 23, 1999.

[8] The action was certified as a class action by McKinnon J. on September 5, 2000. The representative Plaintiff was Bonnie Davis. The class action included all passengers who were on the train at the time of the derailment. Amongst those passengers was Mr. Zuber.

[9] The class action proceeded to a liability trial before Ferguson J. in April 2005. The trial encompassed 47 trial days between April and November 2005. Ultimately, the claim against one of the Defendants, Blue Circle, was dismissed, and a costs sharing agreement was reached amongst the remaining Defendants apportioning liability amongst those remaining Defendants.

[10] On December 13, 2008, Minutes of Settlement which had been entered into between the parties were approved by Ferguson J. The Order approving the Minutes of Settlement incorporated a term that the settlement of the class action claims would not compromise the claims of Mr. Zuber or one other Plaintiff named Ann Pritchard. Ultimately the claim of Ms. Pritchard was resolved, and by May 25, 2007 the only outstanding claim in this class action was that of Mr. Zuber.

[11] While the claim of Mr. Zuber did not go to trial until November of 2014 (well in excess of seven years after the settlement of the class action claims of all member with the exception of Mr. Zuber), it is important to understand the full context of what occurred between 2007 and the commencement of the trial in 2014.

[12] As Mr. Zuber was the sole remaining Plaintiff advancing a claim for damages arising out of the train derailment, he was initially examined for discovery on three occasions: specifically, August 11, 2006; April 4, 2008; and April 10, 2008.

[13] Subsequent to his examinations for discovery Mr. Zuber moved to amend the prayer for relief in the statement of claim, seeking an award of damages of $50,000,000 as opposed to the $10,000,000 originally claimed. The motion was argued and ultimately granted by Lauwers J. (as he then was) on September 2, 2010.

[14] Further examinations for discovery of Mr. Zuber occurred in 2012 as a result of various Orders made by Lauwers J. Ultimately, a pre-trial was conducted before the late

Shaughnessy J. in October 2012. During the course of the pre-trial, it is now beyond dispute that Mr. Zuber's counsel, Mr. Strype, advised defence counsel in attendance that he had obtained an agreement with a third-party litigation loan company to provide financial assistance to proceed with the trial. The particular details of the litigation loans were not provided at that time.

[15] Ultimately, as a result of motions heard by Vallee J. in early 2014, the Defendants received production of litigation loan documents in connection with loans provided by Bridgepoint Financial Services Inc. (Bridgepoint); Lexfund Inc. (Lexfund); Seahold Investments Inc. (Seahold); and Yorkfund Investments Inc. (Yorkfund). I will collectively refer to all four of these companies as the "litigation loan providers".

[16] With the production of the litigation loan documentation required by the Orders of Vallee J., it became apparent that Mr. Zuber had been advanced loans totalling in excess of $500,000 with fixed annual rates of interest ranging between 18% and approximately 29%, some of which loans had a clause that allowed for interest to be compounded monthly.

[17] The trial in this matter commenced in September 2014. The evidence was completed in October 2016, after approximately 106 days of trial. Closing arguments were heard by the court in May 2017, and judgment was rendered on July 16, 2018. While Mr. Zuber sought judgment for many multiple millions of dollars, he was awarded damages of $50,000.

[18] The court was then called upon to deal with the issue of costs. In the context of the costs submissions, this court became aware of offers to settle made by the Defendants that substantially exceeded the award of damages made at trial. In dealing with the costs submissions, this court was called upon to deal with whether or not the Plaintiff could recover as a disbursement the interest on the litigation loans. As reflected in my costs decision, I declined to include in the Plaintiff's disbursements any amount for any interest accrued on the litigation loans.

[19] In his costs submissions, Mr. Strype made clear that Mr. Zuber could not have accepted any of the Defendants' offers to settle because of his liability to pay back the litigation loans. Specifically, in his submissions Mr. Strype stated:

> Class Member Zuber submits that the terms in 'satisfaction of all claims' necessarily includes Mr. Zuber's claims for repayment of his loans and disbursements. At the time this offer was presented, Zuber's loans were in excess of the entire offer presented. As such the offer to settle was not capable of being accepted because it would have left Zuber in a position of a net loss.

[20] The existence of the litigation loans attracted peripheral attention during the course of the trial itself. On September 4, 2014, Mr. Zuber's counsel made the following observation:

> Certainly as I am sure Your Honour is aware, people don't go into $900,000 worth of debt with companies like Seahold who charge ridiculous interest amounts if they've got the money at home to pay for it.

[21] On September 9, 2016, Mr. Zuber's counsel made the following observation to the court:

> Your Honour, understanding that the interest rates charged on these litigation loans are extreme in order to obtain it, and we are not gonna know what the obligation is until you make your judgment and the issue of costs and so on may or may not come up so that I need to, I suppose, be able to say to you on this day the obligation is this, and if it were the judgment and we're gonna deal with costs six months later, then I'm not really able to tell you except by guessing what that obligation may be.

[22] It is clear from the costs submissions and the aforesaid comments of Mr. Zuber's counsel that there was some expectation going into the trial that Mr. Zuber might recover as a disbursement, the interest costs incurred on the litigation loans that he had taken out prior to trial. At this stage it is worth observing that as events unfolded in this case, it appears relatively clear that while the obtaining and incurring of a litigation loan may provide a Plaintiff like Mr. Zuber with access to justice, there is also the flip side to this issue - that being the impediment to a fair and sensible resolution of a case as a result of the accrued interest on those litigation loans. In short, the utility of a litigation loan can be seen as a Catch-22. Without the litigation loan a plaintiff may not have access to justice. With the litigation loan and accrued interest, as this case amply demonstrates, the plaintiff may not have the ability to resolve the litigation where offers to settle are presented that still leave the plaintiff in a net zero position.

The Litigation Loans

Seahold

[23] The first litigation loans that were advanced in this litigation were made by Seahold. The first was in the amount of $25,000 advanced on December 5, 2007, and the second was in the amount of $10,000 advanced on June 1, 2009. The interest rate on both loans was 28.8%, compounding on a monthly basis. The total principal advanced was $35,000. The principal plus accrued interest as of the present date would exceed $1,400,000. The Seahold loans were advanced to Mr. Zuber for "personal expenses". The loans were advanced to Mr. Zuber pursuant to an unconditional obligation which was not dependent on the success of Mr. Zuber's litigation. Seahold did not have a contingent interest in any settlement funds or court award. Seahold did not have any control or input as it relates to the conduct of Mr. Zuber's litigation, nor did Seahold have any control or input with respect to Mr. Zuber's refusal or acceptance of any settlement offers.

Yorkfund/Strype Management Inc.

[24] According to the evidence from this motion, Yorkfund was incorporated on January 23, 2012 for the purposes of investments. Yorkfund was legally dissolved and amalgamated into a new company on January 1, 2018. Yorkfund is no longer a legal entity or going concern and has no assets. The amalgamation was undertaken, apparently, to protect the right to recover the loans provided to Mr. Zuber.

[25] As a result of the motion before Vallee J., the Defendants received production of the loan agreements pertaining to Yorkfund. The documentation provided indicated that Yorkfund advanced loans on January 31, 2013 in the amount of $139,320, and on November 1, 2013 a further loan was advanced to Mr. Zuber in the amount of $5,000. The Defendants, therefore, had knowledge of loans made to Mr. Zuber in the total amount of $144,320 at an interest rate of 24%.

[26] As it now turns out as a result of information produced during the course of this motion, the loans shown as advanced by Yorkfund in fact originated from Strype Management Inc. ("SMF"). Between April 11, 2008 and December 2012, there were 30 advances made to Mr. Zuber totalling $139,320. These loans bore interest at the rate of 24%, and as of today's date the principal amount of the loan plus accrued interest exceeds $1,600,000.

[27] Based on the documentation provided by Yorkfund in connection with this motion, it is apparent that the loans advanced to Mr. Zuber were full recourse loans and the full amount of the loan was repayable regardless of the outcome of the action. The affidavit evidence filed by Yorkfund suggests that the interest rate on the Yorkfund loans was not the interest rate disclosed in the loan documentation of 24%, but rather a lower rate of 15%. The Yorkfund loans to Mr. Zuber did not entitle Yorkfund to share in the profits of the litigation, assuming such profits materialized. There was nothing in the Yorkfund loan documentation that would require Yorkfund to indemnify Mr. Zuber or to agree to pay any adverse costs on his behalf.

Lexfund

[28] Lexfund is in the business of providing third-party litigation funding facilities in the form of loans to assist with disbursements and loans to assist with the living expenses of a plaintiff.

[29] Lexfund made two loans to Mr. Zuber. The first was in September 2008 in the amount of $50,000, and the second was in August of 2009 also in the amount of $50,000. Both loans bore interest at a rate of 28% compounded monthly. As of today's date, the principal and interest owing is in excess of $3,100,000.

[30] The litigation loans made by Lexfund were made on the basis of "no interference with control or management of a lawsuit". Lexfund obtained a PPSA Lien which was revealed to counsel for the Defendants in October 2018, when Lexfund advised of its security

interest in Mr. Zuber's damages and cost award. While Lexfund received a periodic update with respect to the status of these proceedings, it was not until late November 2013 that Lexfund first became aware of the Defendants' offer to settle in the amount of $500,000, inclusive of interest plus costs. By the time of that offer from the Defendants, Mr. Zuber's outstanding indebtedness to Lexfund was in the approximate amount of $430,000.

[31] Lexfund maintains in its evidentiary record before this court that while it did have periodic updates with respect to the status of these proceedings and also had some information about offers to settle, Lexfund had no say, control or input, regarding the offer to settle in the amount of $500,000 inclusive of interest plus costs.

The Bridgepoint Loans

[32] Bridgepoint is a commercial lender in the business of providing different financing products, which includes litigation loans to plaintiffs and credit facilities to law firms. In this case, Bridgepoint and Mr. Strype's law firm have, since 2009, maintained a financing relationship pursuant to which Bridgepoint provided a credit facility from which Mr. Strype's law firm may draw to finance working capital, including the cost of disbursements incurred in the course of his practice.

[33] In this case, Bridgepoint advanced various loans between August 2010 and December 2014. The loans ranged from approximately $3,800 to $48,000. The total amount advanced was approximately $136,000 at an interest rate of 18%.

[34] All of the loans were full recourse loans which are to be repaid regardless of the outcome of the litigation. Mr. Strype was required to personally guarantee the amounts loaned. Mr. Zuber was not a signatory or a party to the loan documentation. As of the date of argument of this motion Mr. Strype had repaid $89,000, leaving a balance outstanding as of the end of 2020 of approximately $220,000.

Position of the Defendants

[35] The Defendants assert a number of positions in support of their argument that the litigation loan providers should be responsible for the Defendants' costs.

[36] To begin with, the Defendants argue that the litigation loans required court approval and rely on s. 33.1(2) of the *Class Proceedings Act*, which provides that third-party funding agreements are subject to the approval of the court obtained on a motion of the representative plaintiff, made as soon as practicable after the agreement is entered into with notice to the defendants.

[37] The Defendants argue that this court has jurisdiction to award costs against non-parties and in that regard, the Defendants rely heavily upon s. 131 of the *Courts of Justice Act* which allows the court to impose costs against non-parties in appropriate circumstances. The Defendants also rely on the fairly recent decision of the Court of Appeal in *1318847*

Ontario Limited v. Laval Tool & Mould Ltd. (*Laval Tool*), 2017 ONCA 184, where the Court of Appeal confirms the court's inherent jurisdiction to award costs against non-parties, where the third-party is a "person of straw" who is put forward to protect the true litigant, the non-party from costs; where the non-party commits an abuse of process; and where the non-party engages in gross misconduct, vexatious conduct or conduct that undermines the fair administration of justice.

[38] As it relates to the impact of the litigation loans on the fair administration of justice, the Defendants acknowledge the access to justice issue raised by the litigation loan providers, but suggest that access to justice is a two-way street and that it is clear that the litigation loans in this case had a direct impact on how this litigation unfolded. Specifically, the Defendants refer to the acknowledgment of Mr. Strype in his costs submissions that the Defendants' offers were not capable of being accepted as Mr. Zuber would have been left in a net deficit position.

[39] Finally, in support of their position that the litigation loan providers should be responsible for the Defendants' costs, it is argued that the various loan provider agreements were both abusive and champertous.

[40] The Defendants argue that the various loans provided to Mr. Zuber were abusive for the following reasons:

a) this is a class action where Mr. Zuber had the benefit of advancing his claim in a simplified manner pursuant to the *Class Proceedings Act*. This is especially so given that liability had been admitted by the Defendants;

b) there was no risk that Mr. Zuber would lose this case as it was strictly a damages assessment;

c) given the suggestion that Mr. Zuber's case was without risk, it is argued that there is no justification for the high rates of interest that were charged in this case as reflected in the summary set forth above;

d) there was no cap on the loan interest and as evidenced by the fact that Mr. Zuber's indebtedness is now well in excess of $6,000,000, there can be no justification for such interest charges where the case was ultimately valued by this court in the amount of $50,000. The Defendants argue by reference to a decision of this court: *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, that the lack of a cap on recovery as it relates to the interest charges is an important factor in the court's consideration as to whether the loan agreement constitutes champerty and maintenance.

[41] Finally, in support of the collective position taken by all of the Defendants, this court is directed to a line of jurisprudence from the United Kingdom.

[42] The *Supreme Court Act*, 1981, and specifically s. 51, provides the English courts with the following discretion with respect to costs:

> Subject to the provisions of this or any other enactment and to rules of the court, the costs of and incidental to all proceedings…shall be in the discretion of the court…the court shall have full power to determine whom and to what extent costs are to be paid.

[43] The Defendants observe that s. 51 of the English *Supreme Court Act* is similar to s. 131(1) of the *Ontario Courts of Justice Act*.

[44] In England, litigation loan providers have been held accountable for loans advanced to parties in litigation. The first English appellate authority relied upon by the Defendants is a decision of the English Court of Appeal in *Arkin v. Borchard Lines Ltd. & Ors*, [2005] EWCA Civ. 655, at para. 38, where the English Court of Appeal crafted a solution pursuant to which a litigation funder who finances part of a plaintiff's costs of litigation could be potentially liable for the costs of the opposing party to the extent of the funding provided.

[45] The court in *Arkin* considered two potential types of liability that a non-party litigation funder could be responsible for. Specifically, if the loan agreement was non-champertous then the non-party's liability for costs would be limited to the amount of the loan. The rationale for this approach can be found in the suggestion that loan providers would undertake proper due diligence which would result in fewer loans in meritorious cases. It is also suggested that a litigation loan provider would limit their exposure by lending only what was necessary. The second type of potential liability endorsed by the Court of Appeal in *Arkin* addressed the loan agreement which was deemed to be champertous. Where the loan agreement was found to be champertous there would be no cap on the amount of costs that could be ordered against a non-party loan provider. The first principal endorsed by the Court of Appeal limiting costs to the extent of the loan became known in England as the "Arkin Cap".

[46] In their submissions, the Defendants refer to a more recent decision of the English Court of Appeal in *Chapelgate Credit Opportunity Master Fund Limited. v. Money & Ors*, 2020 EWCA Civ. 246, where the Court of Appeal in England re-visited the Arkin Cap and determined it was not a binding rule and that judges could exercise their discretion in applying it. Specifically, at para. 38, the Court of Appeal stated:

> Judges, as it seems to me retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding in the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant. The more a funder stood to gain, the closer he might be thought to be the "real party" ordinarily ordered to pay the successful party's costs…

[47] In reliance on *Arkin* and *Chapelgate,* the Defendants argue that these decisions are entirely consistent with the discretion afforded judges in Ontario pursuant to the provisions of s.

131 of the *Courts of Justice Act*, as well as the principles enunciated by our Court of Appeal in *Laval Tool*. The only difference the Defendants observe relates to the fact that in England, the English courts have extended the principle of liability for costs to non-parties on a more principled basis, and as such it is argued that this court should adopt a similar approach.

Position of the Litigation Loan Providers

[48] While each of the litigation loan providers assisted this court with their own separate written and oral submissions, I intend to condense those submissions collectively as they were largely similar in nature.

[49] Dealing first of all with the submission made by the Defendants that because this was a class action there was an obligation on the part of the loan providers to obtain the approval of this court for the various loan agreements, the loan providers respond with a very simple argument. Simply put, the litigation loan providers argue that the various loan agreements pursuant to which loans were advanced to Mr. Zuber, were all made well prior to the commencement of the trial and well prior to the coming into force of s. 33.1(2) of the *Class Proceedings Act*. Specifically, s. 33.1(2) provides:

> A third-party funding agreement is subject to the approval of the court, obtained on a motion of the representative plaintiff made as soon as practicable after the agreement is entered into, with notice to the defendant.

[50] Section 33.1(2) was enacted by the Ontario Legislature as an amendment to the *Class Proceedings Act*, forming part of Schedule IV of Bill 161. Bill 161 received Royal Assent on July 8, 2020. Schedule A amending the *Class Proceedings Act* came into force on October 1, 2020 by proclamation of the Lieutenant Governor.

[51] The litigation loan providers argue that s. 33.1(2) did not exist when this action was launched, nor did it exist even when the trial on liability began or when Mr. Zuber's trial began. Even when judgement was rendered the section did not exist. The section also did not exist when this court released its decision on costs in April 2019.

[52] It is also noted that s. 33.1 imposes the obligation on the representative plaintiff in the class proceeding. In this case Mr. Zuber was the sole remaining member of the class action, Mr. Zuber never was the representative Plaintiff. The representative Plaintiff was a Bonnie Davis.

[53] As it relates to the overall claim by the Defendants for costs against the non-party litigation loan providers, it is argued that as a matter of fairness this court should exercise its discretion against the Defendants given that the litigation loan providers had no notice of their potential exposure to a non-party costs award until well after the completion of the trial.

[54] The litigation loan providers accept that the court does have a discretion to impose costs against a non-party but point to the same Court of Appeal decision as the Defendants in support of their position regarding procedural fairness. In *Laval Tool*, the litigation loan providers note that the Court of Appeal imposes on a litigant the obligation to provide unequivocal notice of their intention to seek costs from a non-party as soon as is reasonably possible prior to the hearing.

[55] The litigation loan providers rely on *Laval Tool* in support of their submission that they were entitled to notice in advance of Mr. Zuber's trial of any potential liability to the Defendants for the Defendants' costs.

[56] As it relates to the issue of maintenance and champerty, the essence of the contrary argument from the litigation loan providers lies in the suggestion that maintenance includes someone who has an improper motive, which in written submissions has been described as a wanton or officious intermeddling to become involved in litigation of others in which the maintainor has no interest whatsoever, and the assistance it renders to one or more parties is without justification or excuse. Champerty, as noted in the written submissions of Lexfund, is an egregious form of maintenance with the added element that the maintainor shares in the profits of the litigation.

[57] Specifically, as it relates to all of the loan agreements of the various litigation loan providers, it is emphasized that none of them would allow any of the loan providers to participate in the actual so-called profits of Mr. Zuber's litigation. The litigation loan agreements in that regard are quite different from the provisions of a contingency fee agreement between a plaintiff and his or her counsel where the lawyer, as part of his or her fee, may stipulate a percentage of the damages that the lawyer may receive as payment for his or her services. None of the litigation loan agreements at issue in this case allowed the litigation loan providers to participate in the damage award that Mr. Zuber could have recovered from the court.

Analysis

Jurisdiction

[58] The starting point for the determination of the court's jurisdiction to award costs against a non-party begins with s. 131(1) of the *Courts of Justice Act* ("the *CJA*"), which gives the court its statutory discretion to award costs. Specifically, s. 131(1) provides:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine **by whom** and to what extent the costs shall be paid. [Emphasis added]

[59] As previously noted in these reasons, the Court of Appeal in *Laval Tool* provides greater clarity with respect to the court's jurisdiction under s. 131(1) to award costs against a non-

party. Specifically, the Court of Appeal determined that costs against a non-party may be awarded where the non-party is a "man of straw" and the non-party is the "real litigant". The person of straw test is met where the following elements are found by the Court, specifically:

a) the non-party has status to bring the action;

b) the named party is not the true litigant; and

c) the named party is a person of straw put forward to protect the true litigant from liability for costs.

[60] In my view, the so-called "person of straw" test is not applicable to any of the litigation loan providers. Rather, as it applies to whether a litigation loan provider should be held responsible for the Defendants' costs, the real issue is whether this court should exercise its inherent jurisdiction. Specifically, as noted by the Court of Appeal in *Laval Tool*, the court's jurisdiction to award costs against a non-party is not limited to the "person of straw" test, nor is it limited to the court's statutory jurisdiction set forth in s. 131(1) of the *CJA*.

[61] The Court of Appeal in *Laval Tool* makes clear, that the court has an inherent jurisdiction to order costs against a non-party on a discretionary basis where the non-party initiates or conducts the litigation in such a manner to amount to an abuse of process. The Court of Appeal makes equally clear that the court's inherent jurisdiction to award costs against a non-party must be exercised "sparingly and with caution": see *Laval Tool*, at paras. 65-79.

[62] It is important to recognize that the court's jurisdiction to award costs against a non-party can be found either under s. 131(1) of the *CJA*, or pursuant to the court's inherent jurisdiction to order costs against a non-party who commits an abuse of process.

[63] The characterization of an abuse of process is set forth in *Laval Tool* as amounting to the "bringing of proceedings that are unfair to the point that they are contrary to the interests of justice" or "oppressive" or "vexatious" treatment that undermines "the public interest in a fair and just trial process in the proper administration of justice": see *Laval Tool*, at para. 73.

[64] In *Laval Tool*, the Court of Appeal exercised its inherent jurisdiction to award costs against the non-party, because the non-party had initiated a fictitious proceeding and "purposely orchestrated a false claim". The Court of Appeal went on in its reasons to observe that it could also envisage other situations of gross misconduct, vexatious conduct, or conduct that undermines the fair administration of justice that could give rise to an award of costs against a non-party.

[65] Recently, the Divisional Court in *Marcos v. Lad*, 2021 ONSC 4900, in upholding the award of costs against the non-party by the trial judge, referenced the following factual findings in support of the award of costs against the non-party:

> The fraud and gross misconduct on the part of the non-party must relate to conduct during litigation for the costs to be awarded against the non-party. Findings of this Court are replete with acts relating to Mr. Marcos gross misconduct during the litigation for the purposes of advancing the claim. Mr. Marcos conduct amounted to an abuse of the process being the purported subject matter in the litigation. The action was of a construction company claiming for its work. The misconduct of Mr. Marcos, as this Court has found, was deliberate in an attempt to justify and falsely support an inflated claim outside the scope of the agreement between the parties.

[66] As the Divisional Court in *Marcos* went on to observe in para. 11 of its reasons, the award of costs against the non-party was entirely justified because of the non-party's deceitful and fraudulent conduct. Furthermore as the Court observed, it was more likely, and in fact entirely probable, that the trial of the action would never have been required but for the deceitful and fraudulent conduct of the non party..

[67] While the litigation loan providers may have provided loans to Mr. Zuber with what many would describe as exorbitant rates of interest, it is difficult to see how the extension of such loans amounts to the type of abuse of process canvassed by the Court of Appeal in *Laval Tool* and the Divisional Court in *Marcos*. I do not accept that on the facts before this court, that the extension of the loans to Mr. Zuber amounts to the type of abuse of process envisaged by the Court of Appeal in *Laval Tool* such that this court should exercise its inherent jurisdiction to award costs against a non-party.

The Issue of Notice

[68] It is clear from the jurisprudence of both the Court of Appeal in *Laval Tool* and the Divisional Court in *Marcos* that as a matter of procedural fairness, if a non-party is to be held responsible for costs, that the non-party must be provided notice of their particular jeopardy in that regard. This is made clear by the Court of Appeal at para. 79 of *Laval Tool*, where the court states:

> Before returning to the facts of the case at hand, I acknowledge that, as a matter of procedural fairness, non-parties must be given notice of a litigant's intention to seek a costs award against them: *St. James' Preservation Society*, at paras. 48-55. The inquiry into whether there has been adequate notice is a contextual one driven by the circumstances of each case, but, in most cases, unequivocal notice of a litigant's intention to seek costs from a non-party should be given as soon as reasonably possible prior to the hearing: see *Middlesex Condominium*, at para. 44.

[69] As it relates specifically to the facts before this court, the litigation loan providers suggest that the Defendants should have provided notice to the litigation loan providers of the Defendants' intention to seek costs against them as non-parties as soon as the Defendants had disclosure of the litigation loan agreements. The Defendants argue that while notice is

a matter of procedural fairness, such notice on the facts of this case could not be given until the trial result was obtained. Specifically, only when this court rendered its reasons and its costs decision could the Defendants know that the litigation loan providers might have some responsibility to the Defendants for costs as a non-party.

[70] In my view, there is no dispute between either the Defendants or the litigation loan providers that notice must be provided where there is an intention to seek costs against a litigation loan provider as a non-party. While this court has ultimately determined that the litigation loan providers in this case are not responsible to the Defendants for costs, this does not preclude the possibility that in future cases where the facts warrant such an award that notice must be provided. Notice in that regard must be made at the earliest opportunity. While the Defendants can argue that the true extent of the litigation loan providers' potential jeopardy to the Defendants in costs would not have been known until the trial was completed and the court rendered its decision on costs, nonetheless, in my view, there is really no good reason why the litigation loan provider should not be put on notice by a defendant once the defendant becomes aware of the existence of the litigation loan. The sooner notice is provided, the sooner the litigation loan provider can properly analyse its position with respect to the continued funding of a plaintiff.

[71] On the facts of this case, had the court determined that it would exercise its jurisdiction against the non-party litigation loan providers, I am satisfied that notice was provided by the Defendants and that such notice was provided in a timely fashion.

Class Actions and Court Approval

[72] The litigation loan providers dispute whether this action, as it was constituted going into the trial and thereafter, remained a class action. The litigation loan providers suggest that this was nothing more than a simple personal injury damages assessment and that it was not a class action.

[73] While it is clear from my reasons that the reality of the trial was a damages assessment arising out of injuries suffered by Mr. Zuber in the railway accident, the fact still remains that as far as the court record is concerned this matter involving Mr. Zuber was, and remains, a class action. In that regard, one need not go further than para. 20 of the Minutes of Settlement which were approved by Ferguson J. on December 13, 2007, which state under the heading Continuing Jurisdiction of the Court, the following:

> The parties agree that the court will retain jurisdiction over the class action and all parties named or described therein including but not limited to all class members and settling defendants.

[74] It is also worth recalling that Mr. Zuber initiated his own claim by serving a statement of claim in early 2000. The claim was later discontinued, and Mr. Zuber pursued his claim as part of the class action. Ultimately, Mr. Zuber's claim as part of the class action continued

in accordance with the Order of Ferguson J. Thus, when the trial began and when it ended this litigation was always in accordance with the Order of Ferguson J.

[75] As it relates to whether Mr. Zuber's trial proceeded as part of a class action, it is also worth recalling that in his costs submissions Mr. Strype specifically argued that this court should consider the application of s. 31 of the *CPA* which requires the court to consider if the claim was a "test case". While I rejected the suggestion Mr. Zuber's case was a test case, it is clear that Mr. Strype in his costs submissions wanted this court to consider all arguments favourable to Mr. Zuber arising from the fact the action remained a class action.

[76] When the issue of costs first came before the court on November 27, 2018, Mr. Strype quite appropriately sought an adjournment until he had heard from the Class Proceedings Fund ("The Fund").

[77] The significance of the adjournment to establish the position of the Fund can be found in a brief review of what the Fund is all about. The Fund finds its genesis in s. 59.1 of *The Law Society Act*, R.S.O. 1990 c. L.8. The purpose of the Fund is to provide financial support for the plaintiff in class proceedings in respect of disbursements related to the proceedings ,and payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.

[78] There is no evidence before this court that Mr. Zuber or Mr. Strype ever sought assistance from the Fund with respect to his disbursements. There may be many reasons why no such assistance was ever sought. Part of that explanation may lie in the fact that Mr. Strype was never class counsel. Class counsel was the law firm of Walker Head. Once the settlement was approved by Ferguson J. in 2007, it seems apparent that Walker Head had no further involvement with this class action. Future class action settlements that leave an individual plaintiff to pursue his claim should incorporate an order of the court that makes clear the status of counsel acting for that individual plaintiff.

[79] Before leaving the issue of the status of class counsel it is significant to point out that in 2010, Mr. Strype brought a motion before the court to increase the prayer for relief in the statement of claim issued on behalf of the class from $10,000,000 to $50,000,000. There was an initial objection made by the Defendants on the basis of Mr. Strype's standing to bring that motion as he was not class counsel. The Defendants argued that Mr. Zuber needed an amendment to the certification Order of MacKinnon J. This argument was disposed of by Lauwers J. as follows:

> Mr. Winsor was not quite that accommodating. He said: "A Class Member may seek an order substituting himself for the current personal representative Bonnie Davies. If successful such person may move to amend the pleading. However, Mr. Zuber has not done so." Mr. Winsor here was speaking of the formal process for changing class counsel and the class representative. Mr. Campion supports him in the argument that this would only be done by amending the existing certification order. The

> process to do so would, in my opinion, be unwieldy and unnecessary at this stage of the proceeding.
>
> It seems to me, giving reasonable effect to sections 11 and 12, and the instructions in Section 25(3) of the *Class Proceedings Act*, that the most expeditious way to deal with this situation so that the parties can get to the heart of the matter is to give Mr. Zuber leave to bring this motion to amend the pleading in respect of his own claim only, *nunc pro tunc*, and I do so.

[80] So while Mr. Strype was technically not class counsel, it is clear from the fact he sought the amendment to the prayer for relief of the statement of claim in the class action that de facto he was class counsel for the sole remaining member of the class – Mr. Zuber.

[81] The existence of the Fund, which is there to assist the representative plaintiff, can not be understated in the context of Mr. Zuber's ongoing claim; the ultimate trial; the disbursements incurred; and the unpaid costs claim over against the litigation loan providers. Part of the reason why Mr. Zuber required litigation loans was to fund the cost of his disbursements. The Fund is there precisely for that purpose. It is apparent from the lack of evidence as to what, if anything was done vis-à-vis Mr. Zuber that the Fund was never involved with Mr. Zuber's claim until after the court had issued its decision on costs. If Mr. Zuber had received financial assistance from the Fund, then the Defendants may have had some recourse for their unpaid costs from the Fund. This never happened. Mr. Zuber instead obtained financial assistance from litigation loan providers and in doing so he has amassed an incredible debt for unpaid interest.

[82] The defendants argue that if Mr. Zuber had the right, as a class member, to amend the statement of claim with respect to his own claim, he also had the obligation to comply with s. 33.1(2) of the *CPA* and bring the appropriate motion to have his loans approved. There is a fundamental problem with this argument. Section 33.1(2) did not come into existence until well after the trial was completed and well after this court had released its decision on costs. Compliance with the terms of this section was an impossibility. That said, however, this is not the end of the court's discussion on the need for court approval of litigation loans in the context of a class action.

[83] In my view, s. 33.1(2) of the *CPA* has to a large extent codified what was already part of the common law. Section 33.1 (2) provides:

> A third-party funding agreement is subject to the approval of the court, obtained on a motion of the representative plaintiff made as soon as practicable after the agreement is entered into, with notice to the defendant.

[84] A third-party funding agreement is defined in s. 33.1(1) of the *CPA* as follows:

> Third-party funding agreement means an agreement in which a funder who is not a party to a proceeding under this Act agrees to indemnify the representative plaintiff or provide money to pursue the proceedings under

> this Act, in return for a share in any monetary aware or settlement funds or for any other consideration.

[85] It is now clear that all third-party funding agreements must be approved by the court on motion by the representative plaintiff made as soon as practicable after the agreement is entered into. The real issue, as the *CPA* has codified the third-party funding agreements, is whether a litigation loan provider falls within the definition of a third-party funding agreement. None of the loan agreements which are before this court contain any terms that would require the litigation loan provider to indemnify the representative Plaintiff. None of the litigation loan agreements which are before this court contain any provision that would allow the litigation loan providers, as part of a condition of the loan to Mr. Zuber, to share in any of the monetary award or settlement funds that might have been made in favour of Mr. Zuber. In my view, however, a litigation loan may very well fall within the definition of a third-party funding agreement, because the loan agreement and the advancing of funds to Mr. Zuber allowed him to pursue the claim that ultimately came before this court and occupied well in excess of 100 trial days. The loans were made for "any other consideration", specifically the significant interest rate charged and in some cases the compounding of that interest.

[86] While none of the litigation loans at issue on the motion before this court contain any provision that would have required the litigation loan providers to indemnify Mr. Zuber, and while none of the litigation loan agreements allowed the litigation loan providers to participate in a share of Mr. Zuber's monetary award or settlement funds, the fact remains that either directly or indirectly those loans were advanced to allow Mr. Zuber to at least, in part, utilize the funds to pursue his claim in return for payment of onerous interest charges. In my view, such an agreement falls within the definition of a third-party funding agreement and, as such, approval of such agreements under s. 33.1(2) of the *CPA* should be obtained from the court as soon as practicable after the agreement has been entered into with notice to the defendant.

[87] As previously noted, s. 33.1(1) of the *CPA* did not exist when Mr. Zuber's action proceeded to trial. Nonetheless, caselaw that preceded Mr. Zuber's trial makes clear that the court had endorsed the need for court approval in a class action where third-party funding was being used to fund the class action. In *Metzler Investment GMBH v. Gildan Activewear Inc*., 2009 CanLII 41540, Leitch R.S.J. refused to approve the third-party funding agreement at issue largely in part because of a perceived risk that the agreement might represent champerty.

[88] In *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785 CanLII, Strathy J. (as he then was) approved a third-party funding agreement and stated at paras. 27 and 28:

> [27] One of the important goals of class proceedings is to provide access to justice to large groups of people who have claims that cannot be economically pursued individually. In Ontario, the costs rules applicable to ordinary actions apply to class proceedings -- the loser pays. The costs of losing can be astronomical -- well beyond the reach of all but the

> powerful and very wealthy -- not exactly the group the legislature had in mind when the *CPA* was enacted.
>
> [28] The grim reality is that no person in their right mind would accept the roll of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars.

[89] The decision of Strathy J. in *Dugal* was followed by Perell J. in *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715, where at para. 89 Perell J. - in reference to the decision of Strathy J. in *Metzler Investments*, stated:

> I agree with Justice Strathy's ruling, but I would take it several steps further by ruling that the court's jurisdiction over the management and administration of proposed and certified class actions entails that a third party funding agreement must be promptly disclosed to the court and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice.

[90] The general test that has been developed through the jurisprudence for approval of third-party funding agreements makes clear that the agreement should not be champertous or illegal, and the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interest of the defendants.

[91] Most recently, Perell J. in *Heller v. Uber Technologies Inc.*, 2021 ONSC 5434, summarized the four-factor test developed by the Ontario courts to approve a third-party litigation funding agreement, at para. 28, as follows:

> Ontario courts have developed a four-factor test to approve a third-party litigation funding agreement, which requires that the court be satisfied that: (a) the agreement must be necessary in order to provide access to justice; (b) the access to justice facilitated by the third-party funding agreement must be substantively meaningful; (c) the agreement must a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and (d) the third-party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching, and champertous.

[92] The third-party funding agreement which was at issue in *Heller* included terms that would oblige the third-party funder to indemnify the representative plaintiff against an adverse costs award and also contained, amongst other terms, a provision that would reimburse the third-party provider with eight to ten percent of the proceeds awarded to the class plus a

funder administration fee. None of those terms are before the court in the various loan provider agreements. Where a litigation loan comes before the court for court approval and the loan agreement is a true loan agreement, i.e. there is no provision that would require the loan provider to indemnify the representative plaintiff and the loan provider does not share in the proceeds of any judgment or settlement, nonetheless, in my view, the loan agreement still requires court approval. In approving such a loan agreement, in my view the court must be satisfied that the loan agreement is necessary to provide access to justice; the access to justice facilitated by the loan agreement must be substantively meaningful; and the loan agreement must be a fair and reasonable agreement that facilitates access to justice. A loan agreement with interest rates comparable to those before this court, particularly interest rates which are compounded monthly are, in my view, in direct conflict with the principle of access to justice. The comments of Murray J. in *Giuliani v. Region of Halton*, 2011 ONSC 5119, at para. 56- 59, are equally applicable to the facts before this court:

> [56] The interest rate on the loan obtained by the plaintiff for disbursements is unconscionable. It is turning the world on its head to assert, as does Ms. Chittley-Young, that this is an access to justice issue and that ordering interest payments on the Lexfund is reasonable. This loan agreement does not facilitate access to justice. This loan agreement does nothing to advance the cause of justice. It is difficult to believe that any lawyer would refer a vulnerable client to such a lender.
>
> [57] The concept of reasonableness governs the Court's treatment of disbursements. The interest payments owed by Ms. Guiliani to Lexfund are unreasonable. This Court will not require the defendants to reimburse interest charges on the Lexfund loan whether such interest charges are calculated as of November 15, 2010 or thereafter. To do otherwise would bring the administration of justice into disrepute and encourage predatory lenders whose business it is to extract unconscionable amounts of interest from vulnerable individuals.
>
> [58] The loan agreement requiring repayment of $379,625.71 and counsel fees, plus GST, according to Ms. Chittley-Young, amounted to $558,327.53. In other words, it is painfully clear that even if the plaintiffs had been completely successful at trial and been awarded $750,000 (the quantum of damages agreed to by Ms. Chittley-Young), even with an award of costs, after satisfying Lexfund, she would have ended up owing money to her lawyer and recovering none of the $750,000 awarded to her.
>
> [59] I am in complete agreement with the submissions of defendants' counsel that: "this court should not reward, sanction or encourage the use of such usurious litigation loans, which in this case has interest provisions that are arguably illegal, otherwise such loans will be seen to be judicially encouraged and could become a commonplace tactic." I agree that an award of interest in this case would likely have an adverse impact on other

> defendants' decisions to proceed to trial or to appeal. I think the defendants' counsel is correct in stating that access to justice is a two-way street. As I have indicated above, to award interest as requested by Ms. Chittley-Young would not facilitate access to justice and would undoubtedly bring the administration of justice into disrepute.

[93] In summary, as it relates to the issue of whether Mr. Zuber should have obtained the approval of the court for the various litigation loans at issue, in my view - while s. 33.1 of the *CPA* did not exist when Mr. Zuber's claim proceeded to trial, nonetheless the common law jurisprudence referenced above makes clear that in the context of a class action prior to the enactment of s. 33.1 ,the plaintiff and class counsel should have obtained court approval for a litigation funding agreement, What may not be clear is whether such jurisprudence would apply to Mr. Zuber and to Mr. Strype given that Mr. Zuber was not the representative Plaintiff and Mr. Strype was not class counsel. As I have indicated above by reference to the decision of Lauwers J. in connection with the motion brought by Mr. Strype to increase the prayer for relief, Mr. Zuber essentially assumed the role of the Plaintiff in the class action and Mr. Strype assumed the role of class counsel.

[94] What also was not clear was whether the litigation loans fell within the definition of a litigation funding agreement. In my view, for the reasons set forth above, the litigation loans at issue did fall within that definition, and as such the litigation loans should have been approved by the court. It was precisely for that reason that I refused to order that the Defendants pay the accrued interest on the litigation loans as a disbursement.

Champerty

[95] The Defendants assert that the various loans at issue are champertous and abusive. The Defendants make this argument in support of their position that the litigation loan providers should pay the Defendants' costs previously awarded by this court.

[96] In *Metzler*, Leitch J. held that whether or not a third-party funding agreement was champertous depended on the satisfaction of two criteria, specifically: the involvement must be spurred by some improper motive and the result of that involvement must enable the third-party to possibly acquire some gain following the disposition of the litigation: see *Metzler* at para. 44.

[97] In *Houle v. St. Jude Medical Inc.*, 2018 ONSC 6352 (Div. Ct.), at para. 32, the court held:

> The parties all agree that under the law of champerty an important component of the assessment of an agreement that gives a share of litigation recovery to a third-party is the fairness of the amount of that payment. Under the law of champerty, this falls under the rubric of the assessment of the motive of the funder. An abusive funder asks for too much.

[98] The Defendants reference *Dugal* in support of their submission that the litigation loan agreements do not reflect the types of agreements that had been approved in the past by the courts, nor do they meet the criteria enunciated by Perell J. in *Houle*.

[99] Whether or not the loan agreements meet the criteria laid down by Perell J. in *Houle*, in my view is not determinative of whether the litigation loan providers are required to pay the Defendants' costs. In my view, the determination of the litigation loan providers jeopardy to pay the Defendants' costs rises or falls in relation to the determination of the court's inherent jurisdiction to award costs against a non-party and the application of s. 131 of the *Courts of Justice Act*. I have already determined that on the facts of this case, this court is not prepared to exercise its discretion to award costs against the litigation loan providers. That said, in relation to any future cases that come before this court as it relates to the potential jeopardy of a litigation loan provider to pay the costs of a successful defendant, the criteria that I reference above could be determinative of that issue.

The Approach to Litigation Funding in England and Wales

[100] The Defendants have advocated that this court should adopt the approach that the courts in England and Wales have adopted, pursuant to which the courts in England and Wales have extended the principle of liability for costs of a litigation funder for costs as a non-party on a principal basis. The litigation loan providers argue that there is ample Canadian jurisprudence as it relates to the liability of a non-party for costs, and there is no reason for this court to adopt an approach where there is no problem facing this court that cannot be addressed by Canadian jurisprudence as it presently stands. In that regard, the Defendants cite the decision of Brown J. of the Supreme Court of Canada in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, where at para. 159 Brown J. stated:

> …In particular, comparative analysis, in the sense of using law from another legal system to elucidate or develop the domestic legal system, is generally appropriate only where domestic law does not provide an answer to the problem facing the court, or where it is necessary to otherwise develop that law.

[101] The jurisdiction in England and Wales to award costs is found in s. 51 of the *Supreme Court Act*, 1981, which provides:

> Subject to the provisions of this or any other enactment and to rules of court, the costs of an incidental to all proceedings shall be in the discretion of the court…The court shall have full power to determine by whom and to what extent costs are to be paid.

[102] As previously noted, s. 51 of the *Supreme Court Act* is similar to s. 131(1) of the *Courts of Justice Act*. The law as it has evolved in England and Wales as it relates to the potential liability of a litigation funder came before the English Court of Appeal in *Arkin*. The Court of Appeal framed the issue before it as follows:

> Somehow or other a just solution must be devised whether on the one hand a successful opponent is not denied all of his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate cost consequences if the litigation they are supporting does not succeed.

The solution that the English Court of Appeal came up with can be found in paras. 39-44 of its decision as follows:

> If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.
>
> The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail**.** The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable**.** Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.
>
> We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided.* The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.

> If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.
>
> In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. We have not, however, had to explore the ramifications of an extension of the solution we propose beyond the facts of the present case, where the funder merely covered the costs incurred by the claimant in instructing expert witnesses.
>
> While we have confined our comments to professional funders, it does not follow that it will never be appropriate to order that those who, for motives other than profit, have contributed to the costs of unsuccessful litigation, should contribute to the successful party's costs on a similar basis.

[103] In its decision, the Court of Appeal in *Arkin* determined that there were two types of liability for costs by non-parties. Specifically, if the loan agreement was non-champertous the non-party's liability for costs would be limited to the amount of the loan. In coming to this conclusion, the court reasoned that this would result in loan providers undertaking proper due diligence which would result in fewer loans in meritorious cases. It was also considered that the lenders would limit their exposure by only lending what was necessary. The second category of agreement was an agreement deemed to be champertous, in which case there would be no cap on the amount of costs that could be paid by a non-party.

[104] The first type of liability for costs became known in England and Wales as the "Arkin Cap". More recently, in 2020 the English Court of Appeal in *Chapelgate Credit Opportunity Master Fund Ltd. v. Money & Ors*, [2020] EWCA Civ. 246, revisited the Arkin Cap and determined that it was not a binding rule and that judges could exercise their discretion when applying it. At paras. 34 and 38, the Court of Appeal stated:

> The terms in which the Court of Appeal expressed itself may well reflect its perception that a decision as to what, if any, costs order to make against a commercial funder is in the end discretionary. That would accord with

> section 51 of the Senior Courts Act 1981, which, as can be seen from paragraph 20 above, is framed in entirely general terms…
>
> …
>
> On the other hand, I do not consider that the *Arkin* approach represents a binding rule. Judges, as it seems to me, retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding. In the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant. The more a funder had stood to gain, the closer he might be thought to be to the "real party" ordinarily ordered to pay the successful party's costs in accordance with the guidance given in paragraph 25(3) of the *Dymocks* judgment (for which, see paragraph 22 above). In the case of a funder who had funded the lion's share of a claimant's costs in return for the lion's share of the potential fruits of litigation against multiple parties, it would not be surprising if the judge ordered the funder to bear at least the lion's share of the winners' costs, regardless of whether the funder's outlay on the claimant's costs had been a lesser figure.

[105] By analogy, the Defendants argue that the approach adopted by the English Court of Appeal in *Arkin* - and now more recently in *Chapelgate*, should be applied to the litigation loan providers in the case before this court, but more importantly suggest that the principles should apply more generally.

[106] In my view, while the approach adopted in England and Wales reflected in the aforementioned decisions of the English Court of Appeal may be worthy of further discussion by the Ontario Civil Rules Committee, I am of the view that the discretion afforded under s. 131 of the *Courts of Justice Act* and the inherent jurisdiction of this court reflected in the decision of our Court of Appeal in *Laval*, provide this court with the guidance we need to address any concerns with respect to the potential liability of a litigation loan provider here in Ontario.

Alternatives to Litigation Loans and The Future of Litigation Loans

[107] Many actions that are pursued on behalf of an injured plaintiff are the subject matter of a contingency fee agreement between the client and his or her lawyer. In few cases does the plaintiff fund the costs of disbursements. Those disbursements are funded in many different ways. Some are funded by the lawyers themselves; some through their lawyer’s line of credit. Others may fund the disbursements by means of a litigation loan. Regardless of the method of funding, their can be little dispute that all too often the costs of disbursements

can exceed the realistic value of the claim. Disbursements have, in some cases, been one if not the single biggest impediment to the settlement of an action. Added to the cost of the disbursements, this court has now learned through this motion and the argument over costs that the interest on a litigation loan can easily surpass any realistic assessment of the plaintiff's damages.

[108] In this case, the Plaintiff sought to recover as a disbursement the interest that had accrued on the litigation loans which he had incurred during the course of this action. In my reasons I declined to make that award. In part, the Plaintiff was not successful in the recovery of the accrued interest because the Plaintiff never disclosed the existence of the litigation loans to the defence until what was, in essence, the eve of trial. In the context of this action being a class action, Mr. Zuber also never sought the approval of the court for the litigation loans.

[109] Fundamentally, if a plaintiff (whether in the course of a class action or not) intends to recoup the accrued interest on a litigation loan as a disbursement, the plaintiff as a matter of fairness must disclose the details of the litigation loan to the defence. It might also be said that a plaintiff needing the assistance of a litigation loan should consider any and all other methods of funding the costs of a disbursement before committing to what can only be described as the onerous interest costs of the type of litigation loan that this court was called upon to address. While some may argue a litigation loan provides access to justice, the accrual of the compounded interest in this case demonstrates, in my view, how litigation loans may in fact be an impediment to the fair resolution of a claim, and thus an impediment to access to justice.

[110] Disclosure is at the heart of all litigation whether it is a civil, criminal, or family matter. Some documents are subject to privilege and thus not producible. The loan documents that lie behind a litigation loan likely fall into that category. While the loan documents may not be producible, they nonetheless should be disclosed in Schedule B of a litigant's Affidavit of Documents. Such disclosure will, at the very least, alert the defence to the existence of a litigation loan. Actual disclosure to the defence of the litigation loan documentation could trigger potential exposure to the defence for accrued interest as a disbursement.

[111] Fundamental to a plaintiff's commitment and ultimate exposure to the repayment in full of a litigation loan (including interest compounded at interest rates in excess of 29%), is transparency. Transparency requires that a plaintiff understand what it is he or she is committing to and what alternatives might be available. Part of this process requires that a plaintiff get independent legal advice. I question how a lawyer who represents a plaintiff can act as both counsel and the *de facto* agent for the litigation loan provider. Where the lawyer has an ongoing relationship with the source of the funds that are being loaned to the client, in my view the client is entitled to the benefit of legal advice from someone other than the lawyer who is representing the client in the proceedings before the court. Only in this way can the client truly be said to have entered into a litigation loan with his or her eyes wide open. My observation in this regard may be even more applicable if the client/plaintiff is a party under disability as defined under Rule 7 of *The Rules of Civil Procedure.*

[112] The defence in this case was not without a remedy before the case proceeded to trial as it relates to the ability of the Defendants to recover against the Plaintiff any costs award made in favour of the Defendants. The defence may cry foul that the litigation loan providers do not have to pay some or all of the costs that this court awarded against Mr. Zuber. While I accept it is highly unlikely Mr. Zuber will ever pay the costs awarded against him, the defence could have pursued a motion for security for costs at any time prior to trial. It was a well-known fact that Mr. Zuber was a resident of Poland with no assets in Ontario, or Canada for that matter. While I understand that a motion for security for costs was to be heard by Vallee J. at some point just prior to the commencement of trial, I have no explanation why that motion was never pursued to its ultimate conclusion. There may well have been good reason for this, but I simply observe the defence had available a possible remedy they simply chose not to pursue.

[113] The defence has also taken issue with the fact the Plaintiff needed to subscribe to a litigation loan. In general terms, it is worth observing in the context of a motor vehicle accident where liability is admitted, that s. 258.5 (2) of the *Insurance Act* R.S.O. 1990 c. 18 provides a mechanism for an advance payment. While the *Insurance Act* does not apply in this case because it involves a railway accident, I might suggest that where a plaintiff needs a litigation loan one source of funding is to seek an advance payment from the defendant. In a case where liability is not at issue and the only issue is damages, such an advance payment is an offset to the ultimate damage award.

[114] The defence traditionally is reluctant to make an advance payment as it is argued the provision of the advance will only allow the plaintiff to continue the pursuit of the litigation. This typical response from the defence may continue to be the approach from the defence. However, if a plaintiff makes a request for an advance payment and it is refused, this court is left to speculate how future requests for the funding of litigation loan interest as a disbursement may be handled by the court. Where need can be demonstrated for a litigation loan; where an advance payment has been refused by the defence and where there has been disclosure to the defence of the litigation loan details, one can foresee possible successful requests by the plaintiff to treat litigation loan interest as a disbursement.

[115] The argument and facts of this case demonstrate the need to seriously question how, if at all, a litigation loan will provide access to justice to a Plaintiff in need of financial assistance. This court will never know if an out of court resolution could have occurred if Mr. Zuber did not have the massive interest debt he owed to the various litigation loan providers. We do know that his own counsel has expressed his view to this court that the defendants offers to settle could never have been accepted by Mr. Zuber because of the debt owed to the loan providers. If he had accepted the defendants offer Mr. Zuber would have been left with nothing for himself. Such an outcome is absurd. Others may disagree but I entirely agree with the comments of Murray J in *Giuliani* referenced in para 92 above. The loan agreements did nothing to advance the cause of justice in this case. The interest accrued and still owing by Mr. Zuber is unconscionable.

[116] If civil litigation is ever going to get less costly and more accessible to the public as a whole, the whole issue of litigation costs , including the cost of disbursements and the funding of those disbursements needs more fulsome discussion by all litigation users and by both sides of the Bar. I have declined in this case to order the non-party litigation loan providers to pay the Defendants' costs of this action. The approach that the English courts have adopted as it relates to litigation loan providers and their exposure to paying the defendant's costs should perhaps may form part of that discussion.

[117] The motion by the defendants to have the non party litigation loan providers pay the costs awarded to the defendants by this court is dismissed. As it relates to the issue of the costs of this motion I express the preliminary view that the motion was a "test case" that involved novel arguments that this, and other courts, will have to deal with now and in the future. I urge the parties to this motion to consider their position as it relates to the costs of this motion. If the parties can not resolve the issue of costs, I will receive written submission limited to 5 pages to be received no later than October 20, 2021. If submissions are not received by that date, the court will assume the issue of costs has been resolved between the parties.

Regional Senior Justice M.L. Edwards

Released: September 28, 2021

CITATION: Davies v. The Corporation of the Municipality of Clarington, 2021 ONSC 6449

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BONNIE DAVIES

Plaintiff

– and –

THE CORPORATION OF THE MUNICIPALITY OF CLARINGTON, VIA RAIL CANADA INC., CANADIAN NATIONAL RAILWAY COMPANY, TIMOTHY GARNHAM, THE BLM GROUP INC., APACHE SPECIALIZED EQUIPMENT INC., APACHE TRANSPORTATION SERVICES INC., BLUE CIRCLE CANADA INC., and HYDRO ONE NETWORKS INC.

Defendants

REASONS FOR DECISION

M.L. Edwards, R.S.J.

Released: September 28, 2021