**Litigation Funding, Capital and Access to Justice**

**A paper for the Association of Costs Lawyers**

**By Andrew Hogan Barrister at law[[1]](#footnote-1)**

1. In this paper, I intend to explore three particular issues: the role litigation funding fulfills in a post Legal Aid world, how litigation funding might be expanded to encompass a wider range of disputes and how the cost of litigation funding can be mitigated, through recovery from the losing party.

**A capital problem**

2. A key problem in obtaining effective access to justice in litigation is the inequality of arms which will often exist between a well-funded defendant and an impecunious claimant.

3. Or to put it another way, the imbalance of capital between two parties which enables the richer party to buy better lawyers, better experts and generally turn its financial advantage into strategic or tactical advantage within the litigation.

4. In the jurisdiction of England and Wales, which enjoys (by and large) costs shifting, whereby the loser pays for the costs of the litigation, an additional need for capital exists, to potentially defray the cost of losing.

5. From this perspective the key to enhancing access to justice is to facilitate access to capital for the purposes of the litigation by the economically weaker party. This should enable them to pay for lawyers, pay for experts, pay court fees, and make provision for funding any adverse costs consequences which might follow from an unsuccessful court case. There can then be a reasonable prospect that the provision of capital will remove the inequality of arms and the production of a more “just” result.

6. Now capital used in a broad sense could be provided in a number of ways. In the closing years of the twentieth century and still more so, in the first two decades of the twenty first century the state has lost interest in providing capital through a state funded Legal Aid scheme. This source of capital was never available to SMEs or any other business, and never pretended to provide comprehensive provision.

7. The effective abolition of Legal Aid, has not caused the need for capital to diminish: far from it, but rather has required the provision of capital from the private sector. Litigation funding provided by third parties, external to the litigation is one such source of capital: and I believe that developments to date have only scratched the surface of what such external capital can do.

8. Enabling lawyers to fund (part) of the litigation through making their own fees deferred and conditional on success, is another crucial source of capital for litigation funding, where the lawyers effectively provide capital to an impecunious claimant.

9. In such circumstances their own client can expect to pay an economic “rent” by way of a success fee for the provision of the capital. From 2000 to 2013 this “rent” could be externalised through the scheme of additional liabilities which existed under the Access to Justice Act 1999.

10. Accordingly I believe it is entirely possible to view the Costs Wars of this period as a struggle by defendants whether insurance companies, public authorities or private litigants to exclude the introduction of capital into litigation by their opponents, using tools such as champerty, maintenance and consumer protection provisions coupled with the indemnity principle to achieve this end.

11. Even the mundane struggle to decrease levels of costs through for example the introduction of fixed costs, the Ministry of Justice Portal and more restrictive rules on the recovery of costs generally can be viewed as exercises both in capital conservation and capital restriction.

12. Although the above analysis is unashamedly economically determinative (positively Marxist in fact) it does shed a light on why 700 years of prohibition on contingency fee arrangements was discarded within the span of a single generation of lawyers: the urgent and pressing need to introduce a source of capital into the system which was readily to hand.

13. I consider how this came about as an inevitable result of the state being unwilling to provide the capital  to litigants that they required to access a sophisticated and complex system of laws through appropriately skilled lawyers.

14. I would further suggest that each of the legislative developments from 1990 to 2012, the CLSA 1990, the AJA 1999, the LSA 2007 and LASPO 2012 can be characterized fundamentally as statutory interventions, with the effect (though possibly not the expressed purpose) of working either to liberate or constrict the free flow of capital for the purposes of funding litigation.

**The future**

15. I am prepared to make two predictions for the near future. First that litigation funding from third party funders will undoubtedly increase in terms of its availability and the frequency of its use, secondly that it will evolve moving from funding individual cases into funding or buying, “books” of cases, with an increasingly porous dividing line between third party funders and legal expense insurers.

16. So much I can say for litigation funding provided by third party funders. But perhaps the most far reaching development of all, will be the  market liberalisation of legal services which will facilitate the introduction of capital into litigation funding on an unprecedented scale.

17. Thus the LSA 2007 and the changes it has introduced will prove extremely far reaching, perhaps far more so than the removal of the prohibition on contingency agreements. I anticipate below, the creation of law firms which act as a one stop shop, sourcing claims, deferring their own fees, funding disbursements and providing cover for adverse costs.

18. With law firms bloated by private equity or stock market funding inequalities of arms may well disappear, though new problems of consumer choice and consumer protection can be readily expected to develop between over mighty law firms and their individual clients.

**Expanding the role of litigation funding**

19. Moving from a general overview to the more specific, the question that I consider will need to be posed over the next few years, is how litigation funding can play a useful role in increasing “access to justice” for the individual, as opposed to an SME or larger business with a £1 million plus damages claim?

20. The next few years will provide an answer as the litigation funding market matures and develops, but there are some intriguing hints that the combined effects of ABS structures, litigation funding and an incremental step in the law of assignment might work to enhance access to justice.

**Australia**

21. The modern law of litigation funding in the common-law jurisdictions has its roots “down under”: as the Australian Court of Appeal noted before the case of **Fostif.v.Campbells Cash and Carry**[[2]](#footnote-2) was appealed to the High Court:

These changes in attitudes to funders have been influenced by concerns about access to justice and heightened awareness of the costs of litigation. Governments have promoted the legislative changes in response to the spiralling costs of legal aid. Court have recognised these trends and the matters driving them. “Ambulance chasing” still has negative connotations in many quarters, but it is now widely recognised that there are some types of claims that will simply never get off the ground unless traditional attitudes are modified. These include cases involving complex scientific and legal issues. The largely factual account in the book and film A Civil Action has demonstrated the social utility of funded proceedings, the financial risks assumed by funders, and the potential conflicts of interest as between group members in mass tort claims propounding difficult actions against deep-pocketed and determined defendants.

22. If any personal injury lawyer has not seen “A Civil Action” it can be cheaply purchased on Amazon: leaving aside the amusing incongruity of watching Stephen Fry and John Travolta in the same film, it has the best opening scene of any legal drama in cinema history.

23. But I return to **Fostif**. The landmark decision of the High Court of Australia in the **Fostif** case was to legitimise the role of third party funders who not only funded the litigation but (in Australia) substantially controlled it. In turn third party funding or litigation funding is now recognised as a legitimate form of financing litigation in England and Wales and not prohibited by the last few vestiges of the law of maintenance and champerty.

24. Yet the scope for deployment of litigation funding (at least in it current form) to promote wider access to justice seems constrained. As noted by HK Insall SC in his article **Litigation Funding and the impact of the decision in Campbells Cash& Carry Pty Ltd v Fostif Pty Ltd[[3]](#footnote-3)** it may be limited to “big ticket” litigation where claims for damages are substantial, with a claim valued in the hundreds of thousands or millions of pounds in order to provide a sufficient return on investment:

It is questionable whether litigation funders will provide “access to justice” in any broadsense. It is doubtful whether litigation funders have any interest in providing funding forthe vast majority of individual litigants with relatively small “one-off” claims. If they do, it would probably only be on terms which emasculates the litigant’s control of and financial interest in the litigation.

25. This paragraph could be applicable equally to the position in Australia and the position in England and Wales at the current time. Yet the litigation funding market in England and Wales is immature, nascent and according Jackson LJ, unsuited for a regime of statutory regulation. This will not always be the case, and the question is not whether the market will grow, but how.

**A role for litigation funding**

26. In a world increasingly devoid of Legal Aid, or where the market for ATE insurance is contracting either because of the introduction of QUOCS or the end of the recoverability of premiums, it is possible to envisage litigation funding having a role to pay in increasing access to justice, by expanding into areas where there is currently a dearth of funding options or inadequate options.

27. This could be achieved in a number of ways.

28. The first is to note that the key benefit of an ABS, is not that it permits wider ownership of law firms, or facilitates barristers, solicitors or other professionals working in multi-disciplinary partnerships, it is that it permits the introduction of outside capital into law firms, which in turn facilitates the abilities of lawyers-as-funders to underwrite the costs of litigation.

29. I mean by this underwriting the litigation not just in respect of making their own fees contingent on success, but crucially through funding disbursements, and in certain contexts as demonstrated by the decision in the case of **Sibthorpe and Morris.v.London Borough of Southwark[[4]](#footnote-4)** providing indemnities in respect of adverse costs. This would be litigation funding through an organisation which combined roles in claims management, litigation services and litigation funding.

30. The second is to note that the ancient prohibition on trafficking in litigation is weakening. It is quite conceivable that the common law could develop to permit litigation funders to purchase claims for compensation, for an appropriate discount, take an assignment of the right of action and then fight the claims.

31. At a stroke, considerations of asymmetric litigation might vanish, and an equality of arms be introduced to a variety of consumer disputes. This might be particularly attractive in respect of some of the financial mis-selling claims of recent years, product liability claims or property damage claims.

32. In short, these are claims which whilst possessed by individuals are not personal claims or claims dependent on the oral evidence of the claimants but rather are cases where the result will hinge evidentially on documentary or expert evidence. It would obviously be less attractive or indeed impracticable for personal injury claims, discrimination claims or claims where a non-monetary remedy is sought to be bought and sold in this way.

**The rules against assignment**

33. Such a development is far from impossible. Consider this position noted by Professor Andrew Tettenborn in his classic article **Assignment of rights to compensation[[5]](#footnote-5)**

Suppose for example, a finance company agrees with a large client to discount its damages claims wholesale, buying them up for a portion of their estimated value and then seeking to sue on them for its own benefit and keep the profits (rather as non-recourse factoring companies do every day in respect of debts). The financier’s interest, arising from a pre-existing contract with the client, is a very real one-just as real as that of underwriters, who it is well established can take an assignment of a tort claim. Nevertheless, if ever there was a case of the kind of “trafficking in litigation or selling lawsuits as articles of commerce” this is it: and short of a wholesale rewriting of Trendtex, it must be that such assignments remain ineffective.

34. The reference to **Trendtex** is a reference to the leading authority of the House of Lords: **Trendtex Trading Corp.v.Credit Suisse[[6]](#footnote-6)**. Trendtex was a Swiss company financed by Credit Suisse which had sold cement to Nigerian buyers, with letters of credit issued by the Central Bank of Nigeria. When the Nigerian economy collapsed, the letters of credit were dishonoured.

35. Trendtex had a good cause of action: they had no money to litigate. Credit Suisse took an assignment of the rights of action. It then sold the rights onto a financier for $1.1 million. The House of Lords held that Credit Suisse were entitled to take the assignment because they “had a genuine commercial interest in the enforcement of a claim of another”. Had Credit Suisse then litigated the claim, they could have done so. But in the event, the subsequent sale to the financier, who was a mere speculator, vitiated the whole transaction.

36. So the current test in England and Wales, as to whether an assignee can sue in respect of an assigned right of action is whether prior to the assignment they had a “genuine commercial interest” in the claim, which justifies the assignment being good in law.

37. The restriction on assignment is linked to the ancient doctrine of champerty, but the doctrine of champerty is passing away. It is now more than 40 years, since it ceased to be a criminal offence, and every few years, there appears to be another appellate decision which restricts its scope.

38. Moreover, as noted by Professor Tettenborn, there is an intellectual incoherence, in a system which allows some intangible rights to be assigned (eg debt) but not others (eg claims for damages).

39. In summary as capital flows into the litigation industry, driven by the prospect of returns on investment in excess of 15% (if you believe the blurb), it must find an outlet.

40. The restructuring of the legal services and claims management industries is one route to the sea: overcoming the dykes and barriers of the law against assignment is likely to prove another.

**Overcoming the costs of litigation funding: the Wonga factor**

41. Noting that litigation funding may be available, does not make it cheap. Indeed, litigation funding, as “funding of last resort” is notoriously expensive. This can be explained both by the peculiar nature of what it does: the returns to the investors being contingent upon success, and because of the paucity of competition in this sector. The search naturally arises for a way to make litigation funding “wash its own face” and ideally, to pass on the costs of the funding to the losing party.

42. At this point a chasm opens between arbitration and litigation. Take international arbitrations. International arbitrations are substantial cases which involve substantial claims. A team of leading counsel, junior counsel and suitable experts does not come cheap and even **if** solicitors can be found to act on a contingency basis, disbursements are likely to have to be funded by the client.

43. It is at this point that litigation funding comes into its own defraying the costs of litigation and providing equality of arms, but the price to be paid for the financial assistance of a litigation funder is likely to be heavy. To what extent can this be recovered from the other side, if it lends itself to victory in the arbitration?

44. Although there are many uncertainties about costs awards in international arbitrations, in some respects the power of an arbitrator when it comes to questions of costs, is far wider than that of a High Court judge sitting in the Commercial Court.

45. In particular, it remains of interest to consider what might fall within the scope of “other costs” in section 59 the Arbitration Act 1996? It cannot mean all types of economic loss that might be sustained in litigation. The statutory focus is narrower than that, but it might[[7]](#footnote-7) be stretched widely enough to include the cost of litigation funding, or for example the recovery of ATE premiums.

46. If litigation funding falls outside the scope of "other costs" as defined by section 59, it remains an intriguing issue as to how far, the cost of this form of financial assistance can be claimed back by way of an enhanced award of interest from the arbitrator under section 49 of the Arbitration Act 1996. Keen readers of the Act will note that under the provisions of those sections compound interest can be sought, and interest rates are at large.

47. In ordinary litigation, the cost of litigation funding is a paradigm example of a cost that has never been recoverable as part of a claim for costs. Other examples are the cost of general or bridging loans, or less obviously, success fees and ATE premiums, which required statutory intervention through the Access to Justice Act 1999, to be recoverable as a cost inter partes.

48. Instead, the solution adopted by Parliament initially, to compensate a successful party who has made expenditure on legal costs during the course of litigation is an award of interest. The law has shyed away however from awarding compound interest on costs. This is a curious anomaly: in what area outside litigation is interest calculated on a simple rather than compound basis?

49. An award of interest compensates the successful party for the loss of use of their money, whilst funding legal costs. This is not and has never been an indemnity for the successful party, for their economic loss or opportunity costs of funding the litigation. Instead the principles of such an award are governed by established legal principles.

50. Through the passage of the Judgment Act 1838 initially and then formulated through case law over the years, a mature and established body of principles has been developed through case law to award interest on costs initially from the date of an award, then latterly through further statutory intervention by a power to award pre-judgment interest on costs.

51. But the incidence of interest and the rate and the court’s discretion in these areas, is circumscribed by legal principles as described below. It is important to note that although an award of interest on debt or damages is primarily compensatory in nature, the award of interest proceeds on wholly different lines to an award of damages. The court is exercising a discretion, but as a judicial discretion, it must be exercised judicially in accordance with principle.

52. Other factors than purely the purely compensatory have informed these principles as is set out in the case law. It should be noted that after judgment any award of interest on costs is set by the Judgment Act 1838 at a statutory rate of 8% simple interest.

 53. The law at the moment, thus appears to preclude the full cost of litigation funding being recovered from the losing party, through a compensatory award of interest, in litigation, as distinct from arbitration. This is reflected both in a refusal to award compound as opposed to simple interest, and in respect of the rates which are awarded. This is not to say, that an attempt cannot be made to recover a true compensatory award of interest.

54. In particular it should be noted that the ability to claim interest as damages or by way of a restitutionary claim on a compound basis, has received the approval of the House of Lords in the case of **Sempra Metals Limited.v.Commissioners of Inland Revenue and another**[[8]](#footnote-8). This important case and its deployment in the field of costs is worth a paper in its own right.

55. Probably the most important case on the conventional measure of simple interest, is that of **F & C Alternative Investments (Holdings) Limited.v.Barthelemy and others** [[9]](#footnote-9) Sales J was overturned in the Court of Appeal not only on his award of interest on costs, but in respect of the extremely high rates of interest he allowed both on the principal sums awarded and the interest on costs. Although part 36 featured in this case, for my purposes it is the comments on the rates of interest to be awarded, which are of particular significance.

56. Sales J fell into error by his undue reliance on evidence that the successful party in the particular case before him, had funded his litigation through very expensive loans. Although those loans were “bridging loans” and the source of the loans in this case is different, the principle is the same.

57. See in particular the relevant paragraphs of Davis LJ from paragraphs 80 to 88:

*80 As noted above, the judge ordered that interest on principal be paid at 3% over Base Rate until 15th January 2010, and thereafter at 10% over Base Rate.*

*81 The assessment of the appropriate interest rate on a judgment sum is, of course, a matter for the discretion of the court: it is empowered to stipulate such rate as it thinks fit (or as the Rule may provide) under* [*section 35A of the Senior Courts Act 1981*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I0C5E4B30E44A11DA8D70A0E70A78ED65) *.*

*82 The appellants' point is straightforward and tracks their position on the indemnity costs issue. The judge selected a rate of 3% over Base Rate for the prior period and there is no challenge to that on this appeal. The judge in terms selected a higher rate for the subsequent period (see paragraph 68 of his judgment) by reference to the same analogy with* [*Part 36*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I0E62E610E45011DA8D70A0E70A78ED65) *as he had previously drawn. (Indeed, he underscored that by refusing to award any rate higher than 10% over Base Rate, in part just because* [*Part 36.14(3)(a)*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I71F54A60E42311DAA7CF8F68F6EE57AB) *provided such a cap). Accordingly, the argument goes, if the analogy with* [*Part 36*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I0E62E610E45011DA8D70A0E70A78ED65) *was not properly drawn, the setting of the rate at a rate higher than for the preceding period was not made on a proper basis.*

*83 I can see no answer to that: it must follow. Taking the view, as I do, that the position could not be dictated by* [*Part 36*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I0E62E610E45011DA8D70A0E70A78ED65) *, I conclude that there can be no justification for departing from the rate of 3% over Base Rate which the judge had selected for the previous period.*

*84 I should add that the judge did give as an additional reason for awarding 10% over Base Rate that it “would provide a suitable incentive to settlement in circumstances such as those in this case”. I do not see how such a consideration, taken of itself, can justify increasing the rate of interest otherwise properly payable.*

*85 By way of his respondents' notice, however, Mr Thompson sought to uphold the judge's award of 10% over Base Rate by other means. He accepted that 3% over Base Rate could be a rate properly to be awarded for the class of case where the successful party is equated with a small business. He accepted, also, that the respondents did not advance their position as exceptional. His point was that the economic circumstances of the time were exceptional, justifying a departure from conventional rates; and on that footing a rate of (at least) 10% over Base Rate was justified.*

*86 He referred to a number of authorities in this respect, notably the comment of Rix LJ in* [*Jaura v Ahmed [2002] EWCA Civ 210*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=ICCA71390E42711DA8FC2A0F0355337E9) *who, after reviewing the authorities, said this at paragraphs 25 and 26 of his judgment:*

*“25. A schedule of base rates for the relevant period has been handed to us and we have been encouraged to fix a rate ourselves, without the need for remission or further assessment. This schedule shows that in August 1995, at the beginning of the period, base rate was at 6.75%, as indeed is confirmed by Mr Jaura's bank statements. At the end of the relevant period, which I take to be the date of the judge's order below on 5 March 2001, base rate was 5.75%. In between base rate has fluctuated between a high of 7.5% reached between 4 June and 7 October 1998 and a low of 5% which obtained between 10 June 1999 and 7 September 1999. Even applying Mr Frieze's rule of thumb of 2% above base, 8% over the whole of the period would be too little. However, in my judgment the appropriate rate should be 3% over base from time to time. I strongly suspect that even that figure does insufficient justice to Mr Jaura, but I do not think that this court has enough evidence to support the case that the rate charged to Mr Jaura (4.5% above base) was typical of small businessmen in his position. Even so, there is evidence that Mr Jaura was alive to the opportunity of achieving the most economic borrowing rate available to him, and was prepared to transfer banks and switch his borrowing structure to achieve the best rate. In the circumstances I am confident that a rate of 3% above base does no injustice whatever to Mrs Ahmed.*

*26. It is right that defendants who have kept small businessmen out of money to which a court ultimately judges them to have been entitled should pay a rate which properly reflects the real cost of borrowing incurred by such a class of businessmen. The law should be prepared to recognise, as I suspect evidence might well reveal, that the borrowing costs generally incurred by them are well removed from the conventional rate of 1% above base (and sometimes even less) available to first class borrowers.”*

*87 In this regard, Mr Thompson referred to the evidence filed on the part of the respondents, to the effect that at the relevant times Base Rate had been at exceptionally low levels. But, as the evidence indicated, by reference to unsecured sterling personal loans to households (up to £5,000), that very low Base Rate had not resulted in significantly lower borrowing rates for such households which at the relevant times were in the range, on the evidence, of 9% to 15%. Given, Mr Thompson submitted, that an award of interest is generally underpinned by a compensatory purpose, a rate of (at least) 10% over Base Rate was, he said, justified here.*

*88 I do not agree, for a number of reasons.*

*1) First, the selected comparator (household loans up to £5,000) does not fit well with the small business categorisation properly taken by the judge as applicable to the present case.*

*2) Second, the reality is that the court generally takes a pragmatic approach here, the rate set often being less than what the successful party might have to pay if a borrower but more than he would receive as a lender.*

*3) Third, and perhaps most fundamentally, the judge had taken into account that evidence. Having done so, he selected a rate of 3% over Base Rate for the period up to 16th January 2010. There can be no viable challenge to that exercise of discretion. Since, as I have concluded, there is no other justification for increasing the rate as from 16th January 2010, the judge's assessment of a rate of 3% over Base Rate should apply to that period also.*

58. Depending on the category of borrower, from mainstream corporate borrower to SME, the bracket is base rate plus 1% or base rate plus 3%, and an individual might recover base rate plus 4%. It follows that a court should, when applying conventional principles of law determine what general class of borrower a recovering party falls into, and award a rate commensurate with that granted in the Commercial court calculated by way of simple interest.

59. Returning to **F & C Alternative Investments (Holdings) Limited.v.Barthelemy & Another**[[10]](#footnote-10) Davis LJ noted in paragraphs 91 to 98.

*91 It will be recalled that, under the Order, the judge awarded interest on costs from 16th January 2010 to 24th June 2010 at a rate of 10% p.a over Base Rate; at a rate thereafter until 21st December 2010 at a rate of 40% p.a; and at a rate from 22nd December of 22% p.a.*

*92 I do not think I was the only member of this court to have been disconcerted, on first sight of the Order, by those figures.*

*93 I do appreciate that, again, this was a discretionary matter. But, again, I think, with respect, that the judge's approach was erroneous in principle.*

*94 As to the first period (16th January 2010 to 24th June 2010) the judge explicitly stated that the interest rate should be 10% over Base Rate by analogy with* [*Part 36.14(3)(c)*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I71F54A60E42311DAA7CF8F68F6EE57AB) *. Since, as is my view, the analogy cannot stand it follows that there is no reason why the interest rate should not be the same 3% over Base Rate as selected by the judge for the preceding period.*

*95 As to the subsequent periods, the judge's view was that the evidence showed that the respondents suffered particularly high losses as a result of the litigation (in the form of interest charges on bridging loans initially taken out in June 2010 to fund the ongoing costs of the litigation); and that the divergence in those periods between the application of a “conventional approach” (as the judge styled it) and the underlying purpose of an interest award being to compensate individuals for losses actually suffered “is particularly acute such that justice requires a different approach”.*

*96 We were taken by counsel to the evidence filed. Even allowing for the circumstances, 40% or thereabouts for secured bridging lending seems remarkably high. Mr Browne said that the evidence was filed very late by the respondents: and, although no adjournment was sought, the underlying documentation was not produced. The judge talks about an “effective rate of interest”. It may well be that some significant element over and above simple interest has come into the figures. Mr Culligan's own witness statement, for example, indicates that substantial arrangement and redemption fees and other charges were involved.*

*97 Mr Browne complained that such awards of interest were excessive. He also said that they bear no relation to what could be awarded under* [*section 17(1) of the Judgments Act 1838*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=IF9513270E44711DA8D70A0E70A78ED65) *.*

*98 In my view, with all respect to the judge, these awards of interest also cannot stand, for a number of reasons.*

*1) First, and most significantly, the judge emphasised at paragraphs 78 and 79 of his judgment the importance for his reasoning on these awards of interest of his having decided to award costs on an indemnity basis (that is, pursuant to the analogy he had drawn with* [*Part 36*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I0E62E610E45011DA8D70A0E70A78ED65) *). The inference thus is that the judge would not have made those awards of interest if costs had been awarded on a standard basis. Since, as I have concluded, such an award of costs on an indemnity basis involved an error of principle, this important part of his reasoning on interest on costs is likewise vitiated. It is, putting it another way, a matter that should not have been taken into account.*

*2) Second, the judge drew a “very loose comparison” with intentional torts such as deceit; and also used the award of indemnity costs as a marker “because the standards to be applied are well known”. Those remarks are suggestive of some unreasonable or improper conduct in the litigation on the part of the appellants: but, as I have said, the judge at an earlier stage of his judgment had rejected such a suggestion. In my view, there can here be no justification for some kind of penal award of interest on costs.*

*3) Third, the judge focused almost entirely on the actual funding position of these particular respondents. Of course regard has to be had to the compensatory principle; but reasonableness so far as the paying party is concerned also comes into it. The appellants no doubt would have appreciated that there would have been costs funding pressures on the respondents in this major litigation. But they were hedge fund managers, to be equated for costs purposes with small businessmen (as the judge had found), and the appellants had been given no prior notification or reason to think that the respondents were borrowing such sums and at such rates to fund the defence. The first they knew of it was when the respondents' evidence was served very shortly before the costs hearing (which evidence, incidentally, did not itemise the assets of the respondents). Further, as Mr Browne said, costs of funding litigation by way of bridging loans are not ordinarily recoverable in themselves as costs of litigation: but the judge's approach comes near to having that consequence. It is also something of a puzzle, given the particular importance the judge attached to the indemnity costs award (and the analogy with* [*Part 36*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I0E62E610E45011DA8D70A0E70A78ED65) *), that the judge did not attach more weight to the 10% above Base Rate cap contained in* [*Part 36.14(3)(c)*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I71F54A60E42311DAA7CF8F68F6EE57AB) *. After all, if this had been a* [*Part 36*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I0E62E610E45011DA8D70A0E70A78ED65) *case, the respondents could not necessarily have circumvented the stipulation of* [*Part 36.14(3)(c)*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I71F54A60E42311DAA7CF8F68F6EE57AB) *by saying that their funding of the litigation costs had in fact been provided at a rate greater than 10% above Base Rate.*

*4) In the context of awards of interest on judgment sums, the court ordinarily does not have regard to, or at least is not bound by, the rate at which a particular recipient in his particular circumstances might have borrowed funds: rather the court ordinarily focuses on the relevant class of person (if I can put it that way): see, for example, Jaura v Ahmed (supra); and see also the discussion of Andrew Smith J in Fiona Trust & Holding Corporation v Privalov [2011] EWHC 664 (Comm) at paragraphs 13 to 17 of his judgment. I appreciate that those remarks were made in the context of a sum of which the recipient has been deprived for a period rather than in the context of a recipient who has actually paid out money. Even so, the approach underscores the need for a general appraisal, having regard to what is fair, reasonable and proportionate as between both paying party and receiving party. Certainly such matters are not to be decided by some kind of automatic application of an egg shell skull rule. Indeed, in his written submissions Mr Thompson fairly accepted that the approach of the court in exercising its discretion in relation to interest on costs should be similar to that in relation to interest on principal — albeit subject, as he submitted, to the court being “more prepared to take account, if relevant” of the rate at which the receiving party had actually had to borrow money to fund the litigation.*

*99 I agree with Mr Thompson that the requirements of the* [*Judgments Act 1838*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=80&crumb-action=replace&docguid=I612A6E91E42311DAA7CF8F68F6EE57AB) *relate to the period after judgment, not before judgment: and the discretion conferred by Part 44.3(6)(g) is not to be fettered by reference to that statute. Nevertheless, for the reasons I have given I do consider that the judge erred in principle in the awards of interest on costs which he made for these periods; or otherwise took into account matters that should not have been taken into account. Considering the position, I think that the proper award of interest on costs for these periods should also be 3% above Base Rate.*

60. Giving a concurring judgment, Tomlinson LJ further noted in paragraphs 101 to 105

*101 I agree. Ordinarily one would not wish to interfere with a judge's discretionary award of costs made after a very long and complex trial, but for the reasons given by My Lord I am satisfied that the judge approached his task upon a flawed basis. Although we are differing from the judge, I do not feel it necessary to add anything on that central point.*

*102 I only add a cautionary note as to the reliance on “rules of thumb” or conventional rates in relation to the selection of the appropriate rate at which interest should be awarded. Such rules of thumb or conventional rates are useful in that in the usual run of cases the court is rarely supplied with adequate evidence upon which to reach an informed conclusion as to the appropriate rate. Ordinarily a rule of thumb or convention enables practical justice to be done without incurring the cost of adducing evidence as to appropriate interest rates, which expenditure might in many routine and simple low value cases be out of proportion to the amount at stake.*

*103 In this case there was a suggestion that in the aftermath of the financial upheaval in September 2008 the gap between “policy” rates such as the Bank of England Base Rate and LIBOR and the actual cost of borrowing for both corporate and personal customers has or may have widened. The evidence proffered of actual borrowing rates proved insufficient to bear out this suggestion since it related only to unsecured consumer borrowing described as “household loans” of up to £5,000.*

*104 An uplift of 3% above base rate for a particular class of borrower, “small businessmen”, was adopted in Jaura v Ahmed , cited at paragraph 85 above, on the basis of evidence which the court there recognised to be incomplete and in some respects inadequate. That was in 2002. I do not know to what extent this case has been relied upon more generally as establishing a “rule of thumb” for litigants of the class there described. However, the judge here applied what he described as the “adjusted standardised approach” applied in Jaura v Ahmed and the only challenge thereto has been that it was insufficiently generous to the respondents, not that it over-compensated them.*

*105 A rule of thumb or conventional approach of that sort, if such it has become, will always require reappraisal in the light of changing conditions, and will always yield to comprehensive evidence if shown thereby to be or to have become inappropriate. For the reasons given by My Lord the present is not a case in which such a reappraisal can be attempted. However I would not wish it to be thought that our decision in this case is an indication that any conventional approach is necessarily appropriate or is automatically to be applied in all cases where interest for a period falling after late 2008 is under consideration. The special circumstances which have since obtained, at any rate in this jurisdiction, may call for a reappraisal of the conventional approach in cases where the debt or obligation is denominated in sterling. That said, I am not aware of any suggestion, apart from that made in this case, that the conventional uplift of 1% above base rate or LIBOR has become inappropriate in respect of the usual run of corporate borrowers. Indeed, I note that in Les Laboratoires Servier v. Apotex [2011] EWHC 1318 (Pat) there was unchallenged evidence to the effect that an uplift of 1% over the suitable reference rate, there in fact found to be LIBOR, remained appropriate for the period November 2008 to May 2011, the recipient party being a private company in the pharmaceutical sector with significant assets. I would also not assume that an uplift of 3% for “small businessmen”, if that has become conventional, will necessarily be shown to be inadequate.*

**Conclusions**

61. The future for litigation funding is bright, in the sense that the demand for litigation funding is unlikely to diminish, and the supply is likely to increase. Litigation funding will expand beyond the traditional role of third party funders, as ABSs with large amounts of capital, offer a cradle to the grave approach to the provision of funding cases, including cover for adverse costs. The cost of litigation funding might be softened for the consumer, by increased competition in the sector, or by a more generous approach to awards of interest on costs by the courts.

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**20th April 2015**

1. My website can be found at [www.costsbarrister.co.uk](http://www.costsbarrister.co.uk) and I welcome people subscribing to it or linking with me on Linked In. [↑](#footnote-ref-1)
2. [2005] 63 NSWLR 203 [↑](#footnote-ref-2)
3. HK Insall SC was counsel in the Fostif case. [↑](#footnote-ref-3)
4. [2011] EWCA Civ 25 [↑](#footnote-ref-4)
5. Lloyds Maritime and Commercial Law Quarterly 2007 page 382 [↑](#footnote-ref-5)
6. [1982] AC 679 [↑](#footnote-ref-6)
7. It’s a very big “might”. [↑](#footnote-ref-7)
8. [2007] HL 34 [↑](#footnote-ref-8)
9. [2012] EWCA Civ 843 [↑](#footnote-ref-9)
10. [2012] EWCA Civ 843 [↑](#footnote-ref-10)