Neutral Citation [2015] IEHC 457

THE HIGH COURT

[2001 No. 9223 P]

BETWEEN

PERSONA DIGITAL TELEPHONY LTD. AND SIGMA WIRELESS NETWORKS LTD.

PLAINTIFFS

AND

THE MINISTER FOR PUBLIC ENTERPRISE, IRELAND, AND THE ATTORNEY GENERAL

DEFENDANTS

AND BY ORDER DENIS O'BRIEN

DEFENDANT

AND MICHAEL LOWRY

THIRD PARTY

JUDGMENT of Ms. Justice Donnelly delivered on the 30th day of June, 2015

1. This judgment concerns a preliminary matter raised by the above named defendants arising from a notice of motion issued by the plaintiffs. In their motion, the plaintiffs seek, *inter alia*, an order, by declaration or otherwise, that the plaintiffs, in entering into a litigation funding arrangement with Harbour Fund III Limited Partnership ("HF III"), are not engaged in an abuse of process and/or are not contravening rules on maintenance and champerty ("the funding application"). In this preliminary matter, the defendants seek disclosure of the litigation funding agreement.

2. The main proceedings concern the decision by the Minister for Public Enterprise to award the second GSM mobile telephone licence to ESAT Telecommunications Ltd. following a competition process. The plaintiffs were unsuccessful applicants in that process. The plaintiffs claim damages (including exemplary damages) for misfeasance in public office, breach of duty, including statutory duty, breach of contract, breach of legitimate expectations, breach of constitutional rights, breach of rights under EU Law, and a declaration that the European Communities (Mobiles and Personal Communications) Regulations, 1996, contravene EU Law.

3. James A. Boyle, who is a director of each of the plaintiff companies, swore an affidavit to ground the plaintiffs' motion. He sets out the long history of the proceedings and confirms that it is the intention of the plaintiffs to continue the prosecution of the proceedings. The plaintiffs are impecunious and he blames this on the wrongdoing of the defendants. He says that the plaintiffs do not have the ability to continue the prosecution of the proceedings. To date, the continuation of the proceedings has only been possible because of funds provided by the shareholders of the plaintiffs.

4. Mr. Boyle outlines how he researched litigation funding and identified Harbour Litigation Funding Ltd. ("HLF") as a leading litigation funder. A funding agreement was negotiated and entered into on the 24th March, 2015, between the plaintiffs, Persona and Sigma, on the one hand, and HF III on the other.

5. Susan Dunn, head of Litigation Funding at HLF, swore an affidavit saying that HLF was an investment sub-advisor to HF III. She calls HF III and HLF together by the name of "Harbour". HF III was incorporated in 2015 as a limited partnership under the laws of the Cayman Islands and has £230 million sterling available to invest in commercial litigation and arbitrations worldwide. HLF's headquarters are in London. Ms. Dunn outlines that Harbour was a founding member of the Association of Litigation Funders of England and Wales, the regulatory body formed in 2011 and responsible for litigation funding in England and Wales. She exhibits the Code of Conduct for Litigation Funders under which Harbour, as a member of the Association of Litigation Funders of England and Wales, operates.

6. That code of the Association of Litigation Funders of England and Wales was established by the Civil Justice Council of England and Wales. That is an independent public body under the UK Ministry of Justice. The code is exhibited and it includes provisions that ensure:

(1) Non-interference by funders in litigation

(2) Confidentiality

(3) Capital adequacy of litigation funders

7. Mr. Boyle avers that he believes and is advised that the funding agreement entered into between the plaintiffs and HF III is confidential and privileged and as a result it has not been disclosed. Mr. Boyle says that were the funding agreement to be disclosed to the defendants, it would provide them with an unnecessary, unfair and disproportionate litigation advantage in these proceedings. In his affidavit, he confirms that the plaintiffs and their solicitors and counsel will have full control of the litigation at all times and Harbour's role is limited to that of a funder. Both he and Ms. Dunn indicate a number of terms provided for in the agreement:

- Harbour will act in accordance with the Code of Conduct for Litigation Funders.
- Harbour is entitled to information but cannot interfere with the litigation.
- Harbour cannot withhold consent to change in the plaintiffs' counsel.
- The decisions whether to prosecute, compromise, continue or discontinue the proceedings are at all times within the exclusive control of the plaintiffs.

The Legal Submissions

The submissions on behalf of the State

8. Although this is the preliminary issue, the State defendants referred to the legal and public policy background applicable in this

jurisdiction. By reference to the Statute Law Revision Act, 2007, counsel submitted that maintenance and champerty remain prohibited in Ireland. Maintenance was described by Hogan J. at para. 10 in *Greenclean Waste Management Ltd. v. Leahy (No. 2)* [2014] IEHC 314 *"as the improper provision of support to litigation in which the supporter has no direct or legitimate interest."* Champerty is *"a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action."* The State relied on the decision of Clarke J. in *Thema International Fund Plc. v. the HSBC Institutional Trust Services Ireland Ltd*. [2011] 3 I.R. 654. Clarke J. at para. 22 stated *"in Ireland it is unlawful for a party without an interest (or some other legitimate concern including charity) to fund the litigation of another at all and, in particular, it is unlawful to fund litigation in return for a share of the proceeds."*

9. Counsel relied in particular upon the following passage from Clarke J. at para. 26 in *Thema:* ***"[g]etting precise details*** *as to the identity of the funder* ***and the terms of the funding*** *(provided the funding came from within the group of parties who already have an interest in the matter) is not, in my view, necessary or proportionate to allow the defendant understand who its true adversary is. Its true adversary is the plaintiff backed up by parties who have a legitimate interest in the plaintiff's well being."* (emphasis added). This, it was submitted, leads to the conclusion that the defendant in proceedings is entitled to "*precise details … of the terms of the funding*" where, as in the instant case, the funder is unconnected with the plaintiff. Counsel rejected the view that the plaintiffs can self-select the information to be given to the State.

10. Counsel for the State also relied on *Greenclean (No. 2)* in which Hogan J. came to the view that After The Event ("ATE") insurance was not champertous. In that case, counsel noted, Hogan J. had the contract of insurance before him.

11. In an earlier decision in the *Greenclean* litigation entitled *Greenclean Waste Management Ltd. v. Leahy* [2013] IEHC 74, Hogan J. ruled that the existence of the ATE insurance meant that security for costs did not have to be provided. That decision was appealed and in a judgment delivered on the 8th May, 2015, in *Greenclean Waste Management Ltd. v. Leahy* [2015] IECA 97, the Court of Appeal examined the insurance policy in some detail. Counsel for the State pointed out that the judgment showed that a single page had been initially exhibited by the plaintiff, instead of the policy. Kelly J. noted "it was hardly surprising" that a protest was taken to that inadequate documentation. Ultimately, it seems a copy of the policy of the insurance was sent by e-mail to the defendant's solicitors. Kelly J. outlined how the defendant's solicitor, having been apprised of the contents of the policy, had fourteen separate criticisms of it.

12. In *Greenclean*, Kelly J. specifically noted that the plaintiff never put before the court the "no win no fee" agreement at issue in the case. Kelly J. held that this amounted to a failure to put a fundamental proof before the court to establish the effectiveness of the ATE policy. In particular, he said that in the absence of the "no win no fee" agreement and its compliance with s. 68 of the Solicitors (Amendment) Act, 1994, it could not be said that there was sufficient evidence before the High Court to demonstrate the existence of an effective ATE policy. The appeal was allowed.

13. Counsel for the State in the current proceedings rhetorically questioned how the plaintiffs could ask the court to rule on something diametrically opposed to public policy without sight of it. Counsel submitted that the decision of the Court of Appeal in *Greenclean* is on all fours with the State's case. Indeed, in that respect, it is noted that the State's legal submissions had been filed prior to the decision of the Court of Appeal in *Greenclean*.

14. Counsel submitted that the plaintiffs' argument that they are entitled to have a bilateral dialogue with the court in seeking the ruling on the funding agreement is misconceived *in limine*.

15. Counsel went on to submit that there were matters of confusion and inconsistency placed before the court. In particular, they referred to the precise nature of the relationship between HF III and HLF. Counsel also adopted the submissions that were to be made by counsel for the fourth defendant in relation to the provisions of Order 31 Rule 15 of the Rules of the Superior Courts (RSC).

The submissions on behalf of the fourth named defendant

16. Counsel on behalf of the fourth-named defendant adopted the submissions on behalf of the State. Counsel then addressed the issue of O.31 r.15 of the Rules of the Superior Courts. Order 31 rule 15 states:

> "Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit."

17. Counsel made reference to further aspects of O. 36 dealing with procedural matters in calling for production of documents and in the objection to same. It was submitted that the defendants had required production of the documents and that the plaintiffs had not complied with formal rules of objection.

18. Counsel for the fourth defendant submitted that the right to issue a notice to produce in respect of documents referred to in pleadings or affidavits is of ancient usage. In doing so, he referred to pages 502 to 503 of Wiley, the Judicature Acts (Ireland) 1906. He also referred to *Quilter v. Heatly* (1883) 23 Ch. D. 42 in which the Court of Appeal stated that production must be ordered of documents referred to in the pleadings unless some special reasons against it can be shown. As stated at p. 50 of the judgment, the rationale behind this was that the rules are *"evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings."* This statement of the rationale of the rule is cited and adopted by Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (2nd Ed., Round Hall, 2013) and Delaney and McGrath, *Practice and Procedure in the Superior Courts* (3rd Ed., Tottel Publishing, 2012). In *Hunter v. Dublin Wicklow and Wexford Railway Company* (1891) 28 I.R. 489, the Irish Court of Appeal reached the same conclusion as in Quilter.

19. Counsel also relied upon the leading English authority of *Dubai Bank Limited v. Galadari and Others* (No. 2) 1992 All E.R. 738 concerning an interlocutory application restraining a defendant from disposing of certain property the subject matter of the proceedings. The Court of Appeal held that the fair disposal of a cause or matter was not limited to the final disposal of the action but also involved the fair disposal of all stages or causes of the matter. It was also held that even where the document had not been referred to in an affidavit sworn by a party, it was sufficient if the document was referred to in an affidavit used by a party. It was submitted that what was needed was an express reference to a document. In the present case, there was such an express reference to a document by Mr. Boyle who is a director of the plaintiffs and that this is clearly an interlocutory matter.

20. In *Lowry v. Mr. Justice Moriarty* [2014] IEHC 602, Costello J. considered the application of O. 31 r. 15 to an application by the respondent in judicial review proceedings to a complete set of legal pleadings and affidavits on the basis that the legal proceedings were referred to in an affidavit sworn by the applicant. Costello J. refused that application. Counsel submitted that the construction of the rules set out in Dubai Bank Limited v. Galadari was adopted by the court in that the reason for the refusal was that there had been no direct allusion to the document in the pleadings or affidavit. In that case, the references had been to the existence of proceedings and that was held to be insufficient on the "*authority of* Dubai v. Galadari."

21. Insofar as it was accepted that the court may decide to dispense with the requirement for formal notice to be given and instead rely upon the affidavit of Mr. Boyle and the submissions of the plaintiffs, counsel submitted that the objections did not fit within the limitations set out in O.31 r.18. Reliance was placed on Delaney and McGrath, *Practice and Procedure in the Superior Courts* (3rd Ed., Tottel Publishing, 2012) at para. 11.39:

> *"[t]his test may not be satisfied and an order for inspection may be refused or limited on the grounds that the material in question is confidential. The court may also seek to take measures in order to mitigate the loss of confidentiality such as blanking out parts of the documents, limiting disclosure to legal advisers only or restricting disclosure to experts and other named persons. Specific provision is also made in rule 20 in respect of business books".*

22. In counsel's submission, the affidavit of Mr. Boyle, director of the plaintiff companies, refers to a specific document and relies upon provisions of that document to seek to confirm to the court that it is not a champertous agreement. Mr. Boyle has described the funding agreement as confidential and privileged. Counsel submitted that at no stage does he identify the basis for confidentiality. Even if it was said to be confidential, such confidentiality does not protect it from disclosure in legal proceedings. He points to the case of *Cooper Flynn v. Raidío Teilifís Éireann* [2000] 3 I.R. 344 and says in that case, the confidentiality was clearly one of banking agreements with customers, but even then confidentiality was not a bar to making discovery in those proceedings. Counsel relied in particular upon that part of the decision of the High Court (Kelly J.) in *Cooper Flynn* as set out at pages 352 to 353. Without prejudice to his argument that there was no confidentiality identified here, counsel for the fourth named defendant submitted that if it was accepted by the court that it was a confidential document, it was necessary to decide whether inspection was necessary for the fair disposal of the action. Counsel submitted that having the document would provide the fourth defendant with a litigious advantage, *i.e*. it would show whether the agreement is champertous.

23. With respect to privilege, counsel says that Mr. Boyle does not set out what type of privilege is being asserted. He says that the plaintiffs obtained independent legal advice regarding the agreement but no explanation was given as to whether this was the privilege being claimed. Counsel submitted that even if the document was privileged, the plaintiffs, having deployed it in affidavit, could no longer claim or rely upon such privilege. Counsel relied on *Hannigan v. DPP* [2001] 1 I.R. 378 in the event that the court was to reach the conclusion that some privilege attached to this document. It was submitted by counsel that any such privilege was waived in the circumstances as set out in the affidavit of Mr. Boyle. In essence, counsel submitted that where the document was deployed, there was a waiver of privilege and the defendants were entitled to the document.

24. Counsel also relied upon the decision of Hogan J. in *Greenclean* and emphasised that in that case, Hogan J. had sight of the document. Counsel also relied upon *Dublin Waterworld Limited v. National Sports Campus Development Authority* [2014] IEHC 518 in which the defendant had informed the court that it suspected that an unknown third party was funding the litigation. Although the court refused the requested order for security for costs against the plaintiff, it directed that details of any third party funding be disclosed on affidavit. Counsel also relied upon *McCann v. the Trustees of the Victory Christian Fellowship* [2014] IEHC 665. That case concerned orders sought in aid of execution of judgment.

The submissions on behalf of the plaintiffs

25. Counsel for the plaintiffs submitted that the State's submissions failed to observe the distinction between the issue for determination in the funding application and this issue, namely, whether disclosure was required to be made for that determination. Counsel also observed that neither party had stated why they needed the document ahead of that hearing. Counsel also submitted that many of the arguments raised by the defendants had to do with discovery. With respect to the issue of confidentiality, it was submitted that this case dealt with confidentiality in its commercial sense.

26. Counsel submitted that this was a truly unique case. This had been observed by the Supreme Court in its decision on the motion to strike out the proceedings on the basis of delay. Counsel submitted that this was of relevance in evaluating the handing over of the document.

27. It was also submitted that the issue before the court in this preliminary application was not concerned with any issue in the substantive proceedings. It was a matter of the court controlling its own processes to ensure that there was no abuse of process. Therefore, it was submitted that disclosure rules had to be considered in a very different context to disclosure of documents related to substantive issues in *inter partes* litigation. It was submitted that this was why the court itself could look at the agreement, if the court felt it necessary to ensure that the key terms on which this issue will be decided are, in fact, contained in the document.

28. On behalf of the plaintiffs it was submitted that the defendants were taking it as self evident that because one was talking of a funding agreement, one needed to see the funding agreement. This was not the case as the parameters for the argument on the funding application are clearly established. Those arguments do not require sight of the funding agreement.

29. Counsel for the plaintiffs submitted that the details which have been identified in the case law in this jurisdiction and in other jurisdictions as relevant to this debate have been disclosed. These are matters such as the identity of the funder, background information about the funder, adherence to a Code of Conduct for Litigation Funders, lack of control of the funder over the litigation, the funder cannot withhold consent to change in plaintiffs' lawyers, all decisions to prosecute, compromise, continue or discontinue the proceedings within the exclusive control of the plaintiffs, ATE insurance policy to be taken out to meet adverse costs orders against the plaintiffs. It was submitted that the defendants say that this is fundamentally contrary to public policy and as against this constitutional right of access to the courts, the necessity for vindication of rights in circumstances where the third party did not stir up the litigation, were all matters that could be decided without sight of the funding agreement. Counsel submitted that in light of the above, it can be seen that no argument has been put forward to articulate the reason why the defendants require sight of this funding agreement.

30. It was submitted that the court was not concerned on the substantive motion with details regarding a sliding scale of damages, the percentage given as to budgets, etc. It was those matters which were identified above that were important in this case. They have been set out by Clarke J. in *Thema* and that was all that was relevant to know. It was submitted that those were the key matters going to the administration of justice or to the purity of justice. Where those key details were disclosed, courts in other jurisdictions have been prepared to sanction the agreements. Counsel relied upon the *Waterhouse v. Contractors Bonding Ltd.* [2013]

NZSC 89, a decision of the New Zealand Supreme Court. Counsel submitted there was no necessity for further details. In the ordinary sense, these were commercially confidential. The details had nothing to do with the real issues in the case.

31. A particular submission was that if the court were to order disclosure of the funding agreement and/or any terms beyond the foregoing, this would confer a significant tactical and litigation advantage on the defendants. Counsel submitted that it would be hugely beneficial to the defendant to know the pressure points as to when funding might run out. Therefore, the details should not be disclosed.

32. With regard to the issue in *Thema,* counsel submitted that this went to the substantive issue and was not relevant to this preliminary issue. In any event, he submitted that it was limited disclosure that was being required by Clarke J., e.g. identity and not the terms of the agreement. It was accepted that there was an importance as to the identity of the parties. It was submitted that the same questions had been raised in other jurisdictions. It was submitted that counsel for the State had made a huge leap in relying on that passage in *Thema* at para. 25 when he said that it meant that persons not involved in the litigation must give full details. In *Thema*, the court had not ordered disclosure because of the litigation advantage it might give.

33. Counsel for the plaintiffs relied upon the fact that the funding agreement had been brought into existence exclusively for the purpose of litigation. He submitted that, therefore, it attracts litigation privilege. He submitted that this would satisfy the dominant purpose test referred to in Delaney and McGrath.

34. Counsel replied to the submissions regarding O. 31 r. 15 by submitting that that rule was concerned with documents referred to in the context of pleadings or affidavits on the substantive issues in dispute between the parties. He submitted that it did not relate to an issue external to the substantive issues such as the funding of the litigation. He said that this was clear from the reference in O.31 r.15 to putting the documents "in evidence". He submitted that this was clear by virtue of the reference to the consequence of not complying with a notice to produce, which was that the document could not be put in evidence. He submitted that it would never be sought to put the funding agreement in evidence. Counsel accepted that while it was not formally objected to in the manner prescribed by the rules, to make that a requirement in the circumstances giving rise to this application would be the worse type of nineteenth century reliance on rules of procedure. Counsel said that the *Dubai Bank Limited* case had concerned an interlocutory motion. This case was not an interlocutory motion to do with interlocutory relief. Counsel also distinguished *Tweed* in that the summary of the report in that case may not have given the full flavour of the facts. In *Hannigan*, the circumstances in which the document had been deployed was in the context of the substantive dispute. In those cases, the deployment had been for the purposes of the deploying party in the context of the substantive issue. That was not the case here.

The Replies

35. Counsel on behalf of the State submitted that it was an issue of principle at stake. The constitutionally protected right of natural justice included the principle of *audi alteram partem*. It was not appropriate that one party was to be blindfolded. It was submitted that the plaintiffs were asking the court to give its blessings to a document which the plaintiffs say no one else can see. It was submitted that this would offend against the purity of justice.

36. Counsel submitted that while the plaintiffs say that comfort could be given from the fact that the document complies with the UK Code of Conduct for Litigation Funders, that is in fact no comfort as there is no code available here. In any event, it can only be with reference to the terms of the document that one can say that compliance with a code had been established.

37. Counsel submitted that there was a risk of injustice if one party could not see a document. In those circumstances, it would not be possible to make submissions upon it.

38. On an issue of practicability, it was submitted that in the *Barclays Wealth Trustees (Jersey) Limited v. Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2013] JRC 094 case relied upon by the plaintiffs on affidavit and in their submissions, the court had considered the particular agreement "a matter of fact and degree" as to whether an abuse of process is established. Such matter of fact and degree can only be established where the funding agreement is available for analysis. Counsel submitted that there was no real answer to the point made in *Greenclean* by Hogan J. and by the Court of Appeal that the document must be analysed.

39. Counsel submitted that in this jurisdiction, an adversarial system applies. In the United Kingdom, there was a degree of familiarity with these types of funding agreements. This jurisdiction does not have a code or a yardstick against which to measure the funding agreement. It was submitted by counsel that where the Irish courts are feeling their way around these agreement and these issues, it was necessary to have the funding agreement and the terms thereof available to all of the parties to the litigation. In essence, there was a principle and practicable objection to the documentation being kept from the other parties.

40. Counsel on behalf of the fourth named defendant submitted that there was no evidence before the court that this had been brought into existence exclusively for the purpose of litigation and that the court should be cautious in so inferring.

41. Counsel submitted that the cause or matter referred to in O.31 r.15 applied to all causes or matters and not simply the substantive issues in dispute. Counsel said the reference in O.31 r.15 to "in evidence" did not limit the right of another party to come to court to seek inspection of the document. To do so would be to ignore O.38 r.18.

42. Counsel submitted that while it was suggested that *Cooper Flynn* was not relevant because it referred to discovery, the most important aspect of *Cooper Flynn* was the reference therein to the high level of confidentiality. Notwithstanding that level of confidentiality, discovery had been made in that case. As regards confidentiality, the *Waterhouse* case had indicated that the issue of confidentiality was a matter for the New Zealand High Court to decide upon. It was submitted that in the instant case, all that was being told to the court was that it was confidential. It was submitted that this was wholly insufficient.

43. Insofar as the plaintiffs relied upon the unique nature of the case, counsel for the fourth defendants submitted that it was unique from the perspective that this was the first time that a third party funder issue had come directly before this court.

44. In answer to the claim by the plaintiffs that the defendants had not identified why they wanted the documents, it was submitted that it was sought because the defendants wished to see if the agreement breached rules relating to maintenance and champerty. Reference was made to para. 30 of the affidavit of Mr. Boyle in which it was submitted he had cherry-picked items from the funding agreement.

45. While the plaintiffs have deployed the document, they say that it is not so deployed in the substantial cause or matter. It was submitted that that is a matter of interpretation as to the cause or matter.

The court's analysis
46. Undoubtedly, this is a unique case. It is unique for the reason set out by the Supreme Court. It is also unique in that it is the first time that the issue of third party funding has come directly before the courts of Ireland.

47. The plaintiffs in their written submissions submit that the question of what may amount to maintenance or champerty is "*not frozen by reference to the social conditions and public policy considerations which pertained several hundred years ago*" (as per Hogan J. in *Greenclean*). The plaintiffs say that a nuanced approach is required to this issue and that various factors such as access to justice and the vindication of rights were required to be considered. It is in that context that the plaintiffs submit that the reference in *Thema* by Clarke J. to third party funding not being permitted was purely *obiter*. Many of the submissions made on behalf of the State correctly fall to be dealt in the funding application. The court will decide at that hearing whether the plaintiffs are engaged in an abuse of process and/or are contravening rules on maintenance and champerty by entering into the funding agreement. It is not appropriate for the court to trespass in this preliminary application on the substance of the issues to be determined in the funding application.

48. The Court of Appeal decision in *Greenclean* does not cover the point at issue in this case. However, the decision on appeal regarding the security for costs issue is highly instructive. That case concerned the "comparatively novel" issue of ATE insurance in this jurisdiction and the principles applicable to the consideration of ATE insurance in an application for security for costs. The insurance policy must demonstrate that it actually provides the security claimed. It is only then that the court will be in a position to take it into consideration in the exercise of the court's discretion in the making of an order for security for costs under s. 390 of the Companies Act, 1963. Similarly, Hogan J. in *Greenclean (No. 2)*, when dealing with the issue of whether the ATE insurance was as matter of principle champertous, illegal or otherwise unenforceable in law, had the benefit of the ATE policy before him.

49. In written submissions, counsel for the plaintiffs made reference to a number of cases from other common law jurisdictions. These cases indicate a variety of approaches to the disclosure of third party funding agreements. It is important to bear in mind that each jurisdiction makes its decisions in light of its own provisions on maintenance and champerty, on costs and on court procedure.

50. In the case of *Weston v. Publishing and Broadcasting Limited* [2010] NSWSC 1288, the Supreme Court of New South Wales refused to order complete disclosure of a funding agreement sought by way of motion to produce. Barrett J. referred to a previous decision of the Federal Court of Australia in which the defendants had been denied access to the terms of a funding arrangement entered into by a liquidator due to the "unfair advantage" such details would give them in the litigation. Barrett J. stated at para 36:

> *"the rationale lies, clearly enough, in the court's duty to administer its own proceedings so as to achieve the ends of justice. In order to perform that duty, it possesses, as part of its inherent jurisdiction, a power to forbid of restrict publication of evidence. Such a prohibition or restriction can properly be made, however, only where its imposition is necessary to secure the proper administration of justice."*

51. Barrett J. identified other situations where access to evidence or information was restricted and said that part of the basis for restriction was "*to protect a flow of information that will promote the cause of justice.*" In his view, the test of necessity protected from disclosure to the defendant information about the financial arrangements that allow the plaintiffs to continue the litigation.

52. Within Canada, differing approaches to the issue of disclosure are apparent among the provinces. The Ontario Supreme Court in *Fehr v. Sun Life Assurance Co of Canada* 2012 ONSC 2715, (2012) considered the question of whether plaintiffs in a proposed class action were entitled to seek funding approval by way of an *in camera* motion without notice to the defendants. In his reasons for the decision, Perell J. stated that the defendants should be allowed to participate in approval hearings both because they would be affected by its outcome and that as a policy matter, a defendant's participation would be helpful in dealing with the questions relating to whether the third party funding agreement was champertous or otherwise illegal.

53. Perell J. went on to hold that the said class plaintiffs should obtain court approval of funding arrangements with full disclosure of the agreement, unless the plaintiffs could make out a case for protecting solicitor-client privilege or make out some other public policy argument. In his opinion, the funding agreement was not privileged because the terms of the funding agreement did not concern communications between the plaintiffs and their counsel - it was about who was paying for the lawsuit and whether a third party was providing an indemnity for fees. The judge said that even if the funding agreement were privileged, fairness demanded that it be waived because the defendant was affected by the third party funding. The access to justice principle with respect to class actions appears to have been the main focus of the plaintiffs' submissions in that case and this argument was roundly rejected by Perell J. who commented that there was "an audacious quality" to it. In the course of his judgment, Perell J. made minimal reference to the risk of conferring a litigation advantage on the defendant. It was his view that the propriety of funding agreements "were controversial and problematic" and could not be allowed to operate clandestinely because if unregulated they had "*the potential to subvert the public policy purposes of class proceedings.*"

54. The above can be contrasted with the approach taken by the Supreme Court of British Columbia in *Stanway v. Wyeth Canada Inc*. [2013] BCSC 1585. The court in that case permitted only a redacted version of the funding agreement to be reviewed by the defendants when plaintiffs in a proposed class action were seeking approval of the agreement. Gropper J. first determined that the defendants should have the opportunity to access and make submissions on parts of the funding agreement on the basis that the defendants' input would be of crucial assistance to the court when deciding whether it should approve the agreement. In doing so, the judge also relied on the principle of natural justice that a person whose interests are affected by a proceeding be given an opportunity to speak to it. However, Gropper J. refused to grant access to the entire LFA on the basis that "*the confidential communications between the plaintiff, her counsel and a private financer in respect of the merits of the litigation and the litigation budget, as well as highly sensitive topics relating to the plaintiff's strategy and trial stamina*" were privileged. She did hold that there were other features of the funding agreement that the defendants were entitled to access including that the private financier was not controlling the litigation.

55. The decision of the Supreme Court of Bermuda in *Stiftung Salle Moduable v. Butterfield Trust (Bermuda) Limited* [2012] SC (Bda) 165 is also of interest. The background to that case was slightly unusual in that the plaintiff claimed, as part of its damages in the case, the costs of sums due on foot of a funding agreement. The defendant claimed the agreement was champertous. A redacted version of the funding agreement was disclosed but full access was sought by the defendants. The preliminary issue to be decided by the Supreme Court of Bermuda was whether certain parts of that redacted information should be protected from disclosure of the agreement on grounds of privilege, irrelevance or prejudice to the claimant's right to a fair trial. Those redacted parts included the sum of money that was referred to as the funders' total aggregate commitment and the agreed budget and timeline. The defendants argued that those details should be disclosed to allow the court properly to adjudicate on the champerty issue as well as the exposure to damages.

56. The Supreme Court of Bermuda held that the funding agreement clearly attracted litigation privilege because it was a communication "*between a client and or his lawyer and third parties for the purposes of litigation*" but the plaintiffs had waived that privilege by positively relying upon the document without qualification in support of part of their damages claim. Importantly, however, the court would not compel the disclosure of the redacted sections on the grounds that it would prejudice the plaintiffs to an unacceptable extent to require them to disclose details of the funding agreement which were directly relevant to their litigation strategy. The court held that, in any event, the disclosure of such information was neither relevant nor required for the purposes of adjudicating the champerty argument.

57. Much emphasis was placed on the decision of the Supreme Court of New Zealand in *Waterhouse v. Contractors Bonding Limited* [2013] NZSC 89 by the plaintiffs as well as by the State. In its conclusions, that court held that it may order disclosure of the funding agreement where an application is made to which the terms of the agreement could be relevant (a stay for abuse of process, third party costs orders or applications for security for costs). That will be subject to redactions relating to confidentiality as well as litigation-sensitive and privileged matters. The Court directed that confidentiality arguments would have to be put before the New Zealand High Court.

58. The plaintiffs, in affidavit and in submissions, referred to *Barclays Wealth Trustees (Jersey) Limited v. Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2013] JRC 094 in which the litigation funding agreement to which Harbour was a party was inspected by the court but not by the defendants. The parties in that case had been unable to agree terms upon which a redacted version of the agreement could be made available to the defendants. The Royal Court of Jersey was ultimately satisfied that it could adjudicate upon the legality of the LFA on the basis that the key features of the agreement outlined in the affidavit were sufficient. The court decided to inspect the funding agreement to ensure there was nothing in it that would bring the court to change its mind.

59. The above represents a brief review of the main cases placed before this court from other jurisdictions. Each side can legitimately claim varying degrees of support for their argument with regard to disclosure or non-disclosure of the litigation agreement.

60. In the present case, counsel for the plaintiffs submitted that the funding application was really an issue between the plaintiffs and the court and that the participation of the defendants may not be necessary for the court to be in a position to determine the preliminary point of law raised. The plaintiffs rely upon that argument in part to justify their contention that there is no requirement for the funding agreement to be disclosed to the defendants.

61. It is observed that it is only in exceptional circumstances that the court will conduct a two-way discussion with a single party. While that may occur in an *ex parte* application, those applications are subject to strict rules of procedure which almost invariably permit the other side to re-open issues that arise from the papers giving rise to the particular order. In the situation when a court inspects documents for the purpose of giving a ruling on privilege, it does so in the context of adversarial proceedings. The parameters of the court's duty on inspection of the documents will have been set in the context of the adversarial proceedings preceding the inspection. I conclude that while the plaintiffs have quite properly brought the funding application before the court for the determination of the court, it is brought in the context of adversarial proceedings between the parties.

62. Insofar as the plaintiffs' submission seeks to turn the funding application into a two-way discussion between the court and the plaintiffs, albeit with the benefit of submissions by the defendants, rather than a full adversarial hearing following which the court will decide the issue, I reject that characterisation. Like the Supreme Court of New Zealand in *Waterhouse* and the Ontario Supreme Court in *Fehr*, I am of the view that the adversarial system in which litigation is conducted gives each side the right to participate in matters which affect or potentially affect the other side. In this case, the defendants are affected as the plaintiffs state that they "simply do not have the wherewithal to continue to prosecute the proceedings" without the funding. In circumstances where success on this motion will bring an end to the proceedings, it is in the interests of the defendants for the motion to be determined against the plaintiffs. Furthermore, the court will benefit from the input of the defendants on the funding application.

63. It is necessary again to emphasis that this case presents a unique, novel and unusual set of circumstances. The circumstances in which the funding application is being made is that on the evidence before me, which is unchallenged in this preliminary application, these plaintiffs are impecunious. It is only where third party funding is obtained that they will be in a position to proceed with this unique action. The plaintiffs are asserting rights of access to the courts for the purpose of vindicating their rights. The plaintiffs quite properly understood that they had to reveal, at least at a minimum, the existence of the funding agreement, its general terms and the identity of the funder, so that the court may rule on the issues of abuse of process or breach of maintenance or champerty.

64. Clarke J. in *Thema*, albeit speaking in a different context to the present case, was clear that the giving of detailed information about funding to an adversary was bound to convey a litigation advantage and that ordering such disclosure would need to be justified to a sufficient extent as to make it proportionate to confer the obvious litigation advantage that would arise in favour of the opponent by ordering such disclosure. Information such as the amount of the funding, details as to the precise targets to be met in the conduct of litigation and the circumstances in which the funder may terminate funding can easily be understood as conferring a significant tactical and litigation advantage to the defendants. I will also observe that I do not accept that the passage from *Thema* on which the State relied necessarily implied that Clarke J. was of the view that full details of funding agreements relating to non-interested third party funders had to be revealed.

65. On the other hand, in circumstances where this is an entirely novel application to these courts, it is appropriate that both the court and the other parties to the proceedings should have sight, in general terms at least, of the third party funding agreement. The courts of this jurisdiction have no familiarity with these agreements. It is appropriate that the court and the other parties to the proceedings will see the general lay out of the agreement and the wording of the commitments each party to it makes. Indeed, some potential anomalies in what the court has been told appear to arise and benefit would result from greater clarification. It is noted that the Code of Conduct for Litigation Funders, exhibited in the affidavit of Susan Dunn, refers to a litigation funding agreement as "a contractually binding agreement entered into between a funder, a funder's subsidiary or associated entity and a funded party relating to the resolution of disputes within England and Wales". The entire Code is predicated on standards of practice and behaviour "in respect of funding the resolution of disputes within England and Wales." Since the Code does not apply on its face to disputes in this jurisdiction, greater detail as to incorporation of the relevant terms of that Code would appear to be of some relevance to the issues in the funding application.

66. In my view, simply setting out that Harbour will act in accordance with the code, that Harbour is entitled to information but cannot interfere with the litigation, that Harbour cannot withhold consent to the change in the plaintiffs' lawyers, and that decisions whether to prosecute, compromise, continue or discontinue the proceedings are at all times within the exclusive control of the plaintiffs, is insufficient detail for this court to make a determination on this issue. The court requires sight of the wording of those particular commitments.

67. In all of the circumstances set out above, and not merely the fact that the code clearly relates to England and Wales, it is necessary for this court and for the other parties to have sight of the funding agreement for the purpose of determining the funding application. The court must be mindful, however, that this preliminary decision should not act to destroy the very possibility of vindicating the rights that the plaintiffs claim in both the substantive motion and more particularly the substantive proceedings. Therefore, I am of the view that insofar as the funding agreement makes reference to the details of the funding budget, the details of the timeline, the details of the terms and circumstances on which the funder will release funding from time to time, the details of the funder's remuneration and the precise circumstances in which the funder may terminate funding, may be redacted at this time. That is not to say that a point may not be reached during the hearing of the funding application where those precise details may be determined to be relevant to the issues before the court. The context for making that decision will be much more apparent to the court on the hearing of the substantive motion. Moreover, even if such details are required, further argument can be heard as to whether that is a matter more properly for the consideration of the court or which must be revealed to the other parties.

68. Insofar as the procedure under O. 31 r. 15 is concerned, I accept that the decision in *Dubai Bank Limited v. Galadari* was adopted by the High Court in *Lowry v. Mr. Justice Moriarty*. Order 31 rule 15 therefore applies to the interlocutory stages of proceedings. In my view, the funding application is not a truly interlocutory stage of the proceedings as it does not concern the fair disposal of a stage or cause of the matter. While the defendants may be affected by the outcome of the motion, it is not strictly speaking an application concerning the substantive issues. It is an issue truly external to the substantive issue in the case. Therefore, the issues under the rules do not strictly speaking arise.

69. Even if I am incorrect in that holding, I am of the view that the rule does not require disclosure of the funding agreement other than to the extent as set out above. Insofar as there has been no formal compliance with any of the procedural steps necessary to object to production of the document, those formal steps may be dispensed with in the unique circumstances pertaining here, namely, that the plaintiffs have brought the funding agreement to the attention of the court and other parties for the purpose of making the funding application.

70. For the reasons set out above, I do not consider at this time that the full disclosure of the funding agreement is necessary for the fair disposal of the funding application. I am of the view that where the disclosure of the details of the funding agreement might confer an unfair and disproportionate litigation advantage, there should be careful scrutiny of the necessity for production of the document for the fair disposal of the issue. A redacted disclosure of the document as indicated above may be sufficient to determine the issue of whether the agreement contravened rules on maintenance and champerty or is an abuse of process.

71. Furthermore, insofar as the defendants rely upon *Cooper Flynn*, it is important to recall that the case concerned inspection of documents referred to on discovery. Bearing that in mind, it can be seen that the reference to "litigious advantage" must be understood as relating in some way to an issue between the parties, whether in the substantive action or indeed in a truly interlocutory hearing. It could not and does not mean a litigious advantage by the gaining of knowledge of the other party's litigation tactics. Indeed, in this case, that type of litigious advantage was not put forward by counsel for the defendants. On the contrary, counsel submitted that the litigious advantage would be to show whether the agreement is champertous. As stated above, in circumstances where the redacted litigation agreement is to be disclosed, the precise details may be unnecessary for fairly disposing of that issue.

72. Finally, in relation to the claim that privilege has been waived by virtue of the deployment of the funding agreement, I am of the view that such deployment must relate to deployment for the advancement of a particular point in the substantive or indeed in truly interlocutory proceedings. In the instant case, we are dealing with a unique application where the funding agreement and its existence had to be revealed by the plaintiffs for the purpose of the funding application. Any privilege that may have attached to it by virtue of it being brought into existence exclusively for the purpose of litigation necessarily has to be waived to the extent I have set out above so that a court can rule upon the funding application. That funding application appears capable of determination by the disclosure of a redacted copy of the funding agreement. Revealing the precise details at the present time would appear to give to the defendants a disproportionate litigation advantage. In the context of the uniqueness of this type of application and for the reasons set out above, I am of the view that the principles set out in *Hannigan* do not apply.

Conclusion

73. For the reasons set out above, it is necessary for this court and for the other parties to have sight of the funding agreement for the purpose of determining the funding application. For the reasons set out above, the funding agreement may be redacted to exclude references to details of the funding budget, the details of the timeline, the details of the terms and circumstances on which the funder will release funding from time to time, the details of the funder's remuneration and the precise circumstances in which the funder may terminate funding. That is not to say that a point may not be reached during the hearing of the funding application where those precise details may be determined to be relevant to the issues before the court. The context for making that decision will be much more apparent to the court on the hearing of the substantive motion. Moreover, even if such details are required, further argument can be heard as to whether they are matters more properly for the consideration of the court or that they must be revealed to the other parties.