Neutral Citation Number: [2011] IEHC 357

THE HIGH COURT

COMMERCIAL

2008 10983 P

BETWEEN

THEMA INTERNATIONAL FUND PLC

PLAINTIFF

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

AND

THEMA ASSEST MANAGEMENT LIMITED AND 2020 MEDICI AG

THIRD PARTIES

JUDGMENT of Mr. Justice Clarke on the 20th September, 2011

1. Introduction

1.1 This judgment arises out of an application brought by the defendant ("HTIE") seeking disclosure orders in relation to how the plaintiff ("Thema") is being funded in respect of this litigation. These proceedings are part of the Madoff litigation which has been under case management for some time and has been the subject of some judgments already namely: *Kalix Fund Ltd & Anor v HSBC Institutional Trust Services (Ireland)* [2009] IEHC 457; *Thema International Fund PLC & Anor v HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19; and *Aforge Finance S.A.S. & Ors v HSBC Institutional Trust Services (Ireland) Ltd* [2009] IEHC 565 & [2011] IEHC 6;.

1.2 The order sought by HTIE is of a type which has, so far as I am aware, never previously been sought or indeed made in this jurisdiction. There is, therefore, a very real question as to whether the court has the power to make such orders and, even if there is such a power,, a further question then arises as to the criteria which the court should apply in considering whether to order funding disclosure of the type sought.

1.3 In support of its application HTIE maintains a number of propositions to which I now turn.

2. HTIE's Case

2.1 HTIE asserts the following:-

> A. That there is sufficient evidence placed before the court to support the inference that Thema is not funding this litigation itself but rather is obtaining funding from a third party;
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> B. That the Courts in Ireland have a jurisdiction, in a case where a third party is shown to have funded litigation on behalf of an impecunious party, to make an order against that third party for the payment of any costs which might, in the ordinary way, have been awarded against the impecunious party concerned; and
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> C. That HTIE is <u>now</u> entitled to disclosure as to Thema's funding in the form sought in this application for a variety of reasons, which are addressed in detail later in this judgment.

2.2 I propose dealing with each of those propositions and Thema's answer to them in turn.

3. Is Thema being funded by a Third Party?

3.1 HTIE has placed before the court evidence of a number of communications emanating from Thema. The first is a shareholder circular of the 9th July, 2010, which arose in the context of a possible settlement of a claim under the United States Securities Investment Protection Act. That circular certainly seems to suggest that, in the absence of an acceptance by Thema of the settlement proposal then under consideration, Thema would lack adequate funding to, amongst other things, pursue the litigation against HTIE in the absence of significant shareholder advances.

3.2 A further shareholder notification of the 18th August, 2010, was put in evidence. That notification post-dated what was described as an unexpected withdrawal of the settlement proposal with the US Trustee. The notification informs shareholders that Thema "now no longer has any source of funding with which it could continue to operate and thereby pursue the proceedings".

3.3 What is described as a draft shareholder notice of the 19th November, 2010, appears to suggest that "liquidation is no longer in contemplation and that the proceedings being taken by Thema in the Irish High Court are being pursued vigorously".

3.4 Correspondence ensued between the parties in which solicitors for HTIE asked the solicitors for Thema as to whether Thema had obtained financial assistance from a third party and, if so, the identity of such party and details of the terms on which such assistance was or was being provided. In a reply of the 4th March, 2011, Thema confined itself to stating that "no third party is maintaining these proceedings".

3.5 HTIE placed the above documentation before the court in affidavit evidence. Thema's response was simply to deny that HTIE had

any entitlement to information regarding terms or arrangements which allowed Thema to continue its litigation save for an acceptance that HTIE would be entitled to know whether Thema was in receipt of funding from "unrelated third parties, or whether there is another unidentified adversary against whom it is actually fighting". A denial that any funding from unrelated third parties was available to Thema is included in the relevant affidavit. In that context HTIE did not suggest at the hearing before me that Thema was in receipt of funding which would amount to either maintenance or champerty.

3.6 It seems to me that the only reasonable conclusion to draw from the evidence is that Thema is in receipt of some form of third party funding. The various communications with its shareholders bear the inference that Thema did not have sufficient funds itself to maintain these proceedings. In the absence of any explanation being given as to how things have changed from the time when those shareholder communications took place, and in the absence of any denial in Mr. Brady's affidavit of there being any external funding, it seems to me that I should conclude on the facts that there is a third party funder or funders assisting Thema in this litigation. Whether that funder or those funders are paying in full for the litigation or whether it has been possible, for example, to make arrangements with Thema's advisers, which do not require immediate full funding, does not alter that conclusion. However, I am also satisfied on the evidence that any funder has a sufficient connection with Thema so as to take that funding outside the scope of maintenance and/or champerty.

3.7 As maintenance and champerty have some relevance to the third issue identified earlier, I should say something briefly about that area of the law at this stage. In Hallsbury's *Laws of England* (1st Ed.) Vol. 1, p. 51, maintenance is defined as the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by law as justifying his interference. It is unnecessary to go into the exceptions to the general rule at this stage. It is also of some relevance to note that it is clear from *O'Keeffe v. Scales* [1998] 1 I.R. 290 that maintenance and champerty still subsist in Irish law and that a person guilty of maintenance "acts unlawfully and contrary to public policy" and, therefore, is not entitled to enforce any agreement for any form of benefit made with the relevant litigant.

3.8 Champerty is a particular form of maintenance whereby the person concerned obtains a share in the subject matter or proceeds of litigation in return for assisting with funding the litigation concerned.

3.9 It will be necessary to return, in due course, to the abolition of maintenance and champerty in England and Wales. However, I now turn to the jurisdiction to award costs against a third party funder.

4. The Award of Costs against a Third Party Funder

4.1 This subject was touched on by the Supreme Court in *Cullen v. Wicklow County Manager* [2010] IESC 49 where O'Donnell J., at pp. 58 – 59, noted that the existence of a jurisdiction to award costs against a third party funder in other jurisdictions "points to the possible injustice that otherwise might be created if, in appropriate cases, it was not possible to fix an individual with costs in circumstances where that was the appropriate solution". On the facts of the case in question the Supreme Court was able to deal with the matter on the basis of a jurisdiction which allowed the court to identify the true party in litigation, where the litigation had been conducted wrongly in the name of another, so that it was unnecessary, in that case, to answer the question of whether a jurisdiction to award costs against a third party funder existed.

4.2 However, for the reasons set out in my judgment in that case, I came to the view in *Moorview Developments Limited v. First Active Plc* [2011] IEHC 117 that such a jurisdiction did exist. Neither party to this application argued that I should revisit the views which I expressed in that case or suggested that it was wrongly decided. It seems to me that I should approach the issue which arises in this case, therefore, on the basis that there is a jurisdiction, in an appropriate case, to award costs which might ordinarily fall to be paid by an impecunious party against a third party funder who provided, in furtherance of that funder's own interest, funding to that impecunious party in respect of the relevant litigation. That leads to the third question which is as to whether there is a jurisdiction to require disclosure, at an early stage in the proceedings, of the identity of any such funder.

5. Is there is a Disclosure Jurisdiction?

5.1 HTIE first draws attention to a line of authority, starting with *Hill v. Archbold* [1968] 1 Q.B. 686, in which Lord Denning M.R. has been interpreted as suggesting (in the words of Millet L.J. in *Abraham v. Thompson* [1997] 4 All E.R. 362):-

> "that a stranger who funded litigation should be required to undertake to pay the costs of the other side and that the proceedings should be struck out if such an undertaking was not forthcoming."

However, Millet L.J. went on to state that:-

> "Lord Denning did not, however, suggest that the court should require the undertaking to be fortified or order the third party to supply security for costs. Thus, the mischief which he identified was not the risk that the successful party might be left with un-recovered costs, but that proceedings might be financed by a party who was immune from personal liability for an adverse order for costs. This mischief has now been remedied by s. 51 of the Supreme Court Act 1981."

5.2 However, the relevant mischief referred to by Millett L.J. does not now exist in this jurisdiction, in the light of *Moorview,* for a third party funder is not immune from personal liability for an adverse order for costs.

5.3 Second, HTIE draws attention to decisions from a number of common law jurisdictions in which security for costs has been ordered against third party funders. See for example *Saunders v. Haughton* [2009] NZCA 610, and *Chartspike PPY Ltd v. Chahoud* [2001] NSWSC 585. However, it is clear that in *Saunders* the New Zealand Court of Appeal was dealing with a situation where the New Zealand Courts had accepted (following the Courts of Australia) that professional litigation funding was permissible. *Saunders*, therefore, arose in the context of a case where the plaintiff sought a representative order which would have entitled the plaintiff to represent not only his own interests but those of other members of a relevant class, and was also being professionally funded in a way which would not be permissible in this jurisdiction where maintenance and champerty remain part of the law. Like considerations applied in *Chartspike* where the rationale of the decision was based on the fact that professional third party funding was involved.

5.4 In a jurisdiction where it is accepted that third parties may fund litigation in return for obtaining an agreed share of the proceeds, then it is hardly surprising that the courts have taken the view that such parties who have, in substance, become the litigants should have their identity disclosed and be amenable to orders for security for costs. However, the situation in this jurisdiction is different in that professional third party funding is not permitted.

5.5 HTIE also places reliance on a line of recent United Kingdom authorities culminating in *Merchantbridge & Company Limited & Anor v. Saffron General Partner 1 Limited & Ors* [2011] EWHC 1524 (Comm) where an order for disclosure of the identities of funding parties was made. However, *Merchantbridge* and previous cases need to be seen against the background of the fact that both the

criminal offence and civil tort of maintenance and champerty have been abolished in the United Kingdom by statute (ss. 13(1)(a) & 14(1) respectively of the Criminal Law Act 1967). Again, in the context of it being legally permissible for wholly unconnected third parties to engage in the business of funding litigation in return for a share of the proceeds, it is hardly surprising that the courts have been prepared to require the disclosure of the existence of such funders even in advance of the case coming to trial.

5.6 I am not satisfied that case law from other common law jurisdictions which post date a change in the law in relation to maintenance and champerty (whether by judicial decision or by statute) is of great assistance in determining the extent of the court's jurisdiction to order disclosure at an early stage of a third party funder in a jurisdiction such as Ireland where maintenance and champerty remains the law. Here the situation is very different. 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. The only form of third party funding which is, therefore, legitimate in Ireland is one which comes within the exceptions to maintenance and champerty. Charitable intent, where the funder does not hope to benefit personally, would, of course, take the case outside the third party funder costs order jurisdiction identified in *Moorview*, for that jurisdiction is confined to persons who fund litigation which they hope will indirectly benefit them in capacities such as shareholders and creditors.

5.7 That such parties are, even though they not be guilty of maintenance or champerty, exposed to potential orders for costs is clear from *Moorview.* However, such parties are not, in my view, in the same category as professional third party funders who make a commercial decision to "invest" in litigation in the hope of making a profit. After all, if the litigation is well founded then the shareholder or creditor is only getting their due. If an insolvent company has a good cause of action, then the shareholders or creditors who might benefit by any recovery on foot of that cause of action are getting no more than their entitlements. If the proceedings are *bona fide* progressed, then such parties are simply funding an entity in which they have a legitimate interest in the hope that that entity will be able to pay them monies due (in the case of creditors) or dividends or capital distributions (in the case of shareholders). The law of maintenance and champerty always made a distinction between such parties and professional third party funders. It seems to me that it is appropriate to maintain that distinction.

5.8 Giving detailed information about funding to an adversary is bound to confer a litigation advantage. Why should such a litigation advantage be facilitated? Three possible arguments arise. First, it might be said that the opposing party to the person who is in receipt of third party funding is entitled to know the true nature of its adversary. Second, it might be said that it is necessary for the opposing party to know the identity of a funder so that applications such as those for security for costs which have been allowed in other jurisdictions, could be brought in a timely fashion. Third, it might be said that information is necessary as an aid to the opposing party invoking the jurisdiction (under *Moorview*) to seek a third party funder costs order. I propose dealing with each of those arguments in turn against the backdrop of the fact that the making of an order of the type sought 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.

5.9 The argument that a party needs to know its true adversary does find some echoes in the recent English jurisprudence (such as *Merchantbridge*) to which I have referred. However, those comments do need to be seen in the context of the fact that the courts were, in those cases, dealing with professional third party funders. Where such a third party, who has no direct or indirect connection with the litigation, becomes involved by "buying in" to the case on the basis of an agreement to fund the action in return for sharing in the proceeds, then there is a very real sense in which that person becomes an adversary. They had nothing to do with the case. They now have a lot to do with the case by virtue of the arrangement entered into. In such circumstances it is hardly surprising that the English courts have taken the view that the other side is entitled to know the identity of the party who has bought into the proceedings in that way.

5.10 However, a third party funder who is not guilty of champerty (*i.e.* who has the sort of legitimate interest in the case identified in the champerty jurisprudence) is, in my view, in a different situation. They are, even if only indirectly, already involved in the litigation. Any company which lacks funds always has the possibility that its shareholders (or its creditors) may choose to provide further funding for a whole range of reasons not confined to potential litigation. Commercial judgment will often lead to parties with a direct interest in a particular enterprise investing further sums. There is, therefore, in my view a substantial difference between a party who already has an indirect link to the impecunious party and who has, therefore, already got an indirect interest in the relevant litigation, on the one hand, and a party with no such prior link who simply buys into the litigation on the other hand. A party in the position of HTIE must be aware that shareholders in or others with an indirect interest in Thema may well chose to fund Thema so as to enable it to pursue litigation which is in Thema's interests but which will also, potentially, indirectly benefit them by increasing the value of the shareholding in Thema or permitting Thema to pay its lawful obligations. Getting 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 HTIE understand who its true adversary is. Its true adversary is Thema backed up by parties who have a legitimate interest in Thema's well being. It is not the same situation as one which might pertain in the United Kingdom where an entity totally unconnected with a party such as Thema might be providing funding for the purposes of sharing in the proceeds of litigation. For those reasons I am not satisfied that the argument as to knowing one's adversary has sufficient weight in this jurisdiction (where champerty remains unlawful) to counterbalance the undoubted litigation disadvantage that would be caused by requiring disclosure at this stage.

5.11 Second, it does not seem to me that it would be appropriate for the court to direct security for costs against a third party funder in circumstances where the court would not, in the ordinary way, and on foot of the established jurisprudence, order security for costs against the relevant company. Where special circumstances have been made out, in accordance with that jurisprudence, for not ordering security for costs, why should the fact that there is a third party funder alter the situation? That does not mean that the third party funder might not ultimately be liable for costs at the end of the day. However, it is a very different thing to indicate that the third party funder may be exposed to an order for costs at the end of the day as opposed to ordering that third party funder put up security at an early stage. To permit security for costs to be awarded in such circumstances would run the serious risk of bypassing, at least in many cases, the well settled jurisprudence on security for costs. The situation might be different where a professional third party funder became involved. However, such an eventuality is not possible in Ireland. I am not, therefore, satisfied that a jurisdiction to order security for costs against a third party funder exists in this jurisdiction. Where security is properly required from an impecunious company it may well be that, as a matter of practice, any funder supporting that company may have to put up the security if it wishes the proceedings to continue. That is, however, quite different from directing the third party itself to put up security. It follows, therefore, that an argument that early disclosure is necessary to enable an application for security to be brought does not seem to me to be of any merit.

5.12 It is finally necessary to turn to the argument that disclosure is necessary as an aid to a possible future application for a third party funder costs order. Ordinarily, such a disclosure application can be made after the proceedings are over and when the potentiality for a third party costs order arises. In those circumstances no litigation disadvantage could occur by virtue of disclosure for the proceedings will be at an end. Such orders were made in *Raiffeisen Zentral Bank Ostereich Ag v. Crosseas Shipping Limited &*

Ors [2003] EWHC 1381 (Comm), where Morison J. described the power to require disclosure as being "an ancillary power" which enabled an order to be made against a party or its solicitors to disclose the identity of those who financed litigation. However, the order in *Raiffeisen* was made after the case concluded.

5.13 The only entitlement of an adversary is to apply for a third party funder costs order in the event that it should win. The only orders which should be made are those which are ancillary to and necessary to enable effect to be given to the jurisdiction to make third party funder orders. I cannot see any basis for suggesting that prior disclosure (that is disclosure before the proceedings have concluded) is necessary to give effect to the jurisdiction to make a costs order against a third party funder. Post judgment disclosure is equally effective.

5.14 However, it does seem to me that there are two matters which might reasonably be dealt with at an early stage in the litigation for the purposes of protecting the position of the adversary in the event that it might feel that it was entitled, after the litigation has completed, to seek a third party funder costs order. The first is the fact that, for the reasons set out in *Moorview,* it may be that knowledge by the third party funder of its potential exposure could be a factor in deciding whether to make such an order. In those circumstances it seems to me to be reasonable for a party in the position of HTIE to seek to ensure that any third party funder is at least aware of the possibility of third party funder costs orders being made. The second issue concerns the retention of documentation and information so that same can, if the court thinks it appropriate, be required to be disclosed in aid of a potential application for a third party funder costs order. Both of those matters seem to me to be ones which can be dealt with in a way which does not place the impecunious party in a situation of litigation disadvantage while at the same time protecting the legitimate interests of its adversary.

5.15 It seems to me that those matters can be dealt with by means of a suitable undertaking given personally by an individual (if appropriate a suitable officer of an impecunious corporate party).

6. Conclusions

6.1 For those reasons it seems to me that I should make no order provided that a senior official within Thema is willing to give the following two personal undertakings:-

> A. That any person providing funding for this litigation will be informed in general terms of the jurisprudence of this Court to the effect that there is a jurisdiction to make third party funder costs orders in certain circumstances; and
>
> B. That proper records will be maintained and kept identifying the amount and source of any third party funding.

6.2 In the event that those undertakings are given, it seems to me that the position of HTIE would be secure in that it will be able to seek whatever third party funder costs orders which might be appropriate in an effective way. To go further and order disclosure at this stage would seem to me to confer an unnecessary and disproportionate litigation advantage on HTIE which is not warranted by the need to preserve its legitimate entitlement to seek a third party funder costs order should circumstances dictate.