Neutral Citation Number: [2022] EWHC 1616 (Comm)

Case No: CL-2019-000068

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)

7 Rolls Buildings, Fetter Lane, EC4A 1NL
Date: 24/06/2022

Before:

MRS JUSTICE MOULDER

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Between:

THE ECU GROUP PLC	**Claimant**
- and –	
HSBC BANK PLC	**Defendants/**
HSBC UK BANK PLC	**Applicants**
HSBC BANK USA, NA	
-and-	
THERIUM LITIGATION FINANCE ATLAS AFP 1C	**Respondent**

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Joshua Crow (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Applicants**
Benjamin Williams QC and Stephen Innes (instructed by **Harcus Parker Limited**) for the the **Respondent**

Hearing dates: 29 April 2022

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Approved Judgment

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THE HONOURABLE MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the reserved judgment on the application (the "Application") by the Defendants ("HSBC" or the "Defendants") dated 3 March 2022 pursuant to Section 51 of the Senior Courts Act 1981 for an order requiring Therium Litigation Finance Atlas AFP IC ("Therium") (i) to pay the Defendants' costs of and occasioned by the proceedings on the indemnity basis and (ii) to pay US$1,004,014.11 representing the balance of the payment on account that the Claimant, ECU Group PLC ("ECU" or the "Claimant") was required to pay to the Defendants.

Evidence

2. The Defendants rely on the fifth and sixth witness statements of Mr James Brady of Cleary Gottlieb Steen & Hamilton LLP dated 3 March 2022 and 26 April 2022 respectively, and the second witness statement of Mr Michael Petley of ECU dated 5 January 2022.

3. Therium relies on the witness statement of Mr Neil Purslow, Director and Chief Investment Officer of Therium Capital Management Limited dated 22 April 2022.

Background

4. It is not necessary to set out the background to the substantive proceedings which are in my judgment at [2021] EWHC 2875 (Comm). The Court handed down judgment on this matter in favour of the Defendants on 1 November 2021.

5. Insofar as the costs of the proceedings are concerned, by order dated 26 November 2021 the Court added Therium as a party to the proceedings for the purposes of costs only; required the Claimant to pay the Defendants' costs of and occasioned by the proceedings on the indemnity basis and required the Claimant to make a payment on account of the Defendants' costs of and occasioned by the proceedings in the amount of $11 million within 14 days of receipt of the sealed order.

6. The date for payment on account was extended by consent to 4pm on 29 December 2021.

7. The Defendants have received the sum of $9,995,985.89 in respect of the payment on account.

8. As far as the position of Therium is concerned, the following is taken from the evidence of Mr Purslow:

    i) Therium provided its contribution to the funding of these proceedings via a Litigation Funding Agreement (the "LFA") which was signed on 19 September 2019.

    ii) By this date the following steps had already occurred:

        a) 30 January 2017: ECU's letter before claim.

        b) 3 February 2019: Issue date for the claim.

c) 20 May 2019: Particulars of claim filed.

d) 25 July 2019: HSBC's defence filed.

iii) Prior to this date, Therium had provided no funding for the proceedings nor was there any contractual agreement for it to do so.

iv) Pursuant to the LFA, Therium agreed to provide a commitment of (approximately) £6.6m to ECU for the purposes of funding the proceedings up until the conclusion of the liability trial. This figure included the cost of premiums for the various expected ATE Insurance premiums and deed fees to cover adverse costs exposure in the sum of £1,640,800. In addition, the LFA provisioned for a further commitment of (approximately) £2.7m to be utilised during the quantum stage of the proceedings.

v) Under the terms of the LFA, Therium also agreed to reimburse ECU for part of the costs incurred since 30 November 2018 and the amounts outstanding to Mishcon de Reya LLP ("Mishcon de Reya") at the date of signing of the LFA. These sums amounted to £563,873.50 in respect of Mishcon de Reya invoices dated between 8 January 2019 and 3 May 2019, all of which had previously been settled by ECU, and £382,973.77 for Mishcon de Reya invoices dated between 3 May 2019 and 18 October 2019.

9. According to Mr Purslow, Therium has provided £9,306,208 under the LFA for the purposes of funding the proceedings (included within this amount is £1,640,800 in relation to premiums for Adverse Costs Insurance and Deeds of Indemnity). Therium's percentage share of the funding is said by Therium to be either 53%, or at most 64%.

10. This figure is disputed by HSBC, which asserts that the percentage share is significantly higher.

11. The LFA included a condition with respect to adverse costs insurance. It was agreed between Therium and ECU that the appropriate level of cover was £7,500,000. Therium agreed that £5,000,000 of adverse costs cover would be provided by the insurance market (in this case, QBE and Amtrust) and an excess layer of £2,500,000 (the "Escrow Amount") would be provided by one of ECU's outstanding Class 1 bondholders, James Caird Investments Limited ("JCIL"). The Escrow Amount agreement was signed on 25 November 2019.

12. The amount recovered under the adverse costs insurance and from the Escrow Amount is equal to the amount paid so far to HSBC in respect of the interim payment on account of costs, i.e. US$9,995,985.89.

13. It is said by Mr Purslow that it is:

> "difficult at this point to gain a complete picture of the funding arrangements utilised by ECU for the proceedings. The only parties with knowledge of the full extent of the funding arrangements are ECU and its Directors, and without their participation in the Hearing, we will not have the opportunity to challenge the Disclosure that we are all currently reliant upon."

14. According to his evidence, the funding of the proceedings (and ECU itself) since ECU first sought legal advice in Summer 2016 to date has been provided by at least 27 separate parties (excluding the providers of the ATE insurance), including 9 corporate entities and 18 individuals. The individuals include current and former ECU Directors, as well as their friends, associates and family members. All the individuals and corporates with the sole exception of Therium are either existing shareholders or bondholders, or both.

15. Pursuant to the LFA, if the proceedings were successful, depending on how quickly a pay-out was obtained, in addition to the reimbursement of costs paid out, Therium stood to receive a "contingency fee" of three times the amount of costs funded (around £28 million) plus 20% of any recovery net of costs above £100,000,000.

16. Although under the terms of the LFA, Therium was not entitled to "*interfere*" in the conduct of the litigation, the funding was to be provided in five tranches and Therium had a "*right*" at its "*sole discretion*" to decide whether to fund each of the subsequent tranches. It also had various rights to information (including to be kept informed of "*significant developments*", and a monthly report regarding the progress and conduct of the proceedings), as well as a right for its consent to be sought before any change of solicitors or counsel.

17. Therium also entered into a priorities agreement (the "Priorities Agreement") with ECU, the insurers and the investors which sets out the priority order for paying the sums due to each of them from any recoveries made in the prosecution of the claim. Under the Priorities Agreement, any proceeds were paid first to reimburse Therium for its funding amounts; thereafter, other funders were entitled to reimbursement of the amounts paid out by them; this was followed by payment of the contingency fees to Therium and others, and then any balance to ECU (the "Waterfall").

Amount of funding

18. Mr Purslow identified the following additional "sources of funding" (as referred to below, these are not all accepted by HSBC as such):

    i) Class 1 Bonds: £2,000,000 funded in June 2017 used in the pre-action phase of the litigation against HSBC. Under the terms of the Bonds, the bondholders stood to benefit as to 25-35% of any net litigation receipts from the proceedings.

    ii) Escrow Amount: £2,500,000 funded in November 2019 and held in escrow to meet potential adverse costs risk. JCIL was entitled to the return of capital plus a return of £1,175,000 from the litigation proceeds in accordance with the Priorities Agreement.

    iii) Escrow Arrangement Fee: £200,000 funded in November 2019 to pay an arrangement fee to JCIL. JCIL was entitled to the return of its capital plus a return of £200,000 from the litigation proceeds in accordance with the Priorities Agreement (i.e. subject to the prior claims of amongst others Therium).

    iv) Deeds of Indemnity: £330,000 funded in November 2019 and used to purchase bonds in order to provide additional adverse costs protection. The funders were

entitled to return of capital plus a return on capital of £330,000 from the litigation proceeds in accordance with the Priorities Agreement.

v) Funding for the retainer of Richard Lissack QC: £205,000 funded in December 2020 was used to retain Mr Lissack QC for an advance brief fee, quantum analysis and work in advance of and attendance at a potential mediation. The funders were entitled to return of capital plus a return of £205,000 from the litigation proceeds in accordance with the Priorities Agreement.

19. Mr Purslow's evidence is that these sources of funding amounted to £5,235,000 and, of this, £3,235,000 was received following the signing of the LFA in September 2019.

20. Therium also seeks to include the Class 2 Bonds as part of the funding provided to ECU to pursue litigation on the basis that (as stated by Mr Purslow) ECU has had no ongoing business throughout the life of this litigation save for litigation itself and the Class 2 Bonds were used "*at least in part to compensate and incentivise ECU non-executive directors and management*".

21. Accordingly, the amount provided by Therium (£9,306,208) is said by Therium to amount to 64% of an overall £14,541,208, including all funding referred to in 18(i) to (v) above, and 53.7% of an overall £17,321,208.23 when the Class 2 Bonds are included.

22. These percentages are disputed by HSBC. In particular, I note the evidence of Mr Brady (in his sixth witness statement) that:

i) only £1,246,644.53 of the proceeds from the Class 1 Bonds were used towards the costs of these proceedings;

ii) the Escrow Arrangement Fee is not a cost of the proceedings;

iii) the payment to Richard Lissack QC was made in connection with the mediation the parties engaged in April 2021. The parties' mediation agreement provided that each party would bear its own costs and therefore this amount would not be recoverable *inter partes*.

23. In relation to the Class 2 Bonds, I note the evidence of Mr Brady that:

> "Mr Petley says in his witness statement that, whilst the proceeds were to be used towards ECU's general corporate purposes and working capital, this excluded "*the payment of any fees, costs and expenses incurred by the Company in connection with any litigation - be it Pre-Action or actual proceedings - against the Defendants*"…and that the proceeds from these bonds were not "*raised or intended to be utilised in order to prepare for, bring, issue or fund formal proceedings against the Defendants*""

The Application

24. The Defendants now seek an order that Therium pays the Defendants' costs and shall be jointly and severally liable with ECU in respect of such costs.

25. Therium accepted (paragraph 4 of its skeleton) that:

    i) as a commercial funder it should have "some liability" for costs of the proceedings and it had therefore consented to being joined as a party for costs purposes;

    ii) those costs should be assessed on the indemnity basis since that was the basis of the order against ECU.

26. However, Therium submitted (paragraph 5 of its skeleton) that:

    i) it should only be liable for costs incurred by the Defendants after the date of the LFA, which was 19 September 2019;

    ii) of those costs, Therium should only be liable for a percentage corresponding to its percentage contribution to the total funding after that date, which it calculates as 66.26% (alternatively, if it is liable for costs prior to the date of the LFA, it should only be liable for 53.73%);

    iii) factors relating to the level of HSBC's costs should be taken into account;

    iv) credit should be given to Therium for the £5 million proceeds of ATE insurance and the £2.5 million retention/escrow account already received by HSBC;

    v) Therium should not be required to contribute to the payment on account ordered against ECU.

27. In response it was submitted for HSBC (paragraph 10 of its skeleton) that:

    i) Therium should be liable as the largest/major funder: it is HSBC's case that Therium has funded more than 85% of ECU's costs and paid nearly all of ECU's costs since 30 November 2018 (on the basis that Therium funded costs incurred prior to execution of the LFA);

    ii) Therium stood to obtain substantial profits from the litigation in the event ECU was successful: Therium's contracted profit was three times the amount of costs funded plus 20% of any recovery net of costs above £100,000,000 and would be paid in priority to any payment to ECU;

    iii) the suggestion that Therium should be liable for a several portion of the costs is highly unusual/unheard of on the authorities: *Sharp v Blank* [2020] Costs LR 835;

    iv) the liability for the shortfall in the interim payment is separate but flows from the principle; the shortfall is minimal: approximately $1m out of a total funding of £9.3m equivalent to $11.68m; even if the liability were to be discounted, it would exceed the shortfall.

Legal principles

28. Section 51 of the Senior Courts Act 1981 provides (so far as material):

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in— […]"
>
> (b) the High Court […]
>
> shall be in the discretion of the court. […]
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

29. It was common ground that the jurisdiction under Section 51 gives the court a broad discretion.

Issue 1: Should the liability of Therium be time limited?

30. As referred to above, Therium accepts that it should have "*some liability*" for costs of the proceedings. The first issue to determine is whether Therium should only be liable for costs incurred by the Defendants after the date of the LFA, which was 19 September 2019.

31. It was submitted for HSBC that, in relation to the time based order sought by Therium, it would be unjust to apply a time based order and there was no necessary legal precondition that the costs should be "*caused*" by the non-party. HSBC relied on the authority of *Total Spares & Supplies Limited v Antares SRL* [2006] EWHC 1537 (Ch) where at [54] the court held that "*causation was not a necessary precondition*", which it was submitted was followed in *Turvill v Bird* [2016] EWCA Civ 703.

32. It was submitted for HSBC that:

    i) the liability on Therium to bear costs should not be the date of the LFA as Therium agreed to fund the proceedings retrospectively from 30 November 2018; further, there was an expectation of funding before the LFA was signed and the negotiations will have caused the litigation to be ongoing;

    ii) more than 90% of costs were incurred after 2018 and 85% after the date of the LFA;

    iii) there was no strict legal requirement for the costs to have been *"caused*" by the funder. It could also apply to the difficulty of recovery: here Therium's funding made it more difficult to recover because ECU's position was made worse by the litigation. Causation is not necessary: it was the "usual approach" not the only approach (*Excalibur Ventures LLC v Texas Keystone Inc* [2014] 6 Costs LO 97 at [149]);

    iv) JCIL has discharged £2.5m of costs: it funded the Class 1 Bonds which were used for the pre-action phase and HSBC would seek to allocate this to the period before 30 November 2018 so Therium will be liable for the balance in any event;

    v) the just and practical solution is to order Therium to be jointly and severally liable for all costs and leave disputes about allocation and causation to Therium and the parties it elects to pursue.

33. It was submitted for Therium that:

    i) the costs should only be ordered from the date of the LFA (19 September 2019);

    ii) the amount of the costs prior to the date of the LFA was irrelevant to the principle;

    iii) on execution of the LFA, Therium retrospectively paid costs which had previously been paid (£563k) and costs which had been incurred (£382k). However, the funder did not "cause" those costs and it was not Therium's intervention which caused the Defendants to expend costs;

    iv) it was accepted by Therium that causation was not a prerequisite, but it was submitted that the only authority which can be cited by HSBC (*Total Spares*) had particular facts where in essence there was a "transparent ruse" to frustrate enforcement of costs orders. There was still causation, but the causation was of an inability to recover costs and a long way from this case. Therium has not contributed to non-recovery or caused an impediment to recovery;

    v) in *Excalibur*, the funders were not liable for the period where they were not funding and there is no reason to take a different approach here;

    vi) the arguments about JCIL were not a reason for not making the order -it is a matter for the costs judge and does not affect the principle;

    vii) if the funder has not caused the costs, it would not be just to order the funder to pay.

The authorities

34. In *Total Spares*, the claimant sought a third party costs order against AWF, a company to whom the business of Antares had been transferred.

35. As to the circumstances of that case, the judge found at [27] that the transfer:

> "…was implemented in order to protect the sales and distribution business from an adverse result in the proceedings and to prevent the claimants from enforcing any judgment for damages or costs against the business and its assets. I am satisfied that this was Mr Gargani's purpose in procuring the transfer and, in the absence of any evidence to the contrary from the directors of AWF, that they knew that this was his purpose. It is almost inconceivable that his wife, his son and Mr Piccione, all of whom worked with him in Antares, did not know the reasons for the transfer."

36. And at [33]:

> "Even if the sale was not at undervalue, its effect was to make enforcement of any costs order against Antares more difficult…"

37. And at [39]:

> "…the overwhelming likelihood is that [AWF] was controlled by [Mr Gargani who controlled Antares]"

38. It was submitted in *Total Spares* that the third party (AWF) should be responsible for the costs on the basis that it was "*just*" to make an order for costs against AWF in circumstances where, as transferee of the business with knowledge of the purpose of the transfer, its conduct had been responsible for the claimant's inability to enforce its costs order.

39. It was accepted by the court in that case that there was no causal link between the transfer and the claimant's costs:

> "Only if Antares would not have defended the claim but for the transfer could it be said that there was a causal link between the transfer and the claimant's costs."

40. The judge reviewed the authorities including two then recent authorities: *Dymocks Franchise System (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 and the Court of Appeal in *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055.

41. Having reviewed the authorities, the judge concluded at [54]:

> "54. In the light of these recent statements, it cannot in my judgment any longer be said that causation is a necessary pre-condition to an order for costs against non-party. Causation will often be a vital factor but there may be cases where, in accordance with principle, it is just to make an order for costs against a non-party who cannot be said to have caused the costs in question. In my judgment the circumstances of this case are such as to make it just to make an order against AWF. The transfer to AWF was intended to render it more difficult for the claimant to recover any damages or costs. AWF, through the individuals who controlled it, knew and intended the transfer to have that purpose. AWF was not an independent third party but was closely connected with Antares. The true position is that nothing significant changed except that the business or businesses previously conducted through one company, Antares, were (apparently) from 22 April 2004 conducted through two companies, Antares and AWF. These arrangements were not disclosed to the claimant or to the court, who were allowed to continue to understand that the entire business remained in the ownership of Antares. When asked to explain the situation, Dr Mattolini writing in the name of Antares did not give a proper explanation." [emphasis added]

42. HSBC also relied on *Excalibur* at first instance. At [139]-[140] Christopher Clarke LJ said:

> "139. The next question is whether, when different funders have contributed amounts at different times, they should be liable to the successful defendants only in respect of costs that the

> Defendants have incurred after they made their contribution. If four funders each make one, and only one, contribution of £ 100,000 on 1 January in one of four consecutive years and judgment is given at the end of year 4 is the contributor in year 4 responsible for any of the costs in years 1–3?"
>
> 140. In my judgment the answer is "No". In the example given the contributor in year 4 has not done anything which led to the defendants incurring costs in those years." [emphasis added]

43. HSBC relied on the reference at [149] of that judgment to causation being only the "*usual approach*":

> "149. It does not seem to me, however, that there is any good ground in the present case for departing from the usual approach of requiring causation to some extent…" [emphasis added]

44. However, I note that the judge concluded that in that case the funders should not be liable for costs "*which they have played no part in causing the defendants to incur*":

> "151. While I see the force of these considerations I do not think it appropriate to make an order the effect of which is that the Platinum funders or Blackrobe will be liable for costs which they have played no part in causing the defendants to incur. The fact that they are, in a sense, inheritors of the work of others is not sufficient reason." [emphasis added]

45. In *Turvill* the application was for a costs order against Mr Turvill, who, it was alleged, deliberately left the respondents with unenforceable judgments. The Court of Appeal set out the relevant principles at [24] and [27]-[28] of its judgment:

> "24. A number of recent authorities have stressed that this is a jurisdiction which must be exercised in the interests of justice and that its exercise should not be overcomplicated by authority.
>
> …
>
> 27. The authorities illustrate "the variety of circumstances in which the court is likely to be called upon to exercise the discretion" and "the kind of considerations upon which the court will focus" but are not to be treated as providing "a rulebook". The kind of considerations illustrated by the authorities include the following:
>
> (1) Whether the non-party funds the proceedings and substantially also controls or is to benefit from them and is the "real party" to them;
>
> (2) Whether the non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit;

> (3) Whether there is impropriety by the non-party in the pursuit of the litigation.
>
> (4) Whether the non-party causes costs to be incurred.
>
> See *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807; *Systemcare (UK) Ltd v Services Design Technology Ltd* [2011] 4 Costs LR 666.
>
> 28. (1) (2) and (3) are all examples of circumstances in which non-party costs orders have been made. Generally (4), causation, is also required "to some extent" (per Morritt LJ in *Global Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232) although it is not a necessary pre-condition, as held in *Total Spares & Supplies Ltd v Antares SRL* [2006] EWHC 1537 (Ch). In that case, however, there was still a causal link between the non-party's actions and the claimant's costs recovery in that he had deprived the claimant of any realistic opportunity of recovering its costs. The link was with the recovery of costs rather than the incurring of costs, but in both cases the claimant has to bear costs in circumstances where he otherwise would not have done." [emphasis added]

Discussion

46. Applying the principles set out in the authorities, it is clear that the question is whether it is just to make an order against Therium (Therium also relied on *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48, whilst HSBC submitted that it was confined to insurers but it does not affect the general principle in this regard).

47. It was submitted for HSBC that the litigation would not have continued had Therium not got involved and funded the litigation as it did, including in relation to the costs already incurred. It was submitted that Therium's funding made it more difficult to recover because ECU's position was made worse by the litigation.

48. I am not persuaded that the evidence establishes that Therium's actions made it more difficult to recover, given that ECU was already loss making and balance sheet insolvent in 2018. In his fifth witness statement, Mr Brady (paragraph 42(c)) states:

> "At the time of signing the LFA, Therium would have been well aware of ECU's impecunious financial position and that ECU would be unable to pay any adverse costs orders made against it. ECU's 2018 accounts, published on 10 October 2019, just one month after the LFA was signed, show that ECU had made a loss before taxation of £1,025,147 for the year 2018 and that ECU was balance sheet insolvent." [emphasis added]

49. As referred to by Mr Purslow in his witness statement (paragraph 31), ECU "*predominant purpose*" at this time was to pursue the litigation and by November 2018 it had no cash resources to fund the litigation costs; it was thus reliant from the outset

on third parties funding the litigation, some of whom were independent and external and others who had a personal interest in the litigation and ECU.

50. In my view, neither the scale of the overall costs nor the proportion of those costs incurred prior to the involvement of Therium make it just that Therium should bear costs incurred prior to the date on which it agreed to fund the litigation.

51. Further, I do not think that the mere fact that Therium stands to earn a substantial fee of itself is sufficient to make it just that it should bear the costs incurred prior to its involvement which it has not caused to be incurred.

52. Whilst I accept that negotiations are likely to have started some time before the LFA was actually signed, until it was signed, Therium was free to walk away and therefore I do not accept the submission for HSBC that Therium caused the costs to be incurred from a date earlier than the date of the LFA.

53. However, this case differs from the authorities to which I was referred, in that when Therium agreed on signing the LFA to fund the litigation costs, it agreed to assume liability for the (reasonable) costs incurred since 30 November 2018 and thereafter (subject to the limits of the relevant tranche and its discretion as to whether to fund subsequent tranches). Accordingly, by the terms of the LFA, Therium's entitlement to be reimbursed for the costs that it had funded and the contingency fee applied both to the sums incurred in the period from 30 November 2018 to the date of the LFA and (subject as aforesaid) the future costs. In my view, although Therium did not "cause" those past costs to be incurred, by agreeing to fund the litigation it was not just the "inheritor" of those costs but took a positive decision that as part of the funding arrangements it would fund those incurred costs. Having taken the potential upside of the contingency fee which under the LFA was calculated by reference to all the funded costs including those costs incurred from 30 November 2018 to the date of the LFA, it would be unfair for Therium to avoid the corresponding downside of being liable for such incurred costs in circumstances as now where the litigation was unsuccessful.

54. I do not, however, agree that Therium should be liable for all costs of the proceedings, including those which were incurred prior to 30 November 2018 which it did not agree to fund in the LFA. It seems to me that any dispute as to the responsibility and allocation of the JCIL funding is not sufficient to justify making Therium liable for costs which it did not sanction either prospectively or retrospectively.

55. For these reasons, I find that in the circumstances of this case it would be just to make an order against Therium in respect of the costs from and including 30 November 2018.

Issue 2: joint and several liability

56. The next issue is whether, as Therium submits, it should only be liable for its percentage contribution to the total funding.

57. It was submitted for HSBC that:

    i) the just outcome is that HSBC should not have to pursue each person with potential responsibility for the litigation for individually allocated sums;

ii) the authorities do place limitations on the liability of the funder but the limits have been by reference to the total amount of the funding (the "Arkin cap") which is not argued for by Therium. It was submitted that it was unusual/unheard of to order several liability: *Sharp v Blank* [2020] Costs LR 835; *Merchantbridge & Co Ltd v Safron General Partner 1 Ltd* [2011] EWHC 1524 (Comm) at [45]; *Excalibur*;

iii) there are no features of this case which suggest that it would be just to impose on HSBC the burden of proceeding against multiple parties:

i) Therium was the "real party": it was the "but for" cause of all the funding; it stood to make £28m at trial plus its costs (as compared with JCIL, which stood to make only £1.175m); Therium funded approximately 94% after the LFA (whilst HSBC did not ask the Court to make a finding as to the percentage, it was submitted that 66% was too low);

ii) HSBC should not have to investigate the funding; it was forced to defend the proceedings and should not be required to resolve complicated and costly disputes as regards responsibility amongst those who provided small amounts of funding or payments;

iii) Therium had substantial control over the litigation and held the purse strings: the LFA was funded in tranches and Therium had the option to decline to proceed.

58. It was submitted for Therium that:

i) Therium should only be liable for a percentage corresponding to its percentage contribution to the total funding (after the date of the LFA);

ii) it was agreed by Therium that it was not necessary for the Court to get into the detailed percentages; however it was submitted that it was not just to attribute everything to Therium: in *Sharp v Blank* the parties were arguing for secondary liability, whereas here Therium accepts that it should be jointly liable with ECU for a just proportion but submits that the order should reflect the contribution from other funders; in *Excalibur* there was no consideration of whether there should be joint and several liability as it was not argued;

iii) JCIL was a major investor in the Class 1 Bonds as to £1.75m and stood to recover 25-35% of net litigation receipts and funded the early stages; as to the escrow amount, £2.5m was paid into a retention account for the payment of costs and this was a precondition to Therium's investment. JCIL was paid a fee of £200,000 and under the Waterfall would receive the return of its capital and £1.175m;

iv) Therium should not be "*on the hook*" for everything before Therium has had an opportunity to join the other funders (in correspondence Therium had sought to agree an adjournment to allow it time to join the other funders but HSBC had refused).

Discussion

59. In *Merchantbridge* the judge ordered joint and several liability:

> "The Defendants acted in concert and were in this together. There are no features suggesting that I should impose on the Claimants the task of proceeding separately against the Defendants for individually allocated sums of money. It is said on behalf of DB Suisse that such a result will place particular hardship on them because of potential difficulties of recovery against Zent, Wicklow, Solid and Telcom. While these companies are based abroad there is no evidence before the court that they will fail to pay. The Defendants chose to fund the defence. They knew who they were dealing with and who would share responsibility should the Claimants pursue to matter. [emphasis added]

60. Although the judge was not dealing with the allocation of costs to a non-party commercial funder, this did not affect the principle. In that case, the judge acknowledged the argument that liability might fall disproportionately on DB Suisse because of potential difficulties of recovering against the other defendants but concluded that the defendants "*chose to fund the defence*" and knew they would share responsibility.

61. In *Sharp v Blank*, the funder (Therium) had submitted that it should be so liable only to the extent that the claimants did not satisfy the adverse order. Norris J held that the liability of the funder should be joint and several, observing at [34]:

> "…I see no reason in principle why the liability of Therium (which has indemnified the claimants) should be secondary and not simply joint and several in the usual way…". [emphasis added]

62. In *Excalibur* at first instance, it appears to have been accepted that the appropriate order was joint and several, although a time limited order was made.

63. It was submitted for Therium that it would not be just to fix Therium with everything: there are not many cases where there were multiple funders and the Class 1 Bonds were novel.

64. In my view, it is fair that Therium should bear joint responsibility with ECU for the costs of the proceedings irrespective of the other funders/investors:

    i) Therium had far and away the dominant financial interest in the outcome of the proceedings and effectively controlled the proceedings through the LFA.

    ii) HSBC were the defendants in these proceedings; they were given no choice but to incur costs in defence of the claim and it would not be fair to make recovery of those costs dependent on the pursuit of numerous individuals and entities, thereby causing HSBC further costs and likely delay with an uncertain outcome.

65. If Therium is held liable with ECU on a joint and several basis, it may in due course seek to join those other funders. It is not, in my view, the just course to delay making an order against Therium, in order to give it further time to do so: the costs order was made in November 2021 and HSBC is entitled to receive prompt payment of the costs awarded to it.

66. In my view, it is not therefore necessary to resolve the issue as to what percentage of the overall funding is attributable to Therium and the disputes between the parties as to how certain costs/funding should properly be characterised.

67. I find that the just order in the circumstances is that Therium should be jointly and severally liable with ECU for the costs of the proceedings incurred since 30 November 2018 on the indemnity basis (subject to detailed assessment if not agreed).

Issue 3: the level of costs

68. This can be dealt with shortly. Although Therium stated in its skeleton that the quantum of costs is a matter for detailed assessment, it then seeks to raise issues concerning the increase in HSBC's costs between the amount stated on 3 November 2021 and the amount on 18 November 2021 as well as the "*very high hourly rate*" for HSBC's solicitors.

69. In my view, both of these matters can be raised on detailed assessment and the overall level of costs is not a matter which concerns the Court on this Application, the amount of the payment on account having already been determined by the Court and the subject of the order dated 26 November 2021.

Issue 4: ATE insurance

70. It was submitted for Therium that credit should be given to Therium for the £5 million proceeds of ATE insurance and the £2.5 million Escrow Amount already received by HSBC.

71. Therium relied on the authority of *Chapelgate Credit Opportunity Master Funds Ltd v Money* [2020] EWCA Civ 246 and submitted that the Court of Appeal recognised in that case that a funder should be able to protect its position by ensuring that it or the claimant has ATE cover.

72. The passages relied on by Therium in *Chapelgate* address the application of the Arkin cap. It is not authority for the proposition that Therium's liability for costs in this case should be reduced either by the amount of the ATE insurance or the amount of the Escrow Amount. In my view, these are amounts which reduced the amount now required from Therium but does not affect the amount of costs for which Therium should be liable. The use of ATE insurance (and the retention account) was a mechanism for Therium to reduce its potential liability to HSBC if the proceedings were unsuccessful; it does not result in a further reduction to its liability or a credit against its liability as this would amount to double counting.

Issue 5: payment on account

73. It was submitted that Therium should not be required to contribute to the payment on account ordered against ECU on the basis that its total liability may be less than 67.76% of HSBC's assessed costs.

74. Given that the Court has held that Therium is jointly and severally liable with ECU for the costs after 30 November 2018, Therium's liability for the interim payment should reflect this. Accordingly, I find that Therium should be jointly and severally liable with ECU for that proportion of the payment on account which is equal to the proportion which HSBC's costs after 30 November 2018 bear to HSBC's total costs of the proceedings.

I understand that the proportion so calculated is agreed to be 90.8%. Since Therium is jointly and severally liable for HSBC's costs incurred since 30 November 2018, Therium is liable to make the interim payment on account of HSBC's costs from Therium subject only to the limit of 90.8% that is $9,988,000 (the "Therium Limit") and the principle that HSBC cannot recover in aggregate more than the amount of the interim payment. Therium is therefore liable for the amount of the interim payment which remains outstanding and unpaid subject only to the Therium Limit. This conclusion is consistent with the principle of joint and several liability and that as set out at paragraph 72 of the judgment the liability of Therium is not reduced by the amount of the ATE insurance or the amount of the Escrow Amount. I further understand that the amount of the interim payment which remains outstanding and unpaid is $1,004,014.11 and no amount has been paid by Therium to date so that payment of the outstanding amount by Therium will not exceed the Therium Limit.