Insolvency & Restructuring

Litigation funders – how early would their identity be disclosed in a litigation?

Introduction

Funding is one of the most common frustrations for liquidators in Hong Kong as insufficiency of funds would render the liquidators unable to pursue good causes of actions. The liquidators may enter into funding arrangements with third parties in order to pursue those claims. It is not usual for the courts to order disclosure of funding agreements, as there is a real risk that disclosure of the amount of funding available to the liquidator may enable the defendants to assess and implement the extent to which they could, by way of interlocutory processes, eat up the liquidator’s funding before the conclusion of the trial, thereby frustrating or impeding the purpose of the funding agreement: *Re Kingsheath Club of Clubs Ltd* [2003] FCA 1034.

However, in a recent English decision, *Re Hellas Telecommunications (Luxembourg) Ltd* [2017] EWHC 3465 (Ch), the English court ordered the identity of the funders to be disclosed in a litigation as early as in the stage of application for security for costs. This newsletter seeks to discuss this case and its potential implications to Hong Kong.

Background

The applicants, who are the defendants in a litigation brought by the liquidators of Hellas Communications (Luxembourg), applied for an order for disclosure of the identity of the funders for the purpose of determining whether to make an application for security for costs. The applicants relied on the English Civil Procedure Rules (“CPR”) 25.14(2)(b), which provides that the English court may make an order for security for costs against a person who has contributed or agreed to contribute to the claimant’s costs in return for a share for any money or property which the claimant may recover in the proceedings.

The Ruling

The English court referred to *Wall v Royal Bank of Scotland Plc* [2017] 4 WLR 2 and held that it has an inherent or implied jurisdiction to order disclosure of the identity of the third party funders in order to give effect to the power to grant security for costs under CPR 25.14. Such jurisdiction exists notwithstanding that there is no pre-existing costs order against any party in the proceedings. In particular, the English court considered that so long as an application for security for costs is pursued on proper grounds and has a serious prospect of success, as opposed to being speculative or fanciful, then it is a material prejudice to deprive
an applicant of the opportunity to make and pursue that application by keeping it out of knowing the identity of the proper respondent.

In light of all the evidence, the English court was of the view that for the pursuit of the litigation, the liquidators were reliant upon third party funders, including but not limited to the creditors of the company in liquidation. Furthermore, the English court considered that the application for security for costs would be properly brought with a realistic prospect of success and that it is not a speculative or fanciful application or one being pursed for improper tactical reasons. As such, the English court was prepared to order disclosure of both the identity of the funders and the terms on which the funding has been provided to the liquidators. In determining the terms upon which disclosure should be made, the English court held that in exercising its inherent or implied power, the court can and should craft the disclosure order so as to ensure that the legitimate interest in protecting the confidentiality attaching to both the identity of the funders and the terms of the funding arrangement are preserved as far as possible. As such, the English court ordered the disclosure only be made to named individuals and required them to undertake that the information will not be disclosed to any third parties or used other than for the purpose of determining whether to make an application for security for costs.

Imagination to Hong Kong

In Hong Kong, the application for security for costs is governed by Order 23 of the Rules of High Court (Cap 4A) and section 905 of the Companies Ordinance (Cap 622). Neither Order 23 nor section 905 contains express provision for order for disclosure of either the identity of the funder in a litigation and/or the terms of the funding arrangement.

As mentioned earlier, the identity of the funder and the terms of the funding agreement are generally private and confidential between the funder and the funded party. It is unusual for the Hong Kong court to make a discovery order for a party to disclose their funding agreement to the other party in the proceedings. For example, in Moulin Global Eyecare Holdings Limited (In Liquidation) v Olivia Lee Sin Mei [2013] 3 HKLRD 72, the Court of Appeal upheld the trial judge decision to refuse disclosure of the defendant's insurance policy to the plaintiff, on the ground (among other things) that disclosure to the plaintiff would provide the plaintiff with a "windfall and manifest advantage in respect of the main action". The Court of Appeal also specifically agreed with the trial judge’s point that disclosure would be obviously disadvantageous to the defendant in the context of, for example, settlement negotiations and generally in the conduct of the proceedings. Having said that, while the liquidators' concerns that disclosing the funding information would give the defendants an unfair advantage in the action is certainly a relevant consideration, ultimately, the court is to
balance the parties’ rights and the due administration of justice: *Enrich Future Ltd v Deloitte Touche Tohmatsu* [2016] 3 HKLRD 827.

Arguably, the English court in *Re Hellas Communications (Luxembourg)* may appear to be inconsistent with the stance of the Hong Kong court, in that the Hong Kong court seems to put more weight on considering the relative advantages and disadvantages to the litigating parties not only in a particular application for order but also the overall proceedings process. However, one cannot entirely rule out the possibility that the Hong Kong court may follow *Re Hellas Communications (Luxembourg)* and order disclosure in an application for security for costs. As discussed in our *September 2017 newsletter*, the Hong Kong court in *Penta Investment Adviser Limited v Allied Well Development Limited* [2017] HKEC 1475 ordered the identity of funder be disclosed in making cost orders. This means that if the English court’s approach in *Re Hellas Communications (Luxembourg)* is adopted in Hong Kong, the identity of the funder could be disclosed at a much earlier stage of the litigation.

**Conclusion**

Security for costs is generally regarded as a weapon for the defendant especially in the early stage of the litigation. (For a more detailed discussion on security for costs in the insolvency context, please see our *August 2017 newsletter*.) It remains to be seen whether and to what extent the Hong Kong court would follow the English court’s approach in *Re Hellas Communications (Luxembourg)*. If it does, it may add an extra dimension to such weapon.

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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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