Neutral Citation No: [2011] NICh 11 | *Ref:* **DEE8211**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **13/6/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY COURT

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BETWEEN:

FSA

Applicant;

-and-

FORSYTHE De DIETRICH

Respondent.

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DEENY J

[1] This application is a summons brought by the defendants Forsythe De Dietrich and ETIC Solutions Limited to vary an order of injunction granted by the court on 27 October 2010. The summons seeks variation of that order "in regards to the recovery by the defendants of their legal costs from funds retained by the plaintiff or its solicitors, or in accounts frozen by the said order, and to provide a clear and effective mechanism for the release of and sanction for the funds held for legal professional fees and necessary disbursements by order of this honourable court of 27 October 2010" and seeks abridgment of time which was not objected to and it seeks the costs of the particular summons. There is an affidavit of Peter Madden, solicitor, in Madden & Finucane, supporting this application.

[2] The court is informed by and I accept counsel for the defendant's submission that, at first, the law in relation to this matter was not fully to the

forefront of the minds of the parties. Of course it should have been to the forefront of the minds of Messrs Madden & Finucane. They had instructed counsel in this matter and no doubt they should have adverted to whether they were in a position to recover their own fees and fees of counsel in this case. It is clear to me that the summons is, as Mr Stephen Shaw QC, who appears with Mr Jonathan Dunlop for the plaintiffs, submits, indeed a doomed summons. The defendants are shown on strong prima facie evidence to have received very substantial unlawful deposits from persons both in Northern Ireland and in the Republic of Ireland and to have banked some of those. There is also clear prima facie evidence that the nature of the operation was a dishonest one by which they paid the earlier investors extravagant rates of interest to encourage further investments but without in truth investing those funds whether in the purchase of liquidation assets or otherwise. It was right, therefore, that the Honourable Mr Justice Hart gave the order which he initially gave in this case and which I have maintained since October of 2010.

[3] The defendant did provide information about his assets in the jurisdiction initially but subsequently failed despite orders of the court to provide information about his assets out with the United Kingdom. There is a clear prima facie case that some of the deposits received from, it would appear, several hundred persons, were taken outwith the United Kingdom. I say that because the accounts fall far short of the FSA's estimates of what was received by way of unlawful deposits. In any event presumably if there were scant resources Mr De Dietrich would have been content to disclose what they were. Instead he repeatedly failed to do that and was ultimately found in contempt by this court and was sentenced to 18 months imprisonment for that contempt.

[4] I need not in the course of this short ex tempore judgment say anything, it seems to me, about the propriety of him then pursuing an appeal when he is outwith the jurisdiction of the court. I say that because even

without taking that into account it is clear when the authorities are looked at that to enable an applicant of this sort to recover his legal expenses, his costs, he has to meet a two stage test which has been laid down in not one but two decisions of the Court of Appeal in England. Mr Coyle says that this is something the court drew to the FSA's attention, which may well be right but I am glad that my instinctive reservations about the matter were proven to be correct and in accord with the law.

[5] In the decision of Fitzgerald and Williams [1996] 2 All England Reports 171 Sir Thomas Bingham, Master of the Rolls, said as follows:-

> "A defendant should not be entitled to draw on a fund which may belong to a plaintiff until he shows that there is no fund of his own on which he can draw. Where he shows that he has no funds of his own on which he can draw, the court must make a difficult decision, as explained by this court in Sundt Wrigley & Company Limited v. Wrigley [1993] Court of Appeal Transcript 685. But the plaintiffs may very well be right in contending that stage has not yet been reached in this case. The judge was, I think, wrong not to accept both limbs of the plaintiff's argument at this interlocutory stage.
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> On this point I would grant leave to appeal and allow both appeals. The plaintiffs are in my view right to contend that unless and until the first defendant can establish on proper evidence that there are no funds or assets available to him to be utilised for payment of his legal fees and other legitimate expenses, other than assets to which the plaintiffs maintain an

> arguable proprietary claim, he should not be allowed to draw on the latter type of assets."

[6] The first defendant argued before us that he was being denied funds needed for the conduct of his defence. This may or may not be so. But the principles are clear. If the first defendant can make a case for the release of additional funds to him he should make an appropriate application to the judge.

[7] I pause there to say that it is right to say that the FSA as such are not arguing a proprietary claim to the funds i.e. the funds in certain bank accounts in banks in the United Kingdom but it seems to me that their position as the body charged by Parliament with regulating financial services and acting in this matter with the assistance of the joint provisional liquidators whom I appointed at their request to protect the assets of the persons unfortunate enough to have invested in these schemes are in an at least comparable if not in effect synonymous position to those with a proprietary claim. They have a strong claim that the monies wrongly taken by the defendants should not be disbursed in costs unless this two stage process is followed. The two stage process is expressly enjoined or referred to by Lord Justice Roche in the subsequent case of Ostrich Farming Corporation Limited v. Ketchum [1997] EWCA Civ 2953.

[8] The two stage process is firstly for the defendants to show they have no other funds from which they could pay their lawyers and secondly that they themselves have an arguable claim to the funds that are present and that is set out also by Lord Justice Millett, as he then was, in his judgment:-

> "They must establish that they have no other funds out of which to pay the legal costs other than those derived directly or indirectly from the plaintiff. They

> must also establish at least arguable grounds for supposing that they ought to be entitled to the use of monies derived directly or indirectly from the plaintiff, either because it represents money properly obtained from the plaintiff, by way of remuneration or for valuable consideration, or by showing that they have an arguable case for denying the plaintiff's proprietary claim."

[9] It is quite clear on the facts of this case that I must exercise a discretion which I acknowledge I have, to refuse this summons. The defendants have totally failed to show that they have other funds unconnected with this scheme and honestly obtained whether "by way of remuneration or for valuable consideration". They have totally failed to do that and so they do not even get to the second stage which is that they have an arguable claim. An arguable claim must be an arguable lawful claim to these monies and so this summons is indeed doomed.

[10] Mr Coyle this morning, this case having been twice previously adjourned for one reason or another, applied to adjourn the matter further to allow his solicitors to obtain affidavit evidence to mend the defendant's hand in this regard. But I consider that is an application which it is my duty to refuse. The defendants, De Dietrich in particular, has repeatedly failed to do this very thing; that is why he is in contempt because he hasn't told us of his other resources outwith the United Kingdom, so it is a completely untenable submission to say that I should adjourn it in the hope or expectation that he would now do that when he has refused to do it even after he has been found in contempt of court and sentenced to a period of imprisonment. That is the very contempt that he is guilty of. I could have no reasonable expectation that his hand would be mended. If of course it is then it is likely it would be amended in a way that would purge his contempt and I myself would

reconsider the sentence that was imposed upon him in accordance with the dictum of Lord Neuberger and others in regard to sentencing. But that is not the position now. Therefore it is inappropriate in my view to use any of the funds for the benefit of the legal advisers of the defendants in this action until and unless the defendants meet the two stage test envisaged in the Fitzgerald and Ostrich authorities which I am content to follow and which I respectfully agree with but which in any event are of strong persuasive authority in this court and in the Court of Appeal in Northern Ireland.