THE HIGH COURT

[2013 No. 12439P]

COMMERCIAL COURT

BETWEEN:

DEFENDER LIMITED

PLAINTIFF

-AND-
HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

-AND-
RELIANCE MANAGEMENT (BVI) LIMITED
RELIANCE INTERNALTIONAL RESEARCH LLC,
FIMAN LIMITED AND DAVID WHITEHEAD

THIRD PARTIES

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 15th October, 2018.

Summary

1. This is an application for discovery which involves an issue, which counsel have advised has not been considered previously in the Irish courts: does a witness statement lose privilege when it is served on the opposing party or when it is adopted by a witness in open court? For the reasons set out below, this Court concludes that the witness statement remains privileged after it is served on the opposing party.

2. The background to the application is that Defender is suing HSBC for its alleged negligence in relation to its alleged role as a custodian of funds on its behalf. There are other proceedings in which HSBC was sued by an unrelated party (Thema) in similar circumstances. Those proceedings settled, but some of the HSBC witnesses who were due to give evidence in the Thema proceedings are due to give evidence in these, the Defender proceedings. The issue which has to be resolved is:

> whether HSBC witness statements from previous proceedings against HSBC which were served on Thema, but not adopted by the witnesses as their evidence in court (because the case settled), are privileged, so as not to be available on discovery to Defender in these proceedings?

3. Defender seeks the previous witness statements (and expert reports, collectively referred to as 'witness statements') in order, inter alia, to see if there are inconsistencies between the statements of HSBC witnesses in the present proceedings the "Defender Case") compared with the statements of those same witnesses in the prior settled proceedings against HSBC (*Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Ltd* (the "Thema Case")).

4. It is common case that if the witness statements had been adopted in open court by the witnesses in the Thema Case, then privilege would have been lost and there would be no objection to their being discovered, unless the Thema proceedings are closely connected with these Defender proceedings.

5. Although this issue of whether privilege is lost on the service of witness statements does not appear to have been considered by the Irish courts, it is necessary to deliver an *ex tempore* judgment on the issue, as the 20 week trial in these proceedings is due to begin on 30th October, 2018. This is particularly so, because of the possibility of an appeal and also because HSBC has indicated to the Court that if this discovery motion is successful, it will look for witness statements from *inter alia*, those experts retained by Defender for these proceedings, who provided evidence in the Thema Case.

6. The substantive claim in these proceedings is for some $333 million by Defender against HSBC for, *inter alia*, negligence and breach of contract regarding HSBC's alleged role as a custodian of funds which were lost because of the fraud of its alleged sub-custodian, Bernie L. Madoff Securities LLC ("BLMIS"), whose principal, Mr. Bernie Madoff was involved in a €65 billion Ponzi scheme in the United States.

The discovery applications

7. The application for discovery regarding the Thema Case seeks the following documents:

> •The witness statements of Ms Christine Coe, Mr Ronnie Griffin, and the expert reports of Ms Bronwyn Wright, Mr Travis A Taylor, Mr Charles Tabb, Mr Giles Murphy, Mr Jack R Wiener and Mr Ian Hunt, delivered by the Defendant in proceedings titled *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Ltd* and bearing the record no. 2008/10983P.

In addition, there is an application for discovery regarding another set of prior proceedings, which does not raise the foregoing privilege issue since those witness statements were adopted by the relevant witnesses in open court, but it raises other issues. This discovery seeks:

> •The witness statement of Ms Christine Coe and the expert reports of Mr Jack R. Wiener and Mr Gilbert Schwartz in proceedings titled *Primeo Fund (in Official Liquidation) v. Bank of Bermuda (Cayman Ltd) and HSBC Securities Services (Luxembourg) SA* (the "*Primeo Case*") bearing cause number FSD 30 of 2103

8. While the defendant in the Thema Case is the same defendant as in this case, the defendant in the Primeo Case (HSBC Securities Services (Luxembourg) SA) is not the same defendant as the defendant in this case (HSBC Institutional Trust Services (Ireland) Ltd), they are both members of the HSBC group of companies.

9. Both the Thema Case and the Primeo Case are now at an end. The Thema Case was settled after 17 days of hearings before Charleton J. in the High Court. Judgment was delivered by the Cayman Island High Court in the Primeo Case on the 23rd August 2017.

10. In addition to the privilege issue, HSBC objects to the discovery of the Thema Case witness statements and the Primeo Case witness statements, on the grounds of what it sees as the inexcusable delay of Defender in seeking this discovery. HSBC also disputes the necessity for the discovery of these documents.

11. In relation to the Thema Case witness statements, which are alleged by HSBC to be privileged, Defender claims that even if they are privileged, once the proceedings concluded, those witness statements should be available on discovery, because the Thema Case proceedings are not closely connected with these the Defender proceedings, such as to justify the continuation of the privilege.

Primeo witness statements and Thema witness statements
12. In relation to the Primeo witness statements, HSBC objects to their discovery because this application is being made well outside the time limit for the making of such applications under Order 31, rule 12(9) of the RSC. Under that rule applications for an extension of the time for discovery should have been made within 28 days of the date that this matter was set down for trial, which would mean the latest date for such applications was the 4th December 2017.

13. In this regard, it is relevant to note that it was not until the 12th July 2018 that Defender sought discovery from HSBC of the Thema witness statements and the Primeo witness statements.

14. However, the rule in Order 31, rule 12(9) is subject to the important proviso that the Court may agree to extend this time limit where it appears just and reasonable to do so, which is considered hereunder. First however, the issue of the relevance and necessity of the witness statements will be considered.

Relevance and necessity
15. In defending the application for discovery, counsel for HSBC did not raise any objection to the relevance of the Primeo witness statements or indeed the Thema witness statements. In any case, this appears to be clearly a case where the witness statements are relevant since as noted by Charleton J. in an earlier application for discovery in this case, of the transcripts of the Thema Case, he held (at page 94 of the transcript of the judgment of 18th June 2014 *Defender Limited v HSBC Institutional Trust Services (Ireland) Limited)*, that:

> "Generally speaking if there are documents available in relation to what a witness has said before and the witness' evidence is likely to be challenged it is incumbent on people to make those available because those documents (a) exist; it is not just a question of probability. Secondly, are highly likely to be relevant to the other side and thirdly they do fulfil the *Peruvian Guano* test; they are likely, of their nature, to inform what the witnesses say or to undermine the witness's testimony in the event that there is a divergence. Also, I mean, a clear case was made by HSBC Institutional Trust Services in relation to a number of aspects of the case and if that case changes, I think people are entitled, at least to draw the judge's attention to it, whether it makes a difference."

16. This Court has little hesitation in concluding that Charleton J.'s reasoning regarding the relevance of the Thema transcripts to the Defender Case, is applicable to the relevance of the Thema witness statements and the Primeo witness statements (which were also given in proceedings against HSBC for *inter alia* negligence in its use of Mr. Madoff's company as an alleged sub-custodian) to this, the Defender Case.

17. HSBC has suggested that the discovery is not necessary. However, it seems to this Court that Defender has established that the discovery is necessary for disposing fairly of the case. In this regard, Defender relied upon the Cayman Islands' Court of Appeal judgment in the Primeo Case. In that case, discovery was permitted of the witness statements in the Thema Case, by the Court of Appeal in the Cayman Islands, as it concluded that as a matter of Cayman Islands law, privilege did not attach to the Thema witness statements, even though they had not been adopted by the HSBC witnesses in the Thema Case.

18. As a result of this discovery, at the trial in the Cayman Islands' High Court before Jones J., he was able to be compare the witness statement of Ms. Coe in the case before him, the Primeo Case, with her previous witness statement in the Thema Case. The inconsistencies between these two witness statemetns was an important factor in Jones J.'s decision regarding Ms. Coe's credibility as a witness. At para. 121 of the High Court judgment in the Primeo Case, Jones J. states:

> "Her evidence is that the 2002 and 2004 Sub-Custody Agreements had been executed solely for the purpose of securing the credit advanced to these funds. She said that she did not make this point in her statement in the Primeo proceedings because it was not relevant to do so in that case. Ms Coe comes across as a very capable businesswoman. She is very articulate. She made the argument in a more compelling way than Mr Fielding and Mr Pettit but, at the end of the day, it seemed no less contrived."

19. It is further relevant to note that Jones J. also had to consider the credibility of another HSBC witness in the Primeo Case (Mr. Nigel Fielding), but who also had provided a witness statement in the Thema Case. At para 69 *et seq* of his judgment, Jones J. states:

> "Mr Fielding's evidence is that he decided that a similar sub-custody agreement should be put in place in relation to Primeo for the same purpose of strengthening BOB Lux's credit default protection by giving it a right of free delivery in respect of the managed account assets then held by BLMIS as custodian for Primeo [… ..]
>
> I do not accept Mr Fielding's evidence that the 2002 Sub-Custody Agreement was executed *solely* for credit purposes and that it was never intended to change the pre-existing arrangement whereby BLMIS held the assets as custodian for Primeo. I have come to the conclusion that his evidence on this subject is not credible [….]
>
> Mr Fielding's evidence to this Court is also inconsistent with his witness statement made for the purpose of the Thema proceedings in which he said 'In or around July 2002 I called Mr Madoff and explained that I wanted to visit BLMIS for due diligence purposes and to make arrangements for a sub-custody agreement with [BOB Lux] in relation to Primeo and [Lagoon].' This statement is not qualified in any way to explain that it was really only proposing to enter into a sub-custody agreement for credit purposes and that it would not serve any custody purpose as such."

20. As with Ms Coe, it is clear that the previous witness statement of the HSBC witness, in the Thema Case was relevant in the Primeo Case, since the inconsistency between the evidence of Mr. Fielding given in the Primeo case with his earlier evidence in the Thema Case was relied upon by Jones J. for his finding that he was not a credible witness.

21. It seems therefore to this Court that in considering whether discovery should be ordered in this the Defender Case, the Primeo and Thema witness statements are both relevant and necessary for the purposes of these proceedings.

Delay in seeking discovery of Primeo and Thema witness statements
22. It is however the case that there has been a long delay in Defender seeking this discovery. In addition to the fact that Defender has made this application outside the time limit in Order 31, rule 12(9), Defender stated to McGovern J. on the 14th November 2016,

that although it had initially sought discovery of the Thema witness statements in October 2016, which was objected to by HSBC on the grounds of privilege, it was not in fact going to pursue the discovery of the Thema witness statements.

23. This all changed on the 12th July 2018 when Defender sought discovery from HSBC of the Primeo witness statements as well as the Thema witness statements, and this request has ultimately led to the motions which are now before this Court.

24. Defender states that one of the reasons for this change in approach is the fact that on 16th November 2016 there was the decision of the Cayman Islands' Court of Appeal in the Primeo Case to the effect that the Thema witness statements were not privileged as a matter of Cayman Islands law (although it was also held, by the Cayman Islands' High Court, that they were privileged as matter of Irish law based on expert evidence provided by two Irish lawyers) and were therefore subject to discovery.

25. The second reason Defender gave for their change of mind and delay regarding the discovery of the witness statements was the judgment of Jones J. in the Primeo Case which was handed down on the 23rd August 2017. As already noted in this judgment Jones J. relied on the inconsistencies between witness statements given in the Primeo Case and those in the Thema Case for his findings that HSBC's witnesses, Ms. Coe and Mr. Fielding, were not credible. From Defender's perspective therefore the Thema and Primeo witness statements assumed particular importance at this stage.

26. Although after the judgment of Jones J. on the 23rd August 2017, an application for discovery might have been made for the Thema and Primeo witness statements, no such application was made by Defender. Instead, Defender filed its witness statements in this, the Defender Case, in February of 2018 and HSBC filed its witness statements on the 22nd June 2018.

Then some two weeks after the delivery of the HSBC witness statements, on the 12th July 2018, Defender sought discovery of the Thema and Primeo witness statements leading to this motion.

27. Defender explains the timing of the discovery request, just after the delivery of HSBC's witness statements, as being because only at that stage did it know who HSBC would be calling as witnesses. There does seem to be some merit in this argument. This is because, for example, it would have only become clear to Defender that HSBC would not call Mr. Fielding to give evidence in the Defender Case after the witness statements had been filed by HSBC. Thus, Defender at that stage knew not to seek discovery of his previous witness statement is not required. Accordingly, Defender argues that a more focused application for discovery was only possible once the witness statements of HSBC had been filed.

28. For its part, HSBC complains that it is a litigation tactic adopted by Defender, which contravenes the time limits, and was designed to have HSBC witnesses prepare their witness statements based on the discovered documents at that stage, which would have excluded previous witness statements. Counsel for HSBC claimed that it was prejudiced by preparing witness statements based on the incomplete trial documents. However, since one is dealing with the suggestion that a HSBC witness would be prejudiced by not expecting that his previous witness statement would be part of the trial documents for the case, this is not in this Court's view a very compelling argument. This is because it is not the role of this Court to seek to ensure that a witness is not *unexpectedly* accused of contradicting himself because he did not expect a previous witness statement he made to be put to him at the hearing.

29. However, the most critical factor in this Court's decision as to whether to allow discovery, despite Defender's failure to comply with the time limit set down in Order 31 rule 12(9), is whether it appears just and reasonable to do so. Since the witness statements from previous proceedings (the Thema Case) have already been successfully used to undermine the credibility of HSBC witnesses in the Primeo Case, it is this Court's view that the interests of justice demand that if there are any credibility issues arising from conflicts in evidence to be provided by HSBC witnesses in this case on the one hand, and the evidence provided by them in previous cases of Thema and Primeo on the other hand, this Court should be made aware of those inconsistencies, in the same way as Jones J. was made aware of them, save to the extent that any of those witness statements are privileged. Therefore, subject to the privilege issue, to which this Court will now turn, it is this Court's view that the Thema witness statements and Primeo witness statements are discoverable.

Privileged status of Thema witness statement served but not adopted by witness?

30. This Court will next consider the Thema witness statements, since the defence of privilege applies only to those witness statements. It is under this heading that a point of law falls for consideration by the Irish courts for the first time, namely whether a witness statement which is served on the other side, but is not adopted by the witness in open court, loses its privilege when the proceedings have reached an end, as happened in the Thema Case, when it settled after 17 days.

31. It is common case that once a witness adopts his witness statement in open court that privilege is lost. As noted by Finlay Geoghegan J. in *UCC v ESB* [2014] 2 IR 525 at 546:

> "Further, in litigation, documents which may have properly been the subject of litigation privilege may be disclosed, not just to the other party but put into the public arena in the course of the trial. Once this is done, the privilege against disclosure probably comes to an end."

32. Since *UCC v ESB* concerned litigation privilege generally, and not witness statements that had been served but not adopted, Finlay Geoghegan J.'s comments to the effect that documents once put into the public arena lose their privilege, although relevant to the consideration of this issue, are not directly applicable to this case. This is because the key question for consideration in this case is whether the very service of a witness statement on an opposing party leads to the loss of privilege, when the proceedings come to an end?

33. It seems to this Court that if a witness statement has been served on the opposing party but it has not been adopted by the witness (or otherwise deployed at the court hearing) that witness statement does not lose its privileged status.

34. It reaches this conclusion on the basis that the service of the witness statement on one's opponent does not constitute putting the statement into the public arena, since this only happens once the witness adopts the statement when giving evidence in open court (or when the witness statement is deployed in open court).

35. Not only is the witness statement not put into the public arena when it is served on the other side, but it has no evidential value as is clear from the decision of Clarke J. (as he then was) in *Moorview v First Active* [2009] IEHC 214 at para 3.18:

> "A statement of evidence intended to be given by a witness is no more than what its description states it to be. It is a statement that the party concerned anticipates that, if necessary, the named witness will give evidence along the lines of the content of the witness statement concerned. In the absence of any agreement by the parties in advance that all

> of the witness statements filed should be taken as evidence in chief, or a form of similar agreement which would turn a statement of intended evidence into an admitted statement of actual evidence, I do not believe that a Plaintiff is entitled to place any reliance on Defendants' witness statements in circumstances such as arose in this case."

Thus, a witness statement only becomes evidence when it is adopted by the witness.

36. In addition, this court reaches its conclusion not only in reliance on the *obiter* statement of Finlay Geoghegan J., but also on policy grounds that underlie the restrictions on the use of witness statements in England, *albeit* that the court rules there regarding witness statements are very different from those in Ireland, since Order 38 Rule 2A(4) of the English Rules explicitly state that witness statements may not be put into evidence by any other party if the witness is not called:

> "where a party serving a statement under paragraph (2) does not call the witness to whose evidence it relates no other party may put the statement in evidence at trial"

37. Order 38 Rule 2A(8) of the English Rules states:

> "Nothing in this rule shall deprive any party of his right to treat any communication as privileged and make admissible evidence otherwise inadmissible."

38. In England, CPR 32.5 also provides that witness statements stand as evidence in chief once signed and they may forthwith be cross examined by the other parties to the proceedings. In addition, provision is made regarding the use of witness statements for purposes other than the proceedings in their rules of court. CPR 32.12 states:

> "(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
>
> (2) Paragraph (1) does not apply if and to the extent that –
>
> (a) the witness gives consent in writing to some other use of it;
>
> (b) the court gives permission for some other use;
>
> (c) the witness statement has been put in evidence at a hearing held in public."

39. In contrast, our Order 63A r 22(1) of RSC is silent regarding the privileged status of witness statements once the proceedings are at an end. It simply states:

> "Unless a judge shall otherwise order, a party intending to rely upon the oral evidence of a witness as to fact or of an expert at trial shall, not later than one month prior to the date of such trial in the case of the plaintiff, applicant or other party prosecuting the proceedings and not later than seven days prior to that date in the case of the defendant, respondent or other party defending the proceedings, serve upon the other party or parties a written statement outlining the essential elements of that evidence signed and dated by the witness or expert, as the case may be."

40. However, it is relevant to note what the White Book states about the English rules. At p. 1053 it comments as follows: -

> "This rule follows from RSC Ord. 38 r 2A(11) and CCR Ord. 20 r. 12A(11). The procedure for requiring parties to serve witness statements has the principal effect of alerting each party to what their opponent's witnesses are going to say at trial, in the event of there being a trial. (This has the advantage of promoting settlements and avoiding unfair surprise at trial). If there is a trial and the evidence contained in a particular witness statement is given in court, the evidence is in the public domain and certain legal consequence follow from that (e.g. any privilege is waived). However, if the case is settled without trial, or if there is a trial but the witness is not called (or their statement adduced in evidence under the hearsay provisions) the general rule is that no other party may make use of that statement subsequently."

41. It is also relevant to refer to Hollander, *Documentary Evidence* (13th ed) at p. 425, since it comments on the position pre-CPR:

> "The position under the RSC was rather different in the case of witness statements. Not only were draft witness statement privileged, as were signed unserved witness statements, but when the witness statements were served, there was an undertaking not to use the witness statements for a collateral purpose. Service of the witness statements waived privilege in the statements themselves in the litigation, but the confidence in the statements remained and it was probably possible to claim privilege for the statements in subsequent litigation against a different party against whom the statements remained confidential. Of course once the statement has been used in open court or the witness had given evidence the position is completely different.
>
> [….] witness statements once served probably could be the subject of a claim for privilege in a subsequent action against a different party, although the point was never determined. There is no reason to think that this has changed since the CPR."

42. What the commentary on the English position does highlight are the policy reasons for privilege to apply to witness statements until they are '*put into the public arena*' since, *inter alia*, cases will often settle, not only after witness statements have been served, but after a hearing has commenced (as happened in the Thema Case itself which settled after 17 days of hearings).

43. It is also relevant to refer to the English High Court case of *Prudential Assurance v Fountain Page Ltd* [1991] 1 WLR 756 at p. 774. It too considers the policy reasons for English Rules which again, it must be emphasised, make explicit provision for the treatment of witness statements, unlike the Irish rule, which is silent on the matter. In that case, Hobhouse J. stated:

> "In my judgment, when a statement served pursuant to a direction given or under Ord. 38, r. 2A and the witness to whose evidence that statement relates is never called by that party to give evidence (whether it be because the trial never takes place or for any other reason, that statement remains a privileged documents in the same way as a without prejudice communication remains privileged. The party serving the statement may not be compelled to disclose the statement to any other person and is entitled to prevent any other person using that statement without his consent and,

> in particular, using it in evidence against the person who originally served the statement. This was what was decided by the House of Lords in *Rush & Tompkins Ltd. v. Greater London Council* [1989] A.C. 1280 in relation to without prejudice communications and I consider that the same applies to witness statements served under the rule 2A."

44. Since that extract deals with the rule as it exists in England, it is of limited relevance to these proceedings. What is of some relevance is the policy reasons for that rule, since this Court must now decide the status of witness statements under our Rule 63A, which is silent on whether privilege is lost when they are served on the opposing party in the proceedings. As regards the policy reasons for having a restriction on the disclosure of witness statements, even where the relevant witness never adopts the statement, Hobhouse J. states:

> "The policy reflected in the rule is simply procedural. Its purpose is stated in sub rule (2) to be "disposing fairly and expeditiously of the cause or matter and saving costs". It is related to the instant litigation alone. Later paragraphs of the rule cover matters of obvious relevance to the trial, and its preparation, in that action. The secondary purpose must also be to encourage and facilitate the making of admissions and settlements. If one party can see the evidence of the other party has and has also to disclose its own, the exchange of information may enable disputes to be resolved in a manner that is exactly parallel to that which often occurs in without prejudice negotiations. Costs are saved if trials are rendered unnecessary or appropriate admissions are made. The policy of the law which protects without prejudice communications should apply to protect the confidentiality of statements that are exchanged but not used under rule 2A. Similarly, the example of *Riddick v. Thames Board Mills Ltd* [1977] Q.B. 881 illustrates another danger of not recognising a restriction. A statement may contain possibly defamatory statements; if an unused statement is not to be treated as privileged from disclosure to third parties or being used in evidence, obvious difficulties could arise. Accordingly, there are good reasons of policy arising from the rule that reinforce the analogy with the treatment of documents obtained on discovery and communications without prejudice. Likewise, there are good policy reasons for imposing similar restrictions. There is therefore no basis for declining to give effect to the inference to be drawn from the rule itself."

45. It seems to this Court that in addition to the foregoing policy reasons for retaining privilege on witness statements that have not been adopted or otherwise put into the public arena, there is a further aspect to these policy reasons. That is that an incentive for settlement will often be the desire of the parties not to have their dispute aired publicly. It would, in this court's view, be a disincentive to parties settling *after* hearings had commenced, if having revealed their hand completely and fairly to the other side in a witness statement (in the hope, perhaps, of settling), that litigants would lose one benefit of settling (namely the benefit of avoiding a public airing of the details of their dispute as set out in their witness statement). This benefit may in some instances amount to the advantage of not having to reveal publicly highly personal or scandalous or defamatory details. This benefit would be lost simply because they had not managed to settle their dispute until after they had served their witness statement on their opponent (but before being adopted in open court), rather than settling *before* those statements had been so served.

46. In this regard, this Court has previously referred to the fact that Ireland has the lowest number of judges per head in Europe and to the fact that there is a strong public interest in ensuring that every effort is made to settle cases so that court resources are not wasted particularly in long running cases which monopolise the Court's time for weeks on end to the detriment of other litigants (See Sheehan v Flynn [2018] IEHC 188 at para 21 et seq). In this regard, it is relevant to note that the Defender Case itself is set to occupy the High Court for a full half year of the Court's sitting time and so, as a matter of general principle, it is an example of the potential benefits of retaining every incentive for the settlement of the dispute between the parties (although of course the particulars of this application concern witness statements not in the Defender Case, but witness statements in the Thema Case, which itself settled).

47. For this reason, it seems to this Court that there are good reasons for not taking away from litigants any incentive to settle their cases (even after their witness statements have been served or the hearing has commenced) and thus good reasons for attaching privilege to witness statements until the very last minute i.e. until they have been adopted by the witness or put into the public arena.

48. By doing so, this should increase the chances of settlement, since parties preparing their witness statements will know that a particularly frank witness statement (which may increase the chance of settlement) can be safely served on their opponent in the hope that it will lead to settlement, since that witness statement will not lose its privileged status by simply having been served on the other side. As well as encouraging frank and open witness statements (and thus increasing the chances of settlement), such an approach may also provide a longer window for settlement which has the added benefit of keeping the dispute private. This longer window for a settlement which may include the benefit of privilege for witness statements, will be up to the time the witness statement is adopted or put into the public arena, rather than this benefit of settlement disappearing on the date when the witness statement is served on the other side.

49. For the foregoing reasons, it is this Court's view that a witness statement does not lose its status as a privileged document, once it is served, but rather that privilege is preserved until the witness statement is adopted by the witness or otherwise put into the public arena.

Privilege lost when proceedings completed, unless closely connected proceedings

50. Of course, even if privilege is not lost when the witness statement is served on the other side, it is common case that privilege is lost when the proceedings are completed, save insofar as those completed proceedings might be closely connected with the proceedings in which the documents are sought.

51. It therefore remains to be considered whether the Defender Case is closely connected with the Thema Case and the Primeo Case. If it is closely connected to those cases, then even on the completion of both those cases, the privilege attaching to the witness statements is not lost.

52. In this regard, it is clear from *Kerry County Council v Liverpool Salvage Association* (1904) I.L.T.R. 7 at p 8, that for two sets of proceedings to be closely connected there must be "*some connection between the parties or the subject-matter, or both*".

53. It seems clear to this Court that there is a very close connection between both the Thema Case and the Primeo Case on the one hand and the Defender Case on the other hand, since firstly, the parties are not only connected (in the Thema Case), but they are identical, in that HSBC Institutional Trust Services (Ireland) Limited is the defendant in the Defender Case and HSBC Institutional Trust Services (Ireland) Limited is also the defendant in the Thema Case. As regards the Primeo Case and the Defender Case, the parties are clearly closely connected since the defendant in both cases, although not identical, are part of the HSBC Group.

54. More significantly, the subject matter of all three cases are closely connected, since they involve claims by three different funds

against a HSBC company that, *inter alia*, the HSBC entity was negligent in relation to its alleged use of a Bernie Madoff company as a sub-custodian for the assets of the funds.

55. This Court therefore has little doubt that to the extent that privilege exists in the witness statements, that privilege would prevent the discovery of those documents to Defender, because although the Thema and Primeo Cases have finished, they are closely connected with the Defender Case.

Privileged status of witness statement which is not adopted but is used in court?
56. It is clear from the foregoing that this Court has concluded that if a witness statement is served on an opposing party in litigation, that the privilege attaching to that witness statement is not lost. It is also clear and is common case that that if a witness adopts his statement while giving evidence in open court, that the privilege attaching to the statement is lost. However, in the Thema Case, what occurred in relation to Ms. Coe might be said to fall somewhere between having been adopted by a witness in open court and having simply being served on the opposing party. That is because an excerpt from, and summaries of Ms. Coe's statement were relied upon by HSBC in cross-examining a Thema witness. However, before Ms. Coe could be called as a witness, the case settled and so her witness statement, although referred to in court, was not adopted by her.

57. The following is the relevant transcript of the use of Ms. Coe's witness statement by HSBC's counsel in cross-examination in the Thema Case:

> "Q. Have you read Ms Coe's statement?
>
> A. Ah, I am not, I don't think so. Which statement would that be?
>
> Q. Well, she will say in her statement that; "*KPMG narrowed the range of potential trades by indicating a six-month data range from which trades would be chosen but that they did not pre-notify the trades themselves*." That would be appropriate; isn't that correct?
>
> A. I'm sorry. Could you say that again?
>
> Q. There is a six-month range from which the trades are taken but there is no pre-notification of the trades themselves?
>
> A. That sounds reasonable.

58. Counsel then, although not quoting *verbatim* from the witness statement, summarises what Ms. Coe will say when called to give evidence in the Thema Case as follows:

> "Q. And she says that if KPMG were unhappy with that found anything untoward in that, she would have expected them to increase the size of the sample depending upon any discrepancy found. And I'm sure you think that is reasonable to?
>
> A. Yes.
>
> Q. And she will say in the debriefing that I have just mentioned, after the first report, that she was told by the KPMG examiners that Mr DiPascali was able to produce at short notice and number of large ring binders from which he could pull out underlying imitation. And that all sounds perfectly reasonable in terms brand testing, doesn't it?
>
> A. I mean, I think it would have been helpful if the KPMG report would have been clearer about the time lag between selection and review. It doesn't provide that in the report. I think that would have been good if they would have explained that.
>
> Q. I understand your point. But Ms cure will say, and it is stated in a report, she will follow it up by evidence in due course, that there was virtually no time lag between the request on the one hand and the production of the documents on the other hand?
>
> A. I understand that you say she says that."

59. In addition, reference was made by counsel for HSBC to Ms. Coe's witness statement in the following terms:

> "Q. Now, Ms. Coe, who is a witness who will give evidence on behalf of HTIE, she will say she placed no restriction on KPMG in terms of what they should or shouldn't do as part of their review.
>
> A. Yes
>
> Q. She made it clear that she was trying to track trades in order to validate their integrity and that she wanted to ensure that the testing was sufficient to uncover any impropriety. Those all sound like appropriate questions to put to KPMG, isn't that right?
>
> A. I would think.
>
> Q. She will say she asked KPMG to go from end to end on a trade, to take a sample of trades. That sounds like an appropriate thing to ask KPMG to do, isn't that right.
>
> A. Yes."

60. Counsel also put the following to the witness regarding Ms. Coe's evidence:

> "Q. Well, one of the things Ms Coe will say that in the course of the debriefing session that took place after the return of the KPMG investigators from New York, they sat down, Ms Coe asked 'is Bernie at it' and Mr Yim said to Ms Coe that he was not, responding, 'absolutely not, absolutely not'. Isn't that something for which anybody would be entitled to gain great reassurance?
>
> A. Well, I think it would depend on all the different things that Mr Yim said. I don't know that you would rely on only one

statement.

61. In considering the question of whether the foregoing *verbatim* extract and the several summaries of various parts of the witness statement which were used by HSBC in the cross examination of the plaintiff in the Thema Case amounts to a loss of privilege, regard will be had to the decision of Hogan J. in *Kelly v Byrne* [2013] 2 IR 389 which deals not with the status of witness statements, but the status of an affidavit that had been referred to during a court hearing. In reaching his decision, Hogan J refers to his previous judgment in *AIB v Tracey* (No. 2) [2013] IEHC 242. In *AIB v Tracey*, Hogan J permitted access of an applicant (Mr. Agar, who was a non-party) to an affidavit which was opened in court. It was not opened *verbatim* but:

> 'frequent reference was made in open court to the relevant passages from Mr. Tracey's affidavit which sought to implicate Mr. Agar and some, at least, of the relevant passages were opened either in full or in part. The present case is accordingly one where the relevant documents at issue have been fully opened in open court. As we shall shortly see, this is a very important detail, because different consideration might well obtain, for example in the case of a document which lay hidden in the discovery documents and to which no reference- or at least, no reference of any substance was made." :

62. In *Kelly v Byrne* [2013] 2 IR 389 at 393, Hogan J. referred to *AIB v Tracey* as follows:

> "[10] In the course of my judgment, I noted that the critical feature of the affidavit now sought to be produced was that it had been effectively opened in open court in the manner required by Article 34.1 of the Constitution. Once that occurred, I said, at para. 21, that "any cloak of confidentiality or protection from non-disclosure vanished at that point". I then continued, at paras. 22 and 23: -
>
> > "22. The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse.
> >
> > 23. In these circumstances the public are entitled to have access to documents which were accordingly opened without restriction in open court. This is simply part and parcel of the open administration of justice which the Constitution (subject to exceptions) enjoins. Entirely different considerations would naturally arise in respect of material which was not opened in open court or which was protected by the *in camera* rules or by reporting restrictions imposed, for example, pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008."
>
> [11] I might take the opportunity to stress that this principle applies *only* to documents which have *already* been freely opened in *open court* and in respect of which there are no reporting or other restrictions. It does *not* apply to the generality of other types of court files and documents. But where the document has been opened, without restriction, in open court, it then effectively forms part of the public record relating to the administration of justice which Article 34.1 of the Constitution enjoins must (subject to exceptions) be in public. All that *Allied Irish Banks plc v. Tracey (No. 2)* [2013] IEHC 242, (Unreported, High Court, Hogan J., 21st March 2013) decided was that, in principle, at any rate, the public are entitled to know the contents of material which was opened, without restriction, in open court."

63. It is this Court's view that the principle set out by Hogan J. in the context of affidavits is equally applicable to witness statements and the use of the *verbatim* extract and the several summaries of various parts of Ms. Coe's witness statement, without any *caveat* or restriction, in the cross examination of the plaintiff in the proceedings taken against HSBC and amounts to a substantial reference to that witness statement and thus the effective opening of the witness statement in court by HSBC, *albeit* that it was not adopted by Ms. Coe. This amounts, in this Court's view, to the witness statement being effectively *'put into the public arena'* such as would lead to a loss of privilege.

64. During the hearing, HSBC conceded that Mr. Wiener's witness statement in the Thema Case was opened in court or adopted by the witness, so it is also the case that his witness statement lost its privilege and so is available on discovery.

Conclusion

65. The Court finds that the witness statements in the Primeo Case, which lost privilege during the course of that trial by their adoption by the relevant witnesses, should be made available on discovery to Defender, and the delay, absence of necessity or absence of relevance, for refusing discovery put forward by HSBC are rejected by this Court.

66. As regards the witness statements in the Thema Case, these are privileged and did not lose privilege when they were served by HSBC on the opposing side to that litigation, which privilege was not lost on the completion of the Thema Case, because it is closely connected to the Defender Case, and so these documents should not be made available on discovery to Defender. However, an exception is the witness statement of Ms. Coe which, although not adopted by her, was opened in part in court and the effect of some its contents were summarised in open court. This witness statement should be provided on discovery to Defender, as well as the witness statement of Mr. Wiener.