THE COURT OF APPEAL

Neutral Citation Number: [2018] 357

Record No. 2017/332

Peart J.
Whelan J.
McGovern J.

BETWEEN/

BMO REP ASSET MANAGEMENT PLC

APPELLANT/PLAINTIFF

- AND–

FRIENDS FIRST MANAGED PENSION FUNDS LIMITED

RESPONDENT/DEFENDANT

JUDGMENT of the Court delivered on the 15th day of November 2018 by Mr. Justice McGovern

1. This is an appeal from an order of the High Court (Murphy J.) dated the 1st June 2017 in which, for reasons contained in an *ex tempore* judgment, the court determined that the respondent was entitled to inspection of certain documents identified in a notice to produce over which privilege had been claimed in the appellant's affidavit of discovery sworn on the 21st November 2016.

2. In the proceedings the appellant seeks a declaration that it is entitled to a performance fee of STG£5,243,325 and, if necessary, declarations that a formula contained in a management agreement ("IMA") between the appellant and the respondent contains a common mistake and/or should be rectified. The IMA was executed in the context of the appellant's engagement by the respondent in relation to what is known as the Orion Fund ("the Fund"). Under the terms of the IMA the appellant agreed to manage the Fund's property investments and to evaluate and recommend potential acquisitions and dispositions of properties and to oversee the performance of the Fund's property portfolio in the light of certain specified objectives and limitations.

3. The IMA provides that in return for the appellant's performance of various specified services the Fund would pay to the appellant two fees namely:

(a) an asset management fee; and

(b) a performance fee.

4. The parties are in dispute as to whether a performance fee is payable. While there had been discussions as to what figure was payable under the IMA (with certain figures being suggested from time to time) the position changed on the 30th August 2013 when the respondent contended for the first time that no fee was payable to the appellant under the IMA.

5. There are a number of issues to be decided on this appeal. In the first place the Court will have to determine whether or not the High Court judge was correct in concluding that the application before her was for a final order and was not an interlocutory application. This has implications for the admission of hearsay evidence in an affidavit and is also relevant as to whether or not this Court should admit into evidence a further affidavit which has been sworn since the matter was heard in the High Court, given the absence of any application for leave to admit new evidence under O. 86A, r.4 RSC. The Court also has to consider the High Court judge's ruling on the appellant's claim of privilege under the heading of 'legal advice privilege' and 'litigation privilege'.

Was the application in the High Court for a final order?

6. The appellant complains that this issue was never argued in the High Court. However, it is clear that the judge did give some thought as to whether or not an affidavit containing hearsay evidence could be admitted and she concluded that the order being sought was a final one in that it amounted to a determination of two privilege issues once and for all. That decision resulted in the judge ruling inadmissible the hearsay evidence in the affidavit of Mr. Derek Hegarty sworn on the 26th April 2017. The evidence which Mr. Hegarty purported to give in his affidavit was addressed the issue of the role played by Mr. Paul Meads in the plaintiff/appellant's company, and whether or not the appellant was entitled to claim legal professional privilege over certain documents.

7. The evidence is that Mr. Paul Meads was unavailable to swear an affidavit at the relevant time because he was away on holidays. He subsequently swore an affidavit which the appellant seeks to introduce in the appeal. If the order made in the High Court was interlocutory in nature then under Ord. 40, r. 4 RSC the affidavit of Mr. Hegarty would be admissible even though it contained hearsay evidence, and the affidavit evidence of Mr. Meads could be received by this Court without special leave but only in respect of matters arising after the decision. If it was a final judgment, then leave of the Court would be required. (See Ord. 86A, r. 4).

8. In the course of her judgment the High Court judge referred to Minister for *Agriculture v. Alte Leipziger A.g.* [2000] 4 I.R. 32 and *Salter Rex & Co. v. Ghosh* [1971] 2 Q.B. 597. In Salter Rex & Co. Denning L.J. referred to the uncertainty that surrounds the question of whether an order is "final" or "interlocutory" and suggested that the courts would have to do the best they can on a case by case basis when this issue arose. In *Alte Leipziger A.g.* at p. 40, Hardiman J. said:

> *"In his judgment in this case the Chief Justice has thoroughly set out the diverse and sometimes inconsistent English authorities and I agree with him that, generally speaking the difference of judicial approach has been as to whether one looks to the order as made, or to the "application" for the order, and to ask in either case if the order itself or the "application whichever way it is decided", will finally dispose of the case."*

9. He went on to say at p. 50:

> *"I think the fundamental flaw in both these approaches lies in the requirement that the order, or the application (depending on which approach one takes) must finally dispose of the case as a whole if it is to be final and not interlocutory. In my view it is quite sufficient if the order in* ***question finally disposes of a particular issue between the parties****, at least where that issue is discreetly raised by some proper procedure." [Emphasis added]*

Those remarks of Hardiman J. were made after considering the different strands of judicial opinion which existed up to that time.

10. From this it can be said that that the test is not determined by whether or not the order made will finally dispose of the case.

11. In *Lyons v. Delaney & Ors.* [2016] IECA 393 Ryan P. delivered the judgment of this Court in which a detailed analysis was made of the *Alte Leipziger* case and the distinction between interlocutory orders and final orders. In that case the High Court judge had set aside a third party notice because of a five month delay by the appellant in delivering their files to their solicitors. The effect of the order was to dismiss the third party from the proceedings but Ryan P. observed that this did not mean that the third party was free of any potential liability to contribute because the defendant could proceed for a contribution following the determination by the judgment or settlement of the plaintiff's case subject to the discretion of the Court to refuse to impose such liability if they consider that to be just in all the circumstances. Ryan P. concluded that the order made by the High Court was final in its determination of the application by the third party to strike out the notice previously authorised by the Court. At para 16 he said:-

> "16. The two majority judgments in *Minister for Agriculture v. Alte Leipziger* hold that the decision on a discrete issue in the case is a final order and not an interlocutory one, for the purpose of the equivalent rule, with the result that additional evidence on the appeal cannot be adduced as of right and requires special leave of the court…In my judgment, the present decision has to be considered final in the sense of the judgments of Barron J. and Hardiman J. with which their two colleagues concurred. I refer to the citations from the judgements that appear above in the section dealing with submissions. That means that special leave is required before additional evidence may be introduced. The case represents clear relevant authority to assist the court."

12. While the appellant relies on the judgment of Irvine J. in *Director of Corporate Enforcement v. Bailie* [2007] IEHC 365 in which she quoted from Hodson L.J. in his judgment in *Rowsage v. Rowsage* [1960] 1 WLR 249 as to the English rule in respect of the admissibility of hearsay affidavits it must be remembered that the *Rowsage* case pre-dated the *Alte Leipzizer A.g.* case.

13. In the High Court the judge took the view that the issue of privilege was a discreet issue and therefore any decision on that matter was final (subject to appeal). In reaching that conclusion she was correct.

14. Order 86A, r. 4(a) provides that, subject to the provisions of the Constitution and of statute:

> "The Court of Appeal has on appeal full discretionary power to receive further evidence on questions of fact, and may receive such evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner…"

15. While Order 86A, r. 4(c) suggests that on any appeal from a final judgment or order, further evidence may only be admitted on special grounds, and only with special leave of the Court obtained by application by motion on notice setting out the special grounds, the Court nonetheless has an general discretion to receive further evidence where the justice of the case requires it. In *Lyons v. Delaney & Ors.* Ryan P. suggested that "*general fairness*" is a consideration.

16. It is not clear to what extent the issue as to whether or not the order sought was final or interlocutory in nature was discussed in the High Court. From para 11 of the judgment it appears that the issue was canvassed to some extent as the following extract shows:-

> "Mr. Farrelly B.L. on behalf of the applicant has submitted that the Court should attach less weight to the second-hand hearsay evidence of the plaintiff's solicitor. Ms. Smith B.L. on behalf of the plaintiff submits that this is an interlocutory application and that the plaintiff is entitled to rely on hearsay evidence in accordance with O. 40, r. 4 of the Rules of the Superior Courts.".

The fact that this Court has been informed that the point was never argued suggests that the parties may not have addressed their minds to the significance of the issue as it later emerged in the High Court judgment. The practical effect of the judgment was to rule out the affidavit of Mr. Hegarty thereby putting the appellant at a significant disadvantage because there was no other evidence from its side on the issue of privilege. Had the appellant realised the significance of the issue it might well have sought to adjourn the application in order to file an affidavit from Mr. Meads before any final order on that issue was made. Now that the appellant has obtained such an affidavit from Mr. Meads, it seems to me that the balance of justice favours the admission of the affidavit. In his affidavit Mr. Meads sets out the factual position concerning his involvement in the negotiations. The only meaningful way that the issue of legal advice privilege can be considered is to allow the affidavit of Mr. Meads to be considered either by this Court or by sending the matter back to the High Court.

17. I take the view that this Court has a general discretion to admit the affidavit of Mr. Meads as it is relevant to the issue of privilege which arises and the issue has been dealt with in the High Court judgment and in the parties submissions. I also take into account the fact that even if the order of the High Court was final on this particular issue, it is not a final determination of the proceedings. On that basis I have considered the affidavit of Mr. Meads. It is unfortunate that the true ramifications of this issue were not teased out before the judge in the High Court and in particular the significant consequences that would arise for the appellant if Mr. Hegarty's affidavit was excluded as it would then have no evidence to offer on the claim of privilege. I believe that if all these issues had been averted to an application might have been made to adjourn the matter to allow Mr. Meads time to put in an affidavit. On one view the evidence in his affidavit is not "new evidence" but was contained in the affidavit of Mr. Hegarty albeit in a form of hearsay. It is also difficult to see how the respondent is prejudiced by its admission as it re-iterates the appellant's position which was maintained in correspondence before the High Court hearing. In my view the interests of proper case management favour this Court in dealing with the issue now before it on the basis of Mr. Mead's affidavit rather than remitting the matter back to the High Court. I believe the position would be otherwise if the decision under appeal was a final determination of the substantive issues in the proceedings.

Legal advice privilege

18. Mr. Paul Meads has sworn an affidavit on the 29th September 2017 in which he confirms the contents of the affidavit of Mr. Derek Hegarty whose affidavit was ruled inadmissible by the High Court judge on the basis that it consisted of hearsay evidence. He confirms that he was away on holidays when a replying affidavit was required and that the case was being strictly case managed at

that time and a trial date had been fixed for November 2017. He also confirmed that he had provided detailed instructions to Mr. Hegarty in particular with regard to his role as in house legal advisor to the appellant and details in respect of when he first contemplated litigation.

19. Mr. Meads was general counsel to the appellant from September 2008 to January 2017 and during that time he was also partnership secretary to the appellant's parent company. At no time was he a company executive or a partner within the business. His clear evidence is that at all relevant times he was acting as legal advisor to the appellant and that he had no involvement in the negotiation of the IMA but that his role was to give effect to the terms by drafting the agreement and putting them in a proper legal framework. He said that his first dealing with the respondents occurred after the formula, which is the subject matter of the dispute, had been incorporated into the IMA and there was no negotiation or amendments to the formula after this time.

20. In his affidavit of the 29th September 2017 Mr. Meads confirms the averments made by Mr. Hegarty in his affidavit of the 26th April 2017. In that affidavit Mr. Hegarty deposes to the fact that he was instructed that Mr. Des Dennehy was the appellant's member engaged in agreeing the commercial arrangements with the respondent and that Mr. Dennehy was guided by Mr. Nick Criticos at certain times as to the agreed terms. Once the commercial arrangements were agreed Mr. Meads was requested to engage with Mr. Gibney of the respondent in relation to the drafting of the IMA in order to ensure that the commercial terms were appropriately translated into a legally binding agreement. That position has been confirmed by Mr. Meads in his affidavit.

21. In a letter written on the 19th September 2013 to Mr. Richard Gallagher of the respondent, Mr. Paul Meads stated:-

> *"I also refer to your discussions with Des Dennehy of our Dublin office on the 30 August 2013 regarding the calculation of the Performance Fee payable to F &C REIT in respect of the period for September 2013. I understand from Des that you take the view that no performance fee is payable because the formula in Schedule 4 to the IMA does not generate the required IRR for such a fee to be accrued."*

22. An exchange of e-mails to be found in exhibit "EG6" in the affidavit of Eugene Gibney sworn on the 4th day of April 2017 tends to support his position. On the 30th November 2011 at 11:23 Des Dennehy sent an e-mail to Paul Meads which was copied to Nick Criticos. The subject was "*Orian IMA and side letter*". The e-mail refers to the fact that Eugene Gibney has inserted further amendments into the document and then asks Mr. Meads *"can you review these documents and maybe then have a call to discuss same"*. That e-mail followed an earlier e-mail at 10:58 which Mr. Richard Gallagher of the respondent sent to Mr. Dennehy in which he stated *"In follow on from our meeting last week please find the Orian IMA and Side Letter attached with our agreed changes and Eugene's mark-ups"*.

23. As the appellant seeks to assert legal professional privilege the burden is on it to satisfy the Court that privilege is properly claimed. When the matter was before the High Court judge the appellant's position was not comprehensively put before the court because the hearsay evidence in the affidavit of Mr. Hegarty had been ruled out by the judge and there was no affidavit from Mr. Meads. Having now considered all the evidence, and in particular the affidavit of Mr. Paul Meads, I am satisfied that the role of Mr. Meads was that of legal advisor and the claim for legal professional privilege is properly made.

Litigation privilege

24. On the 30th August 2013 the respondent contended that no fee was payable to the appellant. All parties accept that litigation privilege exists from the 19th September 2013. The appellant claims litigation privilege from the 5th September 2013 and it is that privilege up until the 19th September that is an issue.

25. On the 5th September 2013 Mr. Meads informed Mr. Dennehy and Mr. Criticos that he would instruct the appellant's UK based external legal advisors, Olswang LLP, in relation to the dispute. He said that he did so on Friday the 6th September and that he discussed with him the nature of the dispute and the likelihood of proceedings on that date. As the dispute required to be resolved before the Irish courts Olswang suggested that the appellant instruct an Irish law firm to represent them and William Fry was then retained.

26. The respondents set out in their written legal submissions and in their oral submissions to the Court the basis on which litigation privilege can be claimed. The mere possibility of litigation would not be enough. They rely on the test applied by O'Hanlon J. in *Silver Hill Duckling Limited v. Minister for Agriculture* [1987] I.R. 289 at 292 where he stated that litigation must be "well-nigh inevitable" for litigation privilege to exist. Further tests which have been applied by the courts of England and Wales are whether or not the probability of litigation between the parties was strong. See *Alfred Crompton Amusement Machines v. Customs and Excise Commissioners* [1973] 2 ALL ER 1169 which was approved by O'Hanlon J. in the *Silver Hill Duckling* case. In *Hansfiield Developments v. Irish Asphalt* [2009] IEHC 90, I stated that for a claim of litigation privilege to succeed the court must be satisfied that the dominant purpose of the document which has been generated is litigation and not some other purpose. The surrounding background will usually inform the court as to whether or not the test has been met. In this case the appellant was maintaining a claim for a substantial sum of money and although figures had been exchanged at various times between the parties it was not until the 30th August 2013 that for the first time the respondent contended that no fee at all was payable. In the light of the surrounding circumstances it was almost inevitable that this was going to give rise to a dispute involving litigation. The 30th August 2013 was the start of the U.K. August bank holiday weekend and explains why it was not until the 5th September 2013 that the appellants sprung into action by retaining the services of external lawyers. It is difficult to see why they took that course if they were not contemplating litigation. However, it is not necessary for this Court to reach a conclusion on the claim for litigation privilege as this correspondence involves Mr. Meads in his capacity as legal advisor and, therefore, comes within the scope of legal advice privilege.

Conclusion

27. Once the High Court judge concluded that the affidavit of Mr. Hegarty should be excluded the appellant was left in the difficult position that it had no evidence to offer on the issues of legal professional privilege and litigation privilege as Mr. Meads was not available to swear an affidavit at that time. In those circumstances it is not difficult to see why the High Court judge rejected the claims of privilege. But the basis on which she excluded the affidavit evidence of Mr. Hegarty was that it was a final determination and not a interlocutory hearing and there is some uncertainty as to the extent to which this point was argued before her. If it had been then it is reasonable to assume that the appellants would have argued that in the event that she determined the hearing was a final one that they should be permitted to introduce evidence from Mr. Meads.

28. As I would admit the evidence of Mr. Meads this Court has a more complete picture than that presented to the High Court judge. I would allow the appeal and the claim of legal professional privilege in respect of all the documents which are at issue in this appeal, including those prepared between the 5th September, 2013 and the 19th September, 2013.