THE HIGH COURT

COMMERCIAL

[2013 No. 12439 P]

BETWEEN:

DEFENDER LIMITED

PLAINTIFF

-AND-

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) DAC

AND BY ORDER OF THE COURT

RELIANCEMANAGEMENT (BVI) LIMITED, FIRMAN LIMITED, DAVID WHITEHEAD, RELIANCE INTERNATIONAL RESEARCH LLC

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 1st June, 2018

Summary

1. This case involves a claim for some $333 million by the plaintiff ("Defender") against the defendant ("HSBC") for, *inter alia*, negligence and breach of contract regarding HSBC's alleged role as a custodian of funds which were lost as a result of the fraud of its alleged sub-custodian, Bernie L. Madoff Securities LLC ("BLMIS"). This company was operated by the notorious Mr. Bernie Madoff, who was involved in a €65 billion Ponzi scheme in the United States, which is alleged to be the biggest fraud in history.

2. These proceedings are very complex and the full hearing of the action is scheduled for October, 2018 and is due to last 12 weeks. HSBC has already received 31,000 documents on discovery from Defender.

3. HSBC joined Reliance Management (BVI) Limited ("Reliance BVI") and Reliance International Research LLC ("Reliance US") as third parties to the action. Reliance BVI entered a Management Agreement dated 25th April, 2007, with Defender under which Defender appointed Reliance BVI as its investment manager. Reliance US is a related entity to Reliance BVI and HSBC alleges that Reliance BVI and Reliance US operated as a single group entity with no meaningful distinction between them. These two companies ("Reliance") were joined to these proceedings by HSBS as it alleges that Reliance, and in particular Reliance BVI as Defender's investment manager, had full knowledge of all the risks associated with funds being entrusted with Mr. Madoff's company, BLMIS. In this regard, HSBC has received 53,000 documents from Reliance as part of the discovery process.

4. The one day hearing before this Court concerned the failure of Defender to reply to approximately 650 questions raised by means of interrogatories by HSBC which were served on Defender on the 2nd March, 2018. While responses were supplied to some of the interrogatories by Defender on 13th April, 2018, Defender objected to answering a significant number of interrogatories on several grounds, which are set out in detail below.

5. As a result, pursuant to Order 31, rule 11 of the Rules of the Superior Courts ("RSC"), HSBC issued a motion seeking an order directing Defender to provide further and better answers to the interrogatories. In addition, because of the alleged delay in HSBC's receipt of answers to the interrogatories, and on the assumption that this Court would order Defender to answer the unanswered interrogatories, HSBC also seeks an amendment to the pre-trial directions to allow it more time to put in its witness statements, since otherwise, unlike Defender, HSBC would be required to put in its witness statements without having reviewed all the interrogatories. This judgment therefore deals with these two applications by HSBC.

Basis for delivering interrogatories

6. As this matter is being heard in the Commercial Court, under Order 63A, rule 9 of the RSC, parties to litigation are free to deliver interrogatories without the leave of the Court.

7. It is also clear from the judgement of Walsh J. in *J & L.S Goodbody Ltd v. Clyde Shipping co Ltd*, Unreported, Supreme Court, 9th May, 1967, that interrogatories are questions which should be capable of a yes or no answer and are permitted if they are relevant to, not just the facts which are directly in issue between the parties, but also to facts which themselves are relevant to the existence or non-existence of the facts directly in issue.

8. The judgment of Doyle J. in *Long v. Conway*, Unreported, High Court, 25th July, 1977, at p. 5 clarifies that the purpose of interrogatories is to expedite the trial of the action by ascertaining facts material to the dispute and obtaining admissions from the interrogated party.

9. The judgment of Lynch J. in *Bula Ltd v. Tara Mines* [1995] 1 ILRM 401 at p. 405 establishes that interrogatories as to opinions or matters of law or the meaning or effect of documents or statements or conduct are not permissible.

Encouragement of the use of interrogatories to save court resources

10. In the Court of Appeal decision in *McCabe v. Irish Life* [2015] 1 IR 346 at p. 348, Kelly J. (as he then was) provided judicial encouragement for the greater use of interrogatories since they *'can dispose of issues prior to trial, can lessen the number of witnesses and result in an overall shortening of trials' and in that case 'save significant costs and shorten the trial'* (at p 356).

Kelly J. also noted at p. 349 that:

> "When the Commercial Court was set up in 2004, its rules permitted parties in commercial list litigation to deliver interrogatories without leave of the court. That procedural change gave rise to a much more extensive use of interrogatories in commercial court proceedings. They have been beneficial in achieving the desired results."

The desired results to which Kelly J. refers would appear to have been more efficient use of court time and thus a benefit for strained court resources.

11. In addition, it is to be noted that Order 31, rule 7 of the RSC, expressly provides that an interrogatory may be set aside if it is '*unnecessary'* which this Court interprets as meaning not necessary for a fair disposal of the dispute or a reduction in costs or saving in court time.

12. It is also relevant to note that Kelly J.'s reference to saving costs and shortening trials seem particularly apposite at present, since "*Ireland has the lowest number of judges per capita in the OECD*" (per Kelly P. speaking extra-judicially in the *Bar Review* (2018) Vol 23 No. 1 at page 12), and so anything which shortens trials in a country with such a shortage of judges is to be welcomed.

This dispute may occupy one High Court judge for one third of a year
13. It is this Court's view that due to the shortage of judges in Ireland there is a need for judges to use court resources efficiently This need is a factor in a court's decision as to whether to permit interrogatories, particularly where, as in this case, a trial is scheduled to occupy a High Court judge for a third of a year (of court sitting time).

14. However, while the efficient use of court time is factor in this Court's decision, it also seems clear from the judgment of Shanley J. in *Woodfab v. Coillte Teoranta* [2000] 1 IR 20 at 29, that the paramount consideration must be the interests of justice:

> "It does appear that once the party seeking to deliver interrogatories satisfies the court that such delivery would serve a clear litigious purpose by saving costs or promoting the fair and efficient conduct of the action in question then the court should be prepared to allow the delivery of the interrogatories unless it is satisfied that the delivery and answering of the interrogatories would work an injustice upon the party interrogated."

Necessity & relevance of interrogatories plus effect on court resources
15. In conclusion therefore, if the interrogatories are necessary and relevant and in the absence of any injustice to Defender in permitting them, it is this Court's view that interrogatories should be permitted in cases such as this which are scheduled to use so much court resources. This is because it is possible that the use of interrogatories will reduce court time and it is also a possibility (even if this is remote) that the answers to interrogatories could, depending on the admissions of fact solicited, facilitate settlement of the dispute prior to trial.

16. It is against this background that this Court will consider Defender's claims that many of the interrogatories delivered by HSBC are flawed, and they can be categorised into the following seven grounds, namely that some of the interrogatories:

> (i) Should be addressed to the Reliance companies,
>
> (ii) Involve an interpretation of documents,
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> (iii) Relate to the contents of admitted documents,
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> (iv) Relate to corporate awareness not subject to a yes/no answer,
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> (v) Relate to matters of law,
>
> (vi) Relate to Defender's witness statements,
>
> (vii) Relate to disputed concepts.

Objection 1: Interrogatories should be addressed to Reliance companies
17. The first objection by Defender is that some 400 of the interrogatories should be properly addressed by Reliance and not Defender. At the hearing of this application, Defender gave a small number of examples of interrogatories that referred to Reliance and which it alleged should have been addressed to Reliance. For its part, HSBC provided a small number of examples of interrogatories that referred to Reliance which it alleged were properly addressed to Defender. This is because this Court was not asked, nor would it have been practical for it, to consider each of the 400 interrogatories to see they were all properly addressed to Defender. Instead, this Court has been asked to answer this objection as a matter of principle and thereafter it will be for the parties to apply this Court's conclusion to the interrogatories. A similar approach was taken at the hearing of this application to the remaining 250 interrogatories which fall under the remaining six categories of objections.

18. Some of the examples which were provided to the Court of the interrogatories which relate to Reliance were:

> "1.8. From 2000, did not Reliance US provide services to Reliance BVI?
>
> 7.1. As of 26th of February 2007 was not Reliance US and/or Reliance BVI either individually or collectively aware that the structure of the proposed new BMIS fund would leave discretion with BMIS to make purchases and sales of investments?
>
> 9.4.10. Did not Reliance US and/or Reliance BVI either individually or collectively amend the draft presentation to address investor queries a number of times between 15 and 17 April 2007?"

19. In reaching its conclusion on this issue, this Court took account of the following:

> • The Court was advised that these interrogatories which relate to Reliance were delivered to both Reliance and to Defender.
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> • Although employees of the Reliance companies have delivered witness statements on behalf of Defender, the Reliance companies are separately represented in these proceedings and were joined as third parties to the proceedings by HSBC
>
> • On the 4th May, 2018, Reliance delivered to HSBC answers to the interrogatories and it was submitted on behalf of Defender that over half of the interrogatories were substantively answered, with objections made by Reliance in respect of the remaining interrogatories.

20. Bearing in mind that this is not a case where there are only two parties to the litigation, this Court also took account of the fact that Order 63A, rule 9 of the RSC provides that interrogatories are required to have:

> "a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer".

It seems clear to this Court that this wording means that interrogatories should not be indiscriminately delivered to all the parties to the litigation, but rather addressed to the party best placed to answer the interrogatory. In this case, no note was made by HSBC in relation to the 400 or so interrogatories which concerned Reliance and thus both Defender and Reliance were compelled to answer 400 identical interrogatories

21. Based on the selection of interrogatories opened to the Court by Defender and HSBC, it seems clear that this category of interrogatory relates to Reliance and should be within the knowledge of Reliance. Furthermore, these interrogatories have been answered (save where this is an objection) by Reliance. It does not seem to this Court therefore that it is necessary for the same interrogatories to be asked of Defender. More importantly it seems to this Court that asking Defender the same question, as was asked of Reliance, the answer to which is within Reliance's knowledge, would add, in this Court's view, to the costs of the proceedings. That the parties are wealthy corporate clients (which may or may not be the case in this instance) is not a sufficient reason to do so. Also the fact that the dispute is over a huge sum of money does not justify a relaxed approach to legal costs. Just because there is a significant sum of money at stake does not mean that costs should be incurred unnecessarily and it is this Court's view that to permit this category of interrogatory would lead to unnecessary costs. Accordingly, this objection is sustained and if relevant, this Court will hear from the parties regarding the exact type of order, if any, which is required to address this court's decision in this regard.

Objection 2: Interrogatories relate to the interpretation of documents
22. Defender objects that some 135 interrogatories are raised as to the interpretation of documents. As previously noted, the meaning and effect of documents cannot be the subject of interrogatories. However, this does not mean that if an interrogatory covers the same subject matter as a document, but does not seek an answer to the meaning or effect of that document, that it is not permitted.

23. It does seem to this Court that based on the examples opened to the Court that this objection is not sustainable e.g.

> "7.1.3 Did not Jakob Hirschbaeck raise concerns with regard to the disclosures in the proposed offering memorandum?"

While this interrogatory refers to a document, it does not seek Defender's understanding of the meaning or effect of that document.

24. Similarly, the following interrogatory was objected to on the ground that appears to be based on an email between Ms. Nadin and Mr. Lowe dated 23rd April, 2007:

> "8.7 Did not Liz Nadin of Fidux recommend to Justin Lowe on 23 April 2007 that Reliance BVI retain the relationship with BMIS?"

Again, while this interrogatory does not even refer to a document, but may be based on the subject matter of a document, it does not seek Defender's understanding of the meaning or effect of that document. It simply asks a yes or no answer. Indeed, this is an instance of an interrogatory seeking the admission of a fact which could not only shorten the trial by avoiding the necessity for such admissions in oral evidence, but it also strikes this Court (albeit without knowledge of the details of the substantive proceedings) as the type of admission, if made in another case, that could lead to settlement discussions and thus a saving not only of court time for the hearing, but the obviation of the need for the hearing itself.

25. Interrogatory 16.1 and 16.2 were objected to on the ground that they relate to the interpretation of documents and these state:

> "16.1 Did the offering memorandum for Defender state that "Defender has established or will establish a securities trading account with an external trader which is a broker/dealer based in the United States of America?
>
> 16.2 If yes, were either Jakob Hirschbacek and/or Liz Nadin aware that Defender had opened or would open the account with the external trader?"

Again, this Court is of the view that while these interrogatories relate to matters which are the subject matter of documents, they do not seek Defender's interpretation of those documents, but rather first seek a factual confirmation of the contents of a document and then the state of knowledge of two individuals. Again, this Court is struck (*albeit* without any knowledge of the substantive proceedings) by how interrogatories such as these could lead to a saving of court time and perhaps even early settlement of cases, with a consequent easing of the current pressure on court resources.

26. For these reasons, this Court does not believe that Defender's objections under this heading are sustainable.

Objection 3: Interrogatories relate to the content of admitted documents
27. Defender objects that over 105 interrogatories are raised in relation to the contents of documents. This objection is very similar to the previous objection. The only additional point being made is that the parties have reached a *Bula/Fyffes* agreement in respect of various documents, such that those documents do not require formal proof of their execution and are to be treated as *prima facie* evidence of their contents, subject to contradiction by witnesses at the hearing. On this basis, there appears to be an objection to interrogatories that refer to such admitted documents.

28. However, this Court has already concluded that reference can be made to documents in an interrogatory, since there is no reason in principle why an interrogatory cannot relate to the same subject matter as a document, provided it does not seek an interpretation from the interrogated party of that document. The fact that the document is an admitted document does not alter the Court's view of the position. Accordingly, provided the interrogatory does not seek Defender's interpretation of the admitted document referred to in the interrogatory, the interrogatory is allowed. Thus, the objection that interrogatories relate to the contents of admitted documents, or more accurately deals with the same subject matter of admitted documents, is not sustained.

Objection 4: Interrogatories relate to corporate awareness so not yes/no answer
29. This objection is that some of the interrogatories which relate to the corporate awareness of Defender do not admit of a yes or no answer, but rather require a narrative. Interrogatory 4.13 asks:

> "Was not the fax number for which notices were sent to/from HSSI (with the exception of Proper Instructions) in relation to Defender the number of Reliance Gibraltar? "

It appears to this Court that this is amenable to a yes/no answer, subject to context if required by Defender. Interrogatory 5.15 asks:

> "On 18 November 2006 did not Manuel Echeverria of Optimal contact Adrian Pope of Maples & Calder with regard to his desire to create another Non–EU regulated investment vehicle which would be fully invested in BMIS and where BMIS would act as broker dealer?"

Similarly, it appears to this Court that this is amenable to a yes/no answer, subject to context if required by Defender.

Interrogatory 7.4 asks:

> "Were not Justin Lowe and Jacob Hirschbaeck aware as of 1 March 2007 that BMIS would have discretion to trade the "*moneys deposited with him*"?

Again, it appears to this Court that this is amenable to a yes/no answer, subject to context if required by Defender.

30. Based on the examples provided to this Court, this objection is not sustainable. It seems clear to this Court that what is really at issue is not that the interrogatories are capable of a yes or no answer, but that Defender feels that in order to give a more complete understanding of the answer, it needs to provide context. In this Court's view this is not a sustainable ground of objection and in this regard, this Court notes the comments of Kelly J. (as he then was) in the Court of Appeal in *McCabe v. Irish Life* [2015] 1 IR 346 at 349 where he noted that '*robust questions may be posed on a much wider base than is generally appreciated*.' If those robust questions require context, in the interrogated party's view, to be answered properly, then that context can be provided by the interrogated party. It is not a basis for refusing to answer the interrogatory.

Objection 5: Interrogatories relate to matters of law
31. As previously noted, interrogatories cannot seek an answer on a matter of law. Defender objects that over 90 interrogatories relate to matters of law.

32. Interrogatory 9.4.4 asks whether Defender was aware that BMIS had a discretion over trading stocks which resulted in BMIS having a concentration of functions and a conflict of interest. However, it seems clear to this Court that the question of whether BMIS had a conflict of interest is a legal question.

33. Similarly interrogatory 11.2 asks whether BMIS was authorised under the terms of a trading agreement dated 4th May, 2007, to buy, sell, and trade in stocks. Again, this seems to this Court to involve a legal interpretation of an agreement.

34. Likewise, interrogatory 16.30 asks whether HSBC was required to execute/follow Proper Instructions (a term defined in the Custodian Agreement dated 3 May, 2007 between Defender and HSBS) provided by Defender. Again, since Proper Instructions is a defined term defined in the Custodian Agreement between Defender and HSBC, this involves a legal interpretation of that agreement.

35. HBSC's answer to these objections is that it has indicated a willingness to reformulate the question. However, this Court has to deal with the interrogatories as raised and not to any reformulation of them. In this regard, to the extent that certain interrogatories relate to matters of law, this objection by Defender is therefore sustained and this Court will hear from the parties regarding the exact type of order, if any, which is required to address this Court's decision in this regard.

Objection 6: Interrogatories relating to witness statements
36. Defender objects that 40 interrogatories raise questions on matters that are dealt with in Defender's witness statements but without regard to the witness statements or alternatively that they seek to interrogate a witness statement. It is clear however from the judgment of Clarke J. (as he then was) in *Moorview Developments v. First Active* [2009] IEHC 214 at para 3.18, that a witness statement is no more than a statement of the intended evidence which a witness proposes to give at the trial. It follows that in relation to a witness statement, unlike in relation to an answer to an interrogatory which is sworn evidence, it is entirely possible that the witness may not give evidence at the trial in which case the witness statement will have no evidential value at the trial and will have to be discounted by the parties and the court. In contrast, to quote Kelly J. (as he then was) in *Anglo Irish Bank v. Browne* [2011] IEHC 140 at p 4, '*interrogatories, once answered, may be utilised as evidence'.*

37. For this reason, it seems clear to this Court that it cannot be an objection to an interrogatory that the subject matter of the interrogatory is also the subject matter of a witness statement, since it is possible that the witness statement would have no evidential value at the trial. Accordingly, this objection is not sustained.

Objection 7: Interrogatories relating to a disputed term
38. Defender objects to a number of interrogatories which ask questions in relation to the term 'Initial Promoters' which is a disputed concept between the parties. This is because the identity of who were the initial promoters of the investment of Defender is contested. However, it was submitted by HSBC that the term 'initial promoters' when used in the Interrogatories is defined in that document and so has a fixed meaning and so is not a matter of dispute, while the meaning of the term 'initial promoters' in the discovered documents or as used by witnesses is a matter of dispute and may be determined at the trial of the action.

39. It seems to this Court that Defender can give an answer to the interrogatory by reference to the definition of the term Initial Promoters which has been provided in the interrogatory, without having to accept that the persons so defined are properly the initial promoters in this case. Accordingly, this objection is not sustained.

Conclusion regarding the Interrogatories
40. In light of foregoing conclusions, this Court sustains two out of the seven objections made by Defender and will hear from the parties regarding the precise terms of any order to be made.

Variation of the pre-trial directions
41. In light of the failure of Defender to answer all the interrogatories (which failure this Court has found to be unjustified in relation some of those interrogatories), HSBC seeks an alteration to the Pre-trial Directions which are in place and in particular a deferral of the deadline for the delivery of witness statements.

42. HSBC has submitted that Defender had the benefit of replies to its interrogatories from HSBC before finalising its witness statements, but if HSBC is to comply with the deadline for its delivery of witness statements of 25th May, 2018 (which was extended by this Court to date of this judgment), it would not benefit from having the same facility of examining all the replies to interrogatories before finalising the witness statements.

43. This Court sees merit in this argument, particularly where it has found that in relation to some of the Replies to Interrogatories, Defender's refusal to answer them was not justified. For this reason, this Court will accede to HSBC's request and will hear from the parties regarding a suitable revised time-period.