Neutral Citation [2013] IEHC 76

The High Court

Commercial

Record Number: 2008/10983 P

[2012] IEHC 298

Between

Thema International Fund PLC

plaintiff

and

HSBC Institutional Trust Services (Ireland) Limited

defendant

and

Thema Asset Management Limited and 20:20 Medici AG

third parties

Judgment of Mr Justice Charleton delivered on the 20th day of February 2013

1. This judgment is part of the preparation for the Bernie Madoff fraud litigation. The main hearing is listed for trial on 23 April 2013. The plaintiff claims the loss of about $1 billion. The case was carefully managed over two years and made ready for trial by Clarke J and regard is had to his preliminary judgments in most of these applications.

2. Pursuant to a motion on notice, dated 12 February 2013, the plaintiff Thema International Fund PLC seeks:

> An order pursuant to Order 28 Rule 1 of the Rules of the Superior Courts permitting the plaintiff to amend its statement of claim and reply.

3. That rule reads:

> The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Current pleadings

4. The statement of claim as it now exists alleges that the plaintiff had a business relationship with the defendant since 1996 on the basis of the Undertakings for Collective Investment and Transferable Securities Regulations 2003, SI 211 of 2003. Of this relationship it is also alleged that it is founded on a private document called the custody agreement (supplemented in 2006); that the relationship was also governed by notices issued by the Financial Regulator; that liability also exists in contract, tort and for breach of fiduciary duties; that the appointment of Bernie Madoff as subcustodian constituted a breach of duty/contract; and that an account should be ordered in equity. Reading the statement of claim, it is plain that the plaintiff is a corporate entity and that the loss that it suffered arises from disappointment in respect of fees but it is equally obvious that any such loss is a small part of its claim. In particular, whatever the sums that were actually invested, losses are stated at paragraph 25 as being the combination of $498 million and €483 million; sums proposed as the value of the investment made by the plaintiff in the defendant on the basis of the last notice from the defendant in its role as custodian on 28 November 2008. It is pointless to attempt to unravel the detail of this. That is a matter for the trial. As to the current defence, it responds that the Statute of Limitations applies as the damage claimed occurred before December 2002; that there was otherwise no negligence or other breach of duty; that Thema as plaintiffs are guilty of contributory negligence, including by involvement in the appointment of Madoff; in this regard it offers some initial particulars. The defence joins Thema Asset Management Ltd as a third party as being responsible both in contract and tort and everything else and joins 20:20 Medici AG as, similarly, being responsible in tort for appointment of Madoff.

5. Nothing could be clearer from this litigation than that everybody is blaming everyone else for the choice of Madoff and for not finding out about Madoff and for being complacent about Madoff. About all of this, I have no view at all as I have heard no evidence.

6. Another thing that could not be less obscure is that in suing the defendant, the plaintiff Thema is claiming back not only the entire of whatever monies they expended in vain because of the Madoff fraud, which would be tens of millions of dollars or euros for lost work or whatever, but that the substantial bulk of their claim is to recover the investment that they put into the defendant as custodian, sums of hundreds of millions in those currencies. From the statement of claim, it is clear that investors, and I am told there may be about 250 of them and they are called unit-holders, put their money into the plaintiff Thema, probably as a result of a prospectus, and that this is the money that is sought to be recouped together with the growth promulgated in respect of it and which is, perhaps falsely, declared in the figures announced on 28 November 2008. All of that money is gone, I am told. As to the holders in the unit funds that went to make up the Thema investment that the plaintiff held out, some 59 of them have also sued for their losses. Many have sued in Ireland, but some have also initiated proceedings in France and in Germany. Their money, I am told, was supposed to have been forwarded by the plaintiff Thema to the defendant as the custodian and was supposed to have been secured through Madoff in a basket of less than fifty investments in government bonds and in commercial concerns of high repute. It may be that no investment of any kind was undertaken because of Madoff but I await the trial for the illumination of all of that.

7. Regulation 43 of the UCITS Regulations states:

> The trustee shall be liable to the investment company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations, or its improper performance of them.

8. If that means what it says, and I am capable of being persuaded otherwise by the context or for other good reason, those who bought units can sue the trustee, alleged to be the defendant; or the investment company, which is the mantle the plaintiff Thema assumes, can recover. Were Thema as plaintiff to recover, then it is a matter of law not now before this Court as to the unit-holders recovering their money; that is an issue between the plaintiff Thema and the unit-holders. If, as plaintiff, Thema recovers its investment money furnished to it by the unit-holders, it is hard to see at the moment how there can also be recovery by any individual unit-holder, especially those who seem to trust this plaintiff to get back their investment through this litigation. If other unit-holders want to exercise their apparent entitlement under the Regulations, that is for them. Those who have initiated individual actions have generally joined this plaintiff Thema as a co-defendant, or this plaintiff has somehow been brought in as a third party. I do not propose to try to sort out the rights and wrongs of that here.

9. Two principles of law may be relevant into the future. Firstly, that recovery on the double or treble of damages will not be allowed and, secondly, that an unreal view is not to be taken of a statement of claim that plainly seeks the recovery of money that was invested. At the moment, I regard that money supposedly sent to the defendant as that of the plaintiff Thema. The statement of claim makes it clear that its fund, made up of the monies of unit-holders, is to be replenished if fault is laid at the door of the defendant, or partly replenished if the plaintiff Thema acted negligently.

10. In that context, I cannot understand that the following amendment (underlined) of paragraph 1 of the statement of claim has been sought, all other proposed amendments having been agreed:

> The plaintiff is a public limited company having its registered place of business at Fitzwilton House, Wilton Place in the city of Dublin. The Plaintiff brings the within proceedings on its own behalf and on behalf of its shareholders.

Legal principles

11. Concisely stated, an amendment should be allowed where the result is that the real questions in controversy between the parties are put in evidence. While a late amendment is a matter of judicial discretion, errors in pleadings should be corrected. That is especially so where an amendment merely clarifies an aspect of the claim or where the nature of what is alleged was apparent from an earlier stage; whether through correspondence, as a result of submissions or because of the furnishing of particulars. If it is not at all clear that an amendment is necessary, it should not be permitted. While concentration on procedural discrepancies may be diverting, what may militate against an amendment being allowed is fraud or over reaching or some genuine form of prejudice in consequence of a late amendment which cannot be corrected by terms as to costs or otherwise. It should never be forgotten that the primary purpose of the rule is to furnish the court with wide powers of amendment in order to ensure that "the real issues between the parties can be determined"; *Croke v Waterford Crystal* [2005] 2 IR 383 at 399 per Geoghan J. It is rarely necessary to scrutinise any new allegation that an amendment would introduce. Even an amendment based entirely on hearsay can, apparently, sometimes be permitted; O'Leary v Minister for Transport Energy and Communications [2001] 1 ILRM 132. This is so because the test for disallowing an amendment on the basis of underlying fact is that of striking out a pleading under Order 19 Rule 28 on the frivolous and vexatious ground; *Cornhill v Minister for Agriculture* [1998] IEHC 47. Sometimes an allegation, based on hearsay or not, may be so weak that it should not be allowed and other times an allegation may be allowed to be pleaded in the expectation or hope that the trial process may assist in uncovering the truth; an interesting exposition of this in another context is that of Clarke J in *GE Capital Woodchester v Aktiv Kapital Investment Ltd* [2009] IEHC 195 where he said in the context of a summary judgment application that provided a defendant puts forward a credible basis for the contention of evidence being forthcoming he would allow a matter to proceed to plenary hearing. I would tend to lean against amendments incorporating allegations where no evidence and no real prospect of evidence to support these is shown.

This amendment

12. It cannot easily be seen what the proposed amendment would add in terms of clarifying any issue before the court. It is also apparent that looking at the response of this defendant, it has been to deny to the personal unit-holders in pleadings in other cases that they may pursue any individual action where these have been taken; referencing the rule in *Foss v Harbottle* (1843) 67 ER 189, a general rule of company law but not perhaps of this kind of company for investment; *Aforge Finance SAS v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 6 per Clarke J at paragraph 3.5. In this litigation the response of the defendant to the application is that if any individual unit-holder wants to sue that they may do so. That is disingenuous.

13. A more troubling point is what the effect of this amendment may be. As plaintiff, Thema is met with various defences and with a plea that the entire of the trouble with the funds being placed in the hands of Madoff is due to their own choice. Were that correct there would be consequences on the claim. This is not a representative action. It is an action founded in special responsibilities in law that need to be worked out in the course of the litigation. The defendant argues that the purpose of the amendment is to hide behind the unit-holders so that any well-founded plea of negligence by the plaintiff Thema in terms of whatever duties they may have had, or breach of duty or however it is dressed up, would impact by the plaintiff loosing the suit or having the damages diminished by a proportion of fault, but the unit-holders nonetheless succeeding. As to the likelihood of that scenario, I cannot comment. Such a result would not at this stage of a trial preparation process lasting four years be either fair or reasonable. If that is the purpose, it turns this litigation into an unmapped area and for no good reason. Nor would it be right at this stage to introduce the possibility that the defendant would in turn, as it perhaps understandably threatens to do, amend its pleadings to allege fault against the unit-holders and accuse them in turn of steering the wreck that this investment has become into the sinister harbour of the Madoff companies. That would require much more work, it would delay the trial and it would run the risk of this process going out of control.

14. Actually, it seems that the amendment application was made not out of those motives but out of an abundance of caution.

Result

15. I believe the pleadings already adequately reflect the case to be made by the plaintiff Thema and I thus refuse the amendment application.