Neutral Citation Number: [2012] IEHC 298

THE HIGH COURT

COMMERCIAL

[2008 No. 10983 P]

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 27th day of July 2012

1. Pursuant to a motion on notice, dated 18 July 2012, the plaintiff Thema International Fund PLC seeks:

An order that the Defendant made the discovery on oath of documents responsive to categories of documents ordered by [the High Court] on 11 November 2010 within the Defendant's power, possession or procurement, including but not limited to the documents in the possession of the HSBC entities and personnel in New York and Hong Kong.

2. Thousands of documents have already been discovered in this litigation and in three other related cases. The latest estimate is that these number about one million pages. After the exchange of letters seeking discovery at an earlier stage of these proceedings, which commenced in December 2008, a previous motion before the High Court was compromised on 11 November 2010 by the apparent agreement of the parties. Subsequent correspondence indicates that a disagreement has arisen as to the scope of discovery arsing out of that compromise: hence this new motion has been issued. In addition, since then the Rules of the Superior Courts as to discovery of documents have changed.

3. The plaintiff has sued the defendant arising out of the collapse of the financial empire run from New York in United States of America by Bernard Madoff. The plaintiff claims, *inter alia*, that certain investments, which by agreement were to held by the defendant as custodian, have been lost. This defendant also meets the case of another plaintiff in similar terms in a trial listed for 6 November 2012. The target date set for the commencement of the trial of these proceedings is February 2013.

4. In settling the 2010 motion, the parties agreed to a schedule of relevant documents that were categorised in accordance with Order 31 of the Rules of the Superior Courts 1986, as amended. This schedule was appended to the order of the High Court dated 11 November 2010. Pivotal to this litigation is the issue of any cause for concern which the defendant had in placing those investments with Bernard Madoff as sub-custodian, either directly or through his corporate entities, and any assurance that would displace such concern. These have been referred to in the litigation as the issue of the red flags and the white flags. Together with the construction of the relevant applicable legislation and the contract between the plaintiff and defendant, these red and white flags are central to any fair adjudication of the case. It is therefore clear to the Court that, apart from limiting discovery to the HSBC entities and personnel in New York and Hong Kong, as set out in the motion, at this stage only two categories of relevant documents can reasonably be regarded as being at issue. As set out in the schedule to the previous order of the High Court, they are the following:

Category 1

All protocols, instruction manuals, directives, guidance notes, handbooks, procedure lists, due diligence questionnaires or requests for proposals utilised by the Defendant in preparing for the selection appointment and monitoring of a prospective sub-custodian by the Defendant.

Category 2

All documents relating to the selection, appointment and monitoring of [the Bernard Madoff entities] as sub-custodian of the Thema and Landmark funds including:

> (a) all documents formulated or used by the Defendant which were specific to [those entities] or were put in place by reason of the fact that [those entities were] allegedly acting as broker and/or sub-custodian and/or investment manager or adviser.

5. It is clear what the plaintiff is looking for. Nothing like another one million pages are being sought. Rather, in accordance with the traditional view of discovery, only those documents relevant to either causes for concern with or causes for a lack of concern about the Madoff entities are sought together with whatever analysis prompted those entities being selected as sub-custodian or being kept on as sub-custodian. It is in that way that any order that may be made on this motion should be construed. The issue with which these documents are concerned is of key concern to the defendants as well as to the plaintiff.

6. On behalf of the defendant, it has been powerfully argued that documents have already been sourced and discovered from Ireland, the United Kingdom, Luxembourg and Bermuda; that only the entities from those jurisdictions are those relevant in the context of the HSBC operation which extends to 1300 companies and 8000 offices operating in 87 nations; that under the Rules of the Superior

Courts there is no power to make the order sought; that proportionality would be exceeded by any order that goes beyond the discovery already made by the HSBC operations, which extends to all corporate entities providing any delegated function; and that as a matter of policy caution ought to be exercised in issuing discovery orders since a failure to comply can result in a pleading being struck out or even the making of an order for contempt of court. The plaintiff, in response, seeks to argue that the discovery sought is both relevant and necessary; is within the power of the High Court to order; is proportionate; and is not burdensome or oppressive.

Relevance

7. It is clear that in order to come to a just result in this litigation, a great deal needs to be unravelled. Corporate structures alone cannot be allowed to result in obscurity, in particular where there is a power vested in the High Court to require that clarity be provided. The cases faced by the courts to date have not revealed a set of corporate structures of a complexity of anything close to that which the defendant is a part. Notwithstanding that, the companies in question are part of the HSBC group, though they are said to act independently and to be so unconnected that a request from one corporation for documents from another may be refused. At the same time, it has been demonstrated to the court that as between these corporate entities information may be exchanged across legal barriers and corporate structures. The fundamental rules for the granting of a discovery order are conveniently set out in the Supreme Court's decision in *Hansfield Developments Ltd v Irish Asphalt* [2009] IESC 4 where Finnegan J stated:

In order to succeed on an application for discovery the onus is on the applicant to show that the person against whom discovery is sought has or is likely to have in his possession or procurement documents which are relevant to an issue in the proceedings. It is, however, not necessary that the applicant be in a position to establish specific documents as distinct from categories of documents which prima facie are relevant. The degree of particularity required will depend on the nature of the case.

The classic test for relevance is that in *Compagnie Financiere du Pacifique v Peruvian Guano Company* [1882] 11 Q.B.D. 55 at p.63 per Brett L.J.:-

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences."

This test of relevancy has long been accepted by this court: see *Brooks Thomas Limited v Impac Limited* [1999] I.L.R.M. 171 and *Ryanair Plc v Aer Rianta CPT*[2003]4IR264at275.

The applicant must satisfy the requirement of Rule 12 sub rule (3) and show that the discovery sought is necessary for disposing fairly of the cause or matter. The documents need not be absolutely necessary. In *Ryanair Plc v Aer Rianta Plc* [2003] 4 I.R. 264 at 276 Fennelly J. held that the following passage from the judgment of Bingham M.R. in *Taylor v Anderton* [1995] 1 W.L.R.447 at 462 contains useful guidance:-

> "The crucial consideration is, in my judgment, the meaning of the expression 'disposing fairly of the cause or matter'. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of the document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test."

8. It is the information as to the selection and monitoring of Bernard Madoff and the Madoff entities which is said might reasonably result in the kind of evidence that, in accordance with the traditional legal formulation of discoverability referring to documents, may advance the moving party's case or undermine that of the opposing party or lead to other documents which may have that effect. Whether that evidence, if found, would be enough to establish any liability against the defendant or whether such evidence would dispose of the plaintiff's claim is at a considerable distance from any selective quotation made to the court in the course of argument on this motion.

9. A number of documents were opened to the Court to support the plaintiff's application. Insofar as it can be reasonably inferred from the title of the email addresses in documents referred to the Court and from the contents of certain of those emails, the companies in the HSBC group understandably shared concern for the health of the corporate structures within which they operated in the widest sense. An email dating from September 2002 refers to concerns that "Madoff is holding assets in segregated accounts", together with a reference to the conducting of a due diligence exercise. Whether accurate or not, at that time a query is also raised in relation to the firm of auditors said to be responsible for the Madoff entities and what is queried to be a personal relationship with Bernard Madoff. The copying of these emails results in an apparent reference to "warning signs" from an entity in Bermuda. In March 2005, another email from an entity in the United States of America ostensibly confirms satisfaction after a due diligence review in continuing business with Bernard Madoff. In that month, an entity in Hong Kong also seemed to refer to risk and to certain clients, which could include this plaintiff, concerning the appointment of Bernard Madoff as sub-custodian. In the same month emails were exchanged enclosing what was said to be a draft summary of all the client relationships that used Bernard Madoff, a list which possibly included the plaintiff and which might reasonably be regarded, because of other emails, as being relevant to any discussion on his suitability as sub-custodian. A review by the accountancy firm KPMG is said to have been conducted in April 2005 in New York and the plaintiff also wishes to see this. What seems to be another investigation group report states that "the assets are appropriately segregated and that the company exerts adequate control over its clients' assets and meets their regulatory responsibilities." This could provide material relevant to the case to be made by the defendant.

10. It is demonstrated that as between the various entities comprised in the HSBC corporate structure, there was concern and there was reassurance concerning Bernard Madoff and his corporate entities and this material was circulated out of genuine concern or out of appropriate communication in a business sense between entities of the defendant in New York, Bermuda, Hong Kong and Europe. Relevance has therefore been demonstrated as has necessity. This leads to the question: are the limited class of documents sought through this motion capable of being the subject of an order since it is not challenged that the particular defendant in this case does not possess or have power over these documents? The central issue thus turns on the meaning of "procurement", the concept central to the power to order discovery at issue in this case.

11. Statutory Instrument number 93 of 2009 took effect on 16 April 2009 and substituted rule 12 of Order 31 of the Rules of the Superior Courts on the power of the High Court to order discovery. The relevant section now reads:

> (1) Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession, power or procurement relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:
>
> > (a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs;
> >
> > (b) furnish the reasons why each category of documents is required to be discovered, and
> >
> > (c) where the discovery sought includes electronically stored information, specify whether such party seeks the production of any documents in searchable form and if so, whether for that purpose the party seeking discovery seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested.

12. In Abrahamson et al, *Discovery & Disclosure* (Thomson Round Hall, 2007), the authors attempt to untangle the question of the distinctions between the terms "possession", "power", "custody" (a word used in the relevant form to the rule but not in the rule itself) and "procurement" (a word not used up to April 2009 in the Rules of the Superior Courts but often referenced in judgments). Although that work was published before the changes introduced to Order 31 of the Rules of the Superior Courts, at that time Order 46A, rule 3 of the District Court Rules nevertheless included the terms "possession, power or procurement" in respect of a party's right to the discovery of documentation. The authors sought to parse the meaning of the respective terms. It was ventured that it was not entirely clear that the District Court Rules Committee had deliberately intended that discovery in the District Court was to be broader than that available in the other courts. Nevertheless, their conclusion, at page 39, was in the following terms:

The terms "possession", "power", "custody" and "procurement" overlap somewhat in their definition. Furthermore, in the case law the various phrases are used interchangeably, adding to the ambiguity of their meaning. It is submitted that the case law in the area can be distilled to a general principle that a document should be discovered where it is in the physical possession of the deponent or where the deponent has an unfettered right to obtain it.

In the light of the foregoing, it may be that the rule-making committees may be advised to amend the rules for the sake of clarity. …

Caution against the construction of three separate words as eliding the meaning of each must, however, be exercised. The conclusion of those authors, however, that reform was necessary in this area, can be said to have been answered by the 2009 amendment introducing the word "procure" to the relevant rule.

13. In the previous iteration of the rule, the High Court merely had power to order the discovery of documents in the "possession or power" of a party. The clarity of that formulation was somewhat detracted from by the fact that the relevant form also referred to "custody", which merely denotes a closer form of possession and thus added nothing. Since the rule now refers to "documents which are or have been in [the] possession, power or procurement relating to any matter in question," it is clear that the scope of the discovery power of the High Court has been redefined. The ordinary canons of construction demand that when a change has been made to the wording of legislation, effect should be given to that change. In *JC Savage Supermarket Ltd & Anor v An Bord Pleanála* [2011] IEHC 488, this Court attempted to reiterate the fundamental rules on the construction of legislation; of which the following passage appearing at paragraphs 3.5 and 3.6 is of relevance:

The legislative history of an enactment can illuminate its meaning. If a section is grafted into an enactment in order to deal with a situation that may not have been provided for in earlier version of an Act, or if a section is amended, it can become clear that the legislature is defining statute law in a particular way so as to make up for what was missing or to change the wording in order to facilitate a new situation or eliminate an old mischief. This approach emerges from the judgment of Fennelly J. in *Iarnród Éireann v. Hallbrooke* [2001] 1 I.R. 237, which concerned the amendment of the Trade Union Act 1941, by the Trade Union Act 1942, in order to facilitate negotiations in-house. That principle is of equal application where an amendment is necessitated by the decision of a court which the legislation is designed to overturn or to modify.

Words used in a statute are not to be approached as if they are rhetorical or reiterative. Where possible, each word must be given a meaning because it is only by that approach that effect is given to the intention of the legislature. The use, for instance, of different words in the same context, implies that a variation in meaning is required to be taken by a judge construing the statute. As Egan J. remarked *in Cork County Council v. Whillock* [1993] 1 I.R. 231 at p. 239:-

> "There is abundant authority for the presumption that words are not used in the statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or to say anything in vain".

It follows also that the express inclusion of a situation within a statute, or the express inclusion of several situations, can imply that what is not included is to be excluded from the scope of an enactment. This is sometimes expressed in the Latin maxim expressio unius est exclusio alterius. The expression of a general principle in a section of an enactment that is followed by an illustrative list is different and will not attract that rule.

14. As described in Dodd, Statutory Interpretation in Ireland (Tottel Publishing 2008) at paragraph 1.18, "The Rules of the Superior Courts 1986 are a statutory instrument made pursuant to the powers conferred on the Superior Court Rules Committee." As such, there is no question but that the same rules of statutory interpretation are to be applied to Rules in the same way as to primary or secondary legislation. The only distinction arises where a conflict emerges between the provisions of a statute and the rules of procedural law, in which case such a conflict is to be resolved in favour of the statute. See Dodd at paragraph 13.07. No such issue arises here.

15. There is nothing generally illustrative about the deliberate addition of the word "procurement" to the rule in issue. That word must be given a meaning separate from either "possession [or] power". Further, the case law demonstrates the relevant history to the

change. In *Northern Bank Finance Corporation Ltd v Charlton & ors* (High Court, Finlay P, unreported, 26 May 1977) at issue was the discovery of documents from companies within a corporate structure. Finlay P ordered discovery of documents from a related company even though there was nothing more than the equation of close interests with the plaintiff company. Of note, he stated at page 19 that:

I am therefore satisfied that within the meaning of the principle applicable to an affidavit of discovery I must at this stage at least decide ... that these documents are within the procurement of the plaintiff company and that there is not any reason to believe that if the plaintiff company in pursuance of the obligations of the directors of J.G. Mooney & Company properly have to them as their nominees requested the handing over even though it might be on a returnable basis of these documents that that request would be refused.

16. In *Yates v Ciba Geigy Agro Ltd* (High Court, Barron J, unreported, 29 April 1986) at issue was whether the plaintiff was entitled to discovery as against the defendant, which was an Irish company, in a case involving potato blight spray which had been ineffective, of documents from its Swiss parent company where research for the product that was alleged to have failed had been pursued. Barron J offered a wide analysis of the then test of possession or power which extended beyond the scope of those words to encapsulate the concept of procurement and in respect of which the Supreme Court later disagreed. That disagreement is part of the legislative history of the origin of the later inclusion in the current Rules of the test of procurement. At page 3 of the unreported judgement, Barron J stated:

Possession alone is not the test. Documents may be in the power or procurement of a party even though they are not in his possession. That argument must therefore fail. An example of documents being in the power of a party though in the possession of another occurs in family matters where the main asset of one of the parties is a business operated through a company. In such circumstances, discovery may be ordered of company documents, the extent of such discovery being dependent upon many factors including the extent of the spouses control over the affairs of the company: see *B. v B.,* [1979] 1 All E.R. 801.

Documents not being in the power of a party may still be within his procurement: See *The Northern Bank Finance Corporation v. Charlton* … In that case there was an issue as to whether a representation made on behalf of the Plaintiff as to a particular shareholding in a particular company was true. The directors of the latter company held their shares as nominees of the Plaintiff. It was held that documents in the possession of that company bearing on the issue of ownership of its shares were in the procurement of the Plaintiff upon the basis that if such documents were sought by the Plaintiff from the directors of the company there would be no reason to believe that, having regard to the position of such directors as nominees of the Plaintiff, they would refuse such request. In the present case, this and other documents of which discovery [is] sought are all relevant to the issues raised in the pleadings. In the present case, there is no reason to suppose that a request for such documents by the Defendant would be refused. Indeed Counsel for the Defendant has admitted that they will be made available to him for the purposes of the trial and that they have already been made available for the purposes of the preparation of the Defendant's defence. Prima facie such documents must be regarded as being available to Defendant if they are requested. Many of them are in the possession of the parent company solely because of the facilities to carry out investigations in relation to complaints against group products are available only in its laboratories.

17. Similar reasoning to the earlier cases can also be seen in the English decision of *Rafidain Bank v Agom Universal Sugar Trading Co Ltd* [1987] 1 WLR 1606 at 1611 where the Court of Appeal had equated "possession, custody or power" to it being "very likely" that another party would "make it available if only he was asked to do so."

18. In *Johnson v Church of Scientology* [2001] 1 IR 682 the Supreme Court held that these cases were exceptions and that there was no general power to require a party to procure relevant documents from another related entity. Denham J defined a document as being in the power of a party "when that party has an enforceable legal right to obtain the document." The rule change was made after that decision.

19. Procurement is therefore not to be equated with possession or power. In *Bula Ltd (in receivership) v Tara Mines Ltd & ors* [1994] 1 ILRM 111 at 113, O'Flaherty J stated:

I believe that the three concepts come into play, viz possession, custody and power and they are to be considered disjunctively …

A document is within the power of party if he has an enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent or anyone else.

20. The Concise Oxford English Dictionary (10th edition, 2002) defines the word "procure" in two senses: obtain and persuading or causing to do something. The Oxford English Dictionary (2nd edition, 1991) describes the act of "procurement" as "causing, compassing, accomplishing, or bringing about, esp. through the instrumentality of an agent …". This Court appreciates the limited value of looking at dictionaries; see the judgment of Henchy J in *Inspector of Taxes v Kiernan* [1981] IR 117 and also see the judgment of this court in *Health Service Executive v Brookshore Ltd* [2010] IEHC 165. In the Kiernan case at 121, Henchy J expressed this proposition in the following way:

Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed.

21. In this case, there is no reason to suppose that the defendant cannot procure the very limited class of documents in question. There is every reason to conclude from the affidavit evidence and exhibits that were there to exist, as may indeed be the case, documents which give the defendant an unambiguously clear record of diligence in dealing with the Bernard Madoff entities but which are in the power of possession of another HSBC entity, same would on request be furnished to this HSBC company. Documents which are sought because they are relevant and necessary are, though they may possibly be damaging, subject to the same ability of this defendant to procure them. The ample power in the current Rules of the Superior Courts must be construed as at least reinstating the power used by Barron J in the Ciba Geigy case which he exercised where "there is no reason to suppose that a request for such documents by the Defendant would be refused."

22. The documents are limited in scope, are relevant and are necessary to the litigation and are shown to probably exist.

23. In *Framus v CRH* [2004] IR 20 at 38, Murray J for the Supreme Court warned against the abuse of discovery in trenchant terms:

I think it is generally accepted that the introduction of the current rule was prompted by observations of Lynch J. in *Brooks Thomas Ltd. v. Impac Ltd*. [1999] 1 I.L.R.M. 171 where, having adversely commented on the excessive burden which "blanket orders" for discovery could impose on parties, suggested that consideration be given to amending the existing rule. The concerns of Lynch J. reflected a degree of unease which had been expressed in a number of judgments concerning the excessive burden which wide ranging orders for discovery could impose on parties. Murphy J. in *Irish Nationwide Building Society v. Charlton* (Unreported, Supreme Court, 5th March, 1997) observed "discovery of documents is an extremely valuable legal procedure. On the other hand it can be a very burdensome one. Perhaps this burden has been accentuated by the proliferation of documentary records and the improvement in recent years of the photocopying equipment. There is a danger that this valuable legal procedure may be invoked unnecessarily or applied oppressively. It will always involve delay and expense. In virtually every commercial case it is the greatest single cause of delay in obtaining a judicial determination on the real issues between the parties". These concerns are reflected in the observations of Morris P. in *Swords v. Western Proteins Ltd*.[2001] 1 I.R. 324 and indeed the judgments of McCracken J. and Fennelly J. cited above. In *Murphy v. J. Donohoe Ltd.* [1996] 1 I.R. 123, at p. 129, Johnson J. cited with approval a statement in Halsbury's Laws of England (4th ed. para. 38) that "each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed".

It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out the crucial question is whether discovery is necessary for "disposing fairly of the cause or matter." I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.

24. In terms of the specific identification, however, of a limited class of documents demonstrated to be central to the just disposal of this litigation, the order sought is not oppressive and has been properly identified so as to minimise the burden on the defendant.

Result

25. The Court will therefore make an order in the terms of the notice of motion ordering discovery on the understanding that it is limited to HSBC entities and personnel in New York and Hong Kong and is also limited to categories 1 and 2 set out above.