

THE HIGH COURT
COMMERCIAL COURT

[2013 No. 12439P]

BETWEEN:**DEFENDER LIMITED****PLAINTIFF****-AND-****HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED****DEFENDANT****-AND-**

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

THIRD PARTIES**EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 31st day of July, 2018.**

1. This is a preliminary application in a case which 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"), whose principal, Mr. Madoff was involved in a €65 billion Ponzi scheme in the United States. The hearing of the action is expected to last 20 weeks.

2. This preliminary application is a motion seeking liberty from the Court for Defender to deliver expert reports from three additional experts in addition to the expert reports previously delivered by Defender to HSBC. The stated purpose of these additional reports is to rebut the contents of the 11 expert reports delivered by HSBC in response to the initial three expert reports delivered by Defender.

3. As this application was only heard on the last day of term today the 31st July, 2018 and as the parties require an answer before the resumption of the legal term on the 1st October, 2018, this Court will give its *ex temp* judgment today and in doing so set out briefly the reasons for this decision.

4. The background to the motion is that a timetable for this trial was agreed between the parties and approved by the Commercial Court on the 6th November, 2017, with the trial date set for the 30th October, 2018.

5. Defender provided its three expert reports (from Mr. Vinella, Mr. Valentine and Mr. Chidgey) to HSBC on the 2nd February, 2018 as required by the agreed timetable approved by the Court. HSBC responded to Defender's expert reports by providing its 11 expert reports to Defender on the 22nd June, 2018.

6. Defender seeks liberty to issue three rebutting expert reports to certain of the 11 expert reports, from three new experts, namely Mr. Denci, Mr. Shore and Mr. Lundelius.

7. The legal background to this application is Order 63A, Rule 22 which provides that:

"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."

8. It is clear that a judge has 'otherwise ordered' in this case, since there is a court order of the 6th November, 2017 setting out the timeframe for the submission of expert reports by Defender by 2nd February, 2018.

9. However, Order 39, Rule 58 of the RSC is relied upon by HSBC in its opposition to the application by Defender to serve additional expert reports. This rule states:

"Save where the court for special reason so permits, each party may offer evidence from one expert only in a particular field of expertise on a particular issue. Such permission shall not be granted unless the court is satisfied that the evidence of an additional expert is unavoidable in order to do justice between the parties."

10. While particular reliance was placed upon this Rule by counsel for HSBC, counsel for Defender argued that this Rule deals with the admission of evidence to a court and not to the delivery of expert reports. Accordingly, he argued that this Rule cannot be used to prevent the delivery of additional expert reports, since they are not being admitted in evidence at this juncture.

11. In support of this view, Defender also pointed out that at the directions stage (which we were at now) a judge might not be sufficiently informed about the case to make a decision about whether one expert overlaps with another or whether an additional expert is unavoidable in the interests of justice. This is particularly so in a case which is as complex as this one and which will involve 20 weeks of court time.

12. This Court finds this reasoning persuasive and therefore concludes that Order 39, Rule 58 of the RSC cannot be relied upon by HSBC to prevent Defender from delivering additional expert reports to HSBC.

Mr. Denci

13. In reliance on the caselaw opened to the court, and in particular *Moorview v First Active* [2009] 2 IR 788, *UCC v ESB* [2014] IEHC 135 and *Ryanair v Bravofly* [2016] IESC 53, this Court notes that the existence of prejudice to the party objecting to the delivery of reports is a factor in whether such liberty should be granted by the Court. In this case, little or no prejudice has been alleged by HSBC which would prevent this Court from permitting the admission of the additional experts' reports, apart from the obvious tactical advantage which it will lose, namely in HSBC no longer being able to undermine Defender's expert (Mr. Vinella) on Depository Trust Company ("DTC") *vis-à-vis* HSBC's expert (Mr. Wiener) on the grounds that Mr. Vinella did not work in DTC while Mr. Wiener did.

14. This is relevant because HSBC's expert, Mr. Wiener, relies on his time as an employee of the DTC to support his expert opinion on

the procedures adopted by DTC. In one sense therefore Mr. Wiener's expert opinion is a mix of factual evidence and expert evidence.

15. It is this Court's view that the interests of justice, which it is clear from the caselaw is the paramount consideration in deciding an application such as this, justify an additional expert report being delivered by Mr. Denci on DTC on behalf of Defender, since unlike Mr. Vinella, Mr. Denci worked in DTC and therefore can provide a similar opinion, based on factual evidence and expert opinion, on the procedures in DTC, as Mr Wiener has given.

16. In exercising its discretion in favour of Defender, this Court also relies on the fact that Defender has not been a party which has been guilty of any significant non-compliance with the case management process to date.

17. That deals with the expert report by Mr. Denci.

Mr. Shore

18. As regards the additional expert report from Mr. Shore, it is clear that Mr. Shore on behalf of Defender is intended to give an expert report dealing with the expert report given by Mr. Tabb, a US lawyer, on behalf of HSBC in which he dealt with US bankruptcy law. None of the three initial experts used by Defender are US lawyers. Accordingly, it seems clear to this Court that in order to achieve justice between the parties, it is in order for this Court to allow Defender to deliver an expert report from Mr. Shore, who is also an expert in US law.

Mr Lundelius

19. As regards Mr. Lundelius, it is intended that he would give an expert report on behalf of Defender to deal with matters set out in Mr. Rainero's expert report filed on behalf of HSBC in response to the expert reports filed by Mr. Vinella on behalf of Defender. The issue Mr. Vinella dealt with is whether BMILS held the assets in question *qua* sub-custodian or *qua* broker dealer and Mr. Vinella's expert report was given by him in his capacity as a custody expert. The report filed on behalf of HSBC from Mr. Rainero is based on Mr. Rainero's expertise on broker dealers under US law. It is for this reason that Defender wishes to deliver a rebutting expert report from Mr. Lundelius, since Mr. Lundelius is also an expert in broker dealer issues. In these circumstances, it is this Court's view that in order to achieve justice between the parties, this Court should permit Defender to deliver an expert report by Mr. Lundelius on the broker dealer issue.