THE HIGH COURT

[2015 No. 3510 P]

BETWEEN

F&C REIT PROPERTY ASSET MANAGEMENT PLC

PLAINTIFF/RESPONDENT

AND

FRIENDS FIRST MANAGED PENSION FUNDS LIMITED

DEFENDANT/APPLICANT

EX TEMPORE JUDGMENT of Ms. Justice Murphy delivered on the 1st day of June, 2017.

1. This is the defendant's application for inspection of certain documents disclosed by the plaintiff in an affidavit of discovery sworn by its general counsel and partnership secretary, Paul Meads, on 21st November, 2016. The application is brought pursuant to O. 31, r. 18 of the Rules of the Superior Courts. That rule requires that the application be founded on an affidavit showing:-

> *"…of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party."*

The only matter in issue between the parties is the defendant's entitlement to inspection of certain documents. The parties indicated to the Court that the application is urgent on the grounds that this case has been strictly case managed and is due for hearing in November, 2017.

2. The underlying dispute between the parties concerns fees allegedly due to the plaintiff arising from an investment management agreement between the parties which commenced in 2010 but in respect of which a written agreement was not concluded until July, 2012. Pursuant to the said agreement, the plaintiff claims entitlement to a performance fee of in excess of £5 million; alternatively the plaintiff seeks an order calculating the sum due; or in the further alternative, rectification of the investment management agreement to reflect the true agreement of the parties.

3. This application is grounded on the affidavit of Eugene McGibney, head of investment of the defendant company, who avers that he was directly involved in the negotiation of the investment management agreement. He sets out the documents of which inspection is sought being a number of internal emails of the plaintiff company, passing between Paul Meads, general counsel and partnership secretary, Des Dennehy, director property funds, Nick Criticos, chief executive and Iain Reichwald, whose status relative to the plaintiff company, is not clear to the Court. Three of the emails of which inspection is sought, BMO-0311, BMO-0315 and BMO-0354, were sent during the negotiation of the terms of the investment management agreement in the months of February and March, 2012. Two other emails post-date the signing of the agreement in July, 2012. These are dated 21st/22nd March, 2013 and 4th September, 2013.

4. The other documents identified by the applicant of which inspection is sought are a number of draft performance fee calculations prepared by the plaintiff between 4th/5th September, 2013 and 18th September, 2013.

5. The affidavit of discovery in this case was sworn by Paul Meads, general counsel and partnership secretary of the plaintiff company. He has claimed legal professional privilege in respect of the foregoing five emails and litigation privilege in respect of the fee calculations. On the hearing of this motion, counsel for the plaintiff submitted that these documents enjoyed legal professional privilege as well as litigation privilege though such a position was not advanced in the affidavit of discovery.

6. On the hearing of the motion there was no real difference between the parties on the applicable law. Both parties agreed that where legal advice privilege exists, it is absolute. Both parties agreed with the definition in McGrath on Evidence, 2nd Ed., (Dublin, 2014) as set out at para. 10-36:-

> *"The definition of lawyer for this purpose includes, obviously, solicitors and barristers but also salaried in-house legal advisers, foreign lawyers, and the Attorney General."*

There is no dispute that Mr. Meads, the deponent in the affidavit of discovery, is a solicitor and though not on affidavit, counsel for the applicant accepted that he had at all material times a practicing certificate.

7. While in principle, legal professional privilege can attach to in-house legal advisers, whether or not privilege actually attaches will depend on the facts of the particular case. Courts have had no difficulty in deciding those cases where an organisation has a separate legal department whose purpose is to advise the organisation. This is clear from the review of legal professional privilege by Barr J. in *McMahon v. Irish Aviation* [2016] IEHC 221. More difficult are those cases where a lawyer appears to have a multiplicity of roles or functions within a company. If a lawyer within a company structure acts as a principal rather than as an independent adviser, then the privilege does not attach. In *Alfred Crompton Amusement Machines Limited v. Customs and Excise Commissioners* (No. 2) [1972] 2 Q.B. 102, Lord Denning M.R. identified the problem as follows:-

> *"I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege […]*
>
> *I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction."*

The problem presented by lawyers who perform a multiplicity of roles within a company appears to have had greater scrutiny in other jurisdictions. Mr. Farrelly B.L. on behalf of the applicant cited *Telstra Corporation Limited v. Minister for Communications, Information Technology and the Arts* (No. 2) [2007] FCA 1445. In his judgment, Graham J. quoted Tamberlin J. in *Seven Network Limited v. News Limited* [2005] FCA 142. That latter case concerned the legal professional privilege of the chief general counsel for News Limited, a Mr. Philip. At para. 38, Tamberlin J. stated:-

> *"… I am cognisant of the fact that there is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions. In other words, it is often practically impossible to segregate commercial activities from purely 'legal' functions. The two will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement … In many circumstances where in-house counsel are employed there will be considerable overlap between commercial participation and legal functions and opinions … I am not persuaded that in this proceeding Mr Philip was acting in a legal context or role in relation to a number of the documents in respect of which privilege was claimed. Nor am I persuaded that the privilege claims were based on an independent and impartial legal appraisal."*

Graham J. went on to observe:-

> *"… there is no evidence, as I have earlier remarked, going to the independence of the internal legal advisers involved in the communications said to have been brought into existence for the dominant purpose of providing or receiving legal advice."*

The Court went on to hold that certain documents in issue were disclosable.

8. In respect of in-house counsel who are directly involved in negotiations, Mr. Farrelly B.L. opened *Georgia Pacific Corporation v. GAF Roofing Manufacturing Corporation* No. 93 Civ. 5125 (RPP), 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996). That case involved the entitlement to legal professional privilege claimed by a lawyer involved in the negotiation between the plaintiff and the defendant. The Court held:-

"*Since Mr Scott [the lawyer] negotiated the environmental terms of the Agreement, GP is entitled to know what environmental matters he determined would not be covered in the proposed agreement; the extent to which they were covered in the provisions he negotiated in the Agreement; and whether Scott advised GAF Management of the degree to which his negotiations had left GAF protected and unprotected. Only by such testimony can it be determined whether GAF, as a matter of business judgment, agreed to assume certain environmental risks when it entered the Agreement."*

The Court went on to state:-

> *"It seems clear Mr. Scott [the lawyer] acted as negotiator of the terms of Schedule 1 and that his conversation … as regards the status of the negotiations, the tradeoffs that Mr. Scott perceived GP was willing to make, and GAF's options, involved business judgments of environmental risks. Such reporting of developments and negotiations, if divorced from legal advice, is not protected by the privilege under New York law."*

9. It appears to the Court that whether or not legal professional privilege attaches to a lawyer employed by a company will depend on the facts of each particular case. In each case the Court must look to the evidence. Does the evidence disclose that at the material time the person claiming legal professional privilege was in fact acting as an independent legal adviser to his employer? If the evidence discloses that he acted in such a capacity, then his communications are privileged. If on the other hand the evidence shows that he was acting as a principal rather than as a legal adviser, then the privilege may not attach.

The evidence

10. Eugene McGibney, head of investment of the defendant/applicant company, has provided clear evidence at paras. 24 and 25 of his grounding affidavit that Paul Meads in his dealings with the defendant company on behalf of the plaintiff company acted as a principal and not as a legal adviser. He avers at para. 24 that Mr. Meads was directly involved in contact with himself and Richard Gallagher, both principals of the defendant company, in relation to the negotiation of the investment management agreement and that they both dealt with him as one of the principals of the plaintiff company. At para. 25 he avers that Mr. Meads was clearly central to the negotiations as a principal and not as an adviser. He states:-

> *"From when Mr. Meads first corresponded with the Defendant on 21 December 2011 to the signing of the IMA on 9 July 2012 he was the principal point of contact in the Plaintiff Company. This is reflected by the fact that the vast majority of emails exchanged between the parties in this period concerning the negotiation of the IMA were either authored by or sent to Paul Meads."*

At para. 26, referring to the suggestion that Mr. Meads was acting as a legal adviser, he says:-

> *"I do not accept he was acting solely as a legal adviser. He was conducting himself in the same way as myself and Richard Gallagher (for the Defendant) and Des Dennehy (for the Plaintiff) in terms of negotiating the commercial terms of IMA."*

11. In response to those averments, the plaintiff offers the hearsay evidence of the solicitor whom it has instructed in relation to the prosecution of this claim. The solicitor's affidavit goes for broad brushstrokes rather than detail. It repeatedly refers to his client's position and is silent as to Mr. Paul Mead's status and role within the plaintiff company. Is he a salaried legal adviser? Is he a company executive or partner within the business? The Court has not been given any evidence in either regard. 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 first issue therefore for the Court to determine is whether or not this is in fact an interlocutory application such as to entitle the plaintiff to seek to admit hearsay evidence.

Interlocutory or final

12. Having reflected on the matter, the Court considers that this is not an interlocutory application. This hearing is the determination of a discrete issue within the proceedings. It is a determination which will not be revisited in the course of the plenary hearing. The Court's determination on this issue is final, subject only to appeal.

13. In coming to this view the Court is persuaded by and relies on the decision of Hardiman J. in *Minister for Agriculture v. Alte Leipziger A.g.* [2000] 4 I.R. 32. The issue in that case was whether a decision of the High Court that the plaintiff was entitled to sue the defendant in this jurisdiction pursuant to Article 8 of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters, was a final order or an interlocutory order. The Court held that it was a final order which finding had certain procedural consequences for the conduct of the Supreme Court appeal. In his judgment, Keane C.J. (dissenting) having noted the paucity of Irish authority on the issue, reviewed the English authorities on the matter. To put it simply the English authorities were

unhelpful and conflicting. Some courts looked to the order made to determine whether the matter was interlocutory or final and others looked at the nature of the application. Such was the confusion within the courts of England and Wales that Lord Denning in *Salter Rex & Co. v. Ghosh* [1971] 2 Q.B. 597 at p. 601 stated:-

> *"This question of 'final' or 'interlocutory' is so uncertain that the only thing for practitioners to do is look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way."*

It is undoubtedly an unhappy state of affairs when judges cannot say with any certainty what the law is. Hardiman J. with characteristic incisiveness and clarity cut through the fog of uncertainty and stated 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 discretely raised by some proper procedure."*** *[emphasis added]*

14. In this case the defendant has raised a discrete issue as to his entitlement to inspect certain documents pursuant to a procedure provided for by Order 31, rule 18. The issue will not be revisited at the plenary hearing. The application is not designed to preserve the status quo pending that hearing. The order of the Court is a final order on the discrete issue of whether or not the defendant is entitled to inspect certain documents, subject of course to the parties' right of appeal. Applying the test set out by Hardiman J., the Court therefore holds that this hearing is a final hearing and not an interlocutory hearing.

15. Having held that this is not an interlocutory hearing, but rather the trial of a discrete issue within the proceedings, it follows that hearsay evidence is not admissible. Order 40, rule 4 requires that:-

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof..."*

The affidavit of the plaintiff's solicitor does not meet that requirement.

Legal professional privilege

16. The only admissible evidence before the Court is that of Eugene McGibney, head of investment of the defendant company. His evidence is that during the relevant period Paul Meads was acting not as an independent legal adviser to the plaintiff but as a principal conducting negotiations on its behalf in respect of the contents of the investment management agreement. That being the only admissible evidence before the Court, the Court holds that the relevant documents are not subject to legal professional privilege.

17. Ms. Smith B.L. relied on the case of *Somatra Limited v. Sinclair Roche and Temperlay* [2000] 1 W.L.R. 2453 as supporting the proposition that a principal in a firm can claim legal professional privilege when acting on behalf of the firm. In that case, the defendants were a law firm being sued by the plaintiff in respect of negligent representation. A principal in the firm, a Mr. Leach, conducted certain negotiations with a view to settling the claim. Crucially, Mr. Leach had not participated in the original representation of the plaintiff company.

18. Mr. Farrelly B.L. sought to distinguish that case on the facts. Mr. Leach, the principal, was shown to have taken no part in the original transaction. He therefore could be seen as an independent legal adviser in respect of the settlement of proceedings arising from that original transaction.

19. In that case, the Court had evidence that throughout Mr. Leach was exercising skill and judgment as a solicitor on behalf on his firm and on the basis of the evidence, the Court held at para. 44:-

> *"In these circumstances, not without hesitation, I would uphold the claim for privilege on this ground."*

The facts in that case are not analogous to the facts of this case. Unlike Mr. Leach, the Court has no evidence from the plaintiff/respondent beyond bare assertion as to Mr. Mead's role and status in the plaintiff company. The evidence of the defendant/applicant is that at all times he conducted himself as a principal and in that capacity, conducted negotiations as to the contents of the investment management agreement.

Litigation privilege

20. What the Court has found in relation to legal professional privilege applies *mutatis mutandis* to the claim of litigation privilege. The Court has no admissible evidence that litigation was contemplated at the time of the generation of the draft performance fee calculations by the plaintiff company, nor that these calculations were generated in contemplation of litigation. The evidence before the Court in fact points the other way. By mid 2013 the Orion fund, which the plaintiff company had been contracted to manage, was winding down. On 30th August, 2013, Richard Gallagher of the defendant company sent to Desmond Dennehy of the plaintiff company an email. The subject of the email is *"DRAFT Orion - F&C Performance Fee Calc".* It lists an attachment as *"DRAFT Orion - F&C Performance Fee - Proforma August 2013".* The email states:-

> *"Des,*
>
> *Please see draft workings attached as discussed. Let's discuss next week when you have reviewed with Paul."*

Attached to that email are draft workings which are specifically stated to be for discussion purposes. The Court has no admissible evidence as to the reaction of the plaintiff company to the receipt of this email and draft workings. However, both the emails and drafts make it clear that they are for the purpose of discussion. In order to have that discussion, the plaintiff would have had to generate its own calculations of what was due pursuant to the agreement. It generated a number of such calculations between 4th September, 2013 and 18th September, 2013. In the absence of such calculations, there could be no discussion.

21. On 19th September, 2013, Mr. Paul Meads sent a detailed letter to Richard Gallagher of the defendant company setting out his interpretation of the investment management agreement which of itself suggests that his role was that of principal rather than independent legal adviser. At the very end of that letter he states:-

> *"Given that the performance fee at stake is significant, I and the F & C Reit board have a duty to our shareholders to pursue recovery of the performance fee due to us, through litigation if no appropriate agreement can be reached for*

the payment of the fee. I urge you to reconsider your approach to the performance fee calculation before we are left with no option but to instruct solicitors to commence recovery proceedings."

The Court considers it a reasonable inference to draw that the mindset as of that date was negotiation not litigation. The letter does point out that in the event that negotiation was not fruitful, litigation might result, as has in fact transpired. It is worthy of note that litigation did not in fact occur for a period of 20 months post that correspondence. The Court also notes that the tone of the letter of 19th September from Mr. Meads is more indicative of a principal than that of an independent adviser removed from the fray. The calculations in issue are entirely mathematical in nature and were produced, in the Court's view, for the purpose of discussion and contain absolutely no material which could be construed as legal advice. The Court is therefore satisfied that they are not, on the evidence, subject to litigation privilege and should be disclosed.

Hearsay evidence

22. Assuming for the moment that the Court is incorrect and that this is in fact, an interlocutory hearing in which hearsay evidence is potentially admissible, the Court would still come to the same conclusion for the following reasons.

23. Order 40, rule 4 provides:-

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted…"*

Order 40, rule 4 does not give an automatic entitlement to a party to rely on hearsay evidence but rather gives the Court discretion to allow the admission of hearsay evidence. It appears to the Court that the rationale for creating an exception to the general requirement that applications should be evidence based, is that in urgent applications which are truly interlocutory in nature (within the meaning of s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877) where there may be a requirement to protect the status quo pending the hearing of an action, it may not be possible to garner all appropriate evidence immediately, and so, the rule gives the Court a discretion to admit hearsay.

24. The admission of hearsay even in interlocutory applications should be the exception and not the rule. Order 40, rule 4 does not, in the Court's view, grant a general dispensation from the normal rules of evidence but rather permits the Court in appropriate circumstances to allow hearsay evidence.

25. No such urgent circumstances have been made out in this case. The justification offered for advancing hearsay evidence in this case is particularly weak. It consists of the averment that the appropriate deponent, Paul Meads, no longer works for the plaintiff and was on holidays. That is not sufficient grounds, in the Court's view, to allow the plaintiff to rely on hearsay evidence. Mr. Meads's return from holidays could have been awaited before filing an affidavit. Alternatively, direct evidence could have been adduced from other principals in the plaintiff's firm, either Mr. Dennehy, the property manager or Mr. Nick Criticos, the chief executive, as to Mr. Meads's status within the company; his role in the negotiations of the investment management agreement; and the attitude of the plaintiff company on receipt of the draft calculations produced by the defendant in August, 2013. The plaintiff has not made out any sufficient case why it should be entitled to rely on hearsay. Courts lean against hearsay evidence for the very good reason that experience shows it to be unreliable. The Court is reminded of the case of *Smithkline Beecham plc v. Antigen Pharmaceuticals Limited* [1999] 2 I.L.R.M. 190 referred to in McGrath on *Evidence* at p. 372, para. 5-308:-

> *"Furthermore, the courts have traditionally been wary of attributing too much probative value to hearsay evidence adduced on interlocutory applications. The reason for such circumspection is evident from Smithkline Beecham v. Antigen Pharmaceutical Ltd. The plaintiff sought an interlocutory injunction in a passing off action. In support of its argument that there was likelihood of confusion, the plaintiff relied on the affidavit of a sales representative wherein he gave hearsay evidence of three occasions on which he had been told by pharmacists that they were confused between the plaintiff's and the defendant's product. However, the defendant produced affidavits from two of the three named persons and both said that they were not confused. This led McCracken J to comment that while hearsay evidence is admissible in interlocutory applications, the case showed the dangers of relying on it."*

Hearsay should only be admitted as a last resort and not as a first resort. Order 40, rule 4 does not confer a general dispensation from compliance with the rules of evidence. Accordingly, even if this were an interlocutory application, the Court would exercise its discretion not to admit or act upon the hearsay evidence of the plaintiff's solicitor.

26. On this application, the Court is therefore satisfied that the defendant/applicant has met the requirements of O. 31, r. 18 by showing the documents of which inspection is sought; by showing that it is entitled to inspect those documents; and showing that they are in the possession or power of the plaintiff. Accordingly, the Court directs that inspection facilities be afforded to the defendant in respect of all of the documents over which legal professional privilege has been claimed and all of the documents over which litigation privilege has been claimed.