

THE HIGH COURT**COMMERCIAL****2008 10983 P****BETWEEN****THEMA INTERNATIONAL FUND PLC****PLAINTIFF****AND****HSBC INSTITUTIONAL TRUST SERVICES (IRELAND)****DEFENDANT****AND****THEMA ASSET MANAGEMENT LIMITED AND 2020 MEDICI AG****THIRD PARTIES****JUDGMENT of Mr. Justice Clarke delivered the 17th October, 2011****1. Introduction**

1.1 This judgment is concerned with an unusual application brought by Thema in these proceedings. The proceeding are part of the Madoff related litigation which is being case managed together for the reasons set out in *Kalix Fund Ltd & Anor v HSBC Institutional Trust Services [Ireland] Ltd & Anor* [2009] IEHC 457. Parties are described and terms used in the same way as in *Kalix*. However, this specific application arises only in the context of these proceedings although, for reasons which will become apparent, it seems to me that the issues raised have a relevance to both the *Kalix* and *UBI Banca* proceedings.

1.2 The underlying circumstances which give rise to Thema's application stem from the fact that HTIE acted, for many years, in important administrative roles in respect of Thema. In that context, it would appear that HTIE would have received copies of legal advices given by Thema's lawyers. For example, it would appear that HTIE personnel would typically have attended board meetings of Thema and thus, would have had access to documents which formed part of the pack given to board members and would also, obviously, have been party to any discussions concerning legal advice which occurred at those board meetings.

1.3 In those circumstances it seems to be accepted that HTIE actually has documents within its possession, quite properly and in circumstances where no criticism can be made of HTIE, which amount to legal advice tendered to Thema. Leaving aside any possible dispute as to whether any particular document might amount to legal assistance as opposed to legal advice (in the sense in which that distinction is used in *Smurfit Paribas Bank Ltd v A.A.B. Export Finance Ltd* [1990] 1 I.R. 469) there does not seem to be any real dispute between Thema and HTIE that such documents are, at least prima facie, privileged.

1.4 What Thema seeks at this stage is an order requiring HTIE, in those circumstances, to assert in discovery that any such documents are privileged. HTIE resist that application. It seems to me that it is appropriate to start with a brief consideration of the practicalities of the situation from HTIE's perspective.

2. HTIE's Position

2.1 While a number of arguments are put forward by HTIE for resisting Thema's application, the first line of defence was based on an entirely practical consideration of the situation with which the court is faced. HTIE put forward three propositions.

2.2 The first was that (placing reliance on *CAS (Nominees) Ltd and others v Nottingham Forest plc and others* [2001] 1 All ER 954) a company is not, it is said, entitled to rely on legal professional privilege in respect of a claim brought against it by its own shareholders. It is accepted that litigation privilege may attach to documents produced in contemplation of litigation between shareholders and the company. However, it is said that documents, produced in the ordinary course of business and in advance of any anticipated dispute between the shareholders and the company, are not capable of a sustainable claim in privilege as against the shareholders for, it is contended, advice to the company is also intended to benefit the beneficial owners of the company, that is the shareholders.

2.3 On the basis of that analysis it is said that Thema is unable to rely on any privilege as against either *Kalix* or *UBI Banca*.

2.4 The second proposition (based on Matthews & Malek, Disclosure (3rd Ed. 2007) at para.12.04 et seq.) is that Thema, having made the relevant documents available to HTIE, cannot now prevent HTIE from placing any reliance on those documents. It is important to note that, in that context, HTIE argues that it is irrelevant as to whether the disclosure of the documents concerned to HTIE might amount to a waiver of any privilege. The distinction drawn by HTIE is between a disclosure which amounts to waiver which, it is said, renders the documents concerned discoverable to the world at large and a disclosure which may fall short of a waiver, but which nonetheless entitles the party to whom the documents were disclosed to place reliance on same in proceedings between the party who obtained the relevant legal advices and the party to whom same were disclosed. I should emphasise that HTIE also argues that the disclosure in this case may amount to a waiver. However, for the purposes of this initial analysis, on HTIE's argument, the question of any waiver does not arise. On the basis of that argument it is contended by HTIE that, as and between Thema and HTIE, privilege cannot be relied on by Thema.

2.5 The third proposition concerns the only other party to the Thema related proceedings (that is these proceedings, the *Kalix*

proceedings and the UBI Banca proceedings but not the A.A. proceedings) whose position has not been addressed viz TAM. Two points are made in respect of TAM. The first is that the personnel, at least at the relevant time, of TAM were the same as Thema and that, therefore, there is no practical reality to those persons knowing of legal advice in one capacity and not knowing about the same legal advice in a different capacity. However, perhaps more fundamentally, HTIE argues that, at the level of principle, in circumstances where legal advice is admissible in respect of the issues which arise as and between four of five parties to the same set of interconnected litigation, the court could not exclude the fifth party from being able to rely on, or at least have access to, documents containing such advice even though it might be the case that that party could not rely on the documents concerned in litigation involving only itself and the party who received the relevant legal advice.

2.6 The logic of HTIE's position is that a party to litigation cannot be deprived of an entitlement to rely on a document (including legal advice in respect of which privilege cannot be claimed) simply because there is another party to the same litigation who would not, *prima facie*, be entitled to rely on the document concerned. In addition, it is argued that it would be unreal to expect the court to exclude TAM from having access to those documents in circumstances where the case would run with TAM being a party present in court. Even if it were permissible for the court to consider the case as and between all other parties by placing reliance on the legal advice concerned but to consider the case involving TAM without having regard to that advice, nonetheless TAM would gain access to the relevant documents and would know about them because they would be referred to in evidence by all of the other parties. In those circumstances it is suggested in the alternative that the relevant legal advices must be made available to TAM on the basis that that privilege cannot be relied on against TAM either (having regard to the fact that it cannot be relied on in respect of all of the other parties to the case), or that nothing useful would be served by preventing TAM from now having access to those documents when TAM will be involved in a trial where such evidence will be admitted on the basis that such evidence is relevant to the issues between all of the other parties.

2.7 On the basis of those three propositions, it is said on behalf of HTIE that there is, in truth, no reality to it claiming privilege in respect of the documents concerned at this stage for the documents will be admissible at the trial and will either be available to be relied on by all parties or, at a minimum, will be available to be relied on by all parties with the exception of TAM who will, nonetheless, be present at the trial and will have access to any documents in that context.

3. Discussion

3.1 It seems to me that if the three propositions advanced by HTIE are correct then it follows that HTIE would also be correct in asserting that there is no point in it claiming privilege at this stage. It should be noted that counsel for Thema, in reply, quite fairly indicated that he might wish for an opportunity to consider whether he could address more detailed arguments in relation to some or all of those three propositions. I indicated that, in the event that I considered the answer to those propositions to be decisive, I would afford him that opportunity.

3.2 In addition, any final decision on the three relevant propositions necessarily involves the interests of *Kalix*, UBI Banca and TAM. While the normal practice is to allow discovery affidavits to be sworn first and then to rule on any questions of privilege which may be contested at a later stage it is, in my experience, a common enough practice that questions of privilege may be dealt with at an earlier stage where to do otherwise might lead to an entirely redundant exercise in, for example, a party having to make discovery of documents all of which would be manifestly privileged. Where, therefore, an application for discovery relates solely to a category of documents in respect of which it is asserted that privilege manifestly arises, it is not uncommon for the court to determine privilege at the stage of the application for discovery for if it finds in favour of the claim to privilege then the exercise of making discovery, claiming privilege and a subsequent hearing as to the validity of the privilege claimed, would be an unnecessarily wasteful use of the parties' and the court's time and resources. It seems to me that like considerations apply in this case. The whole procedure proposed by Thema only makes sense if there is any reality to Thema being able, in practice, to prevent some other party gaining access to the documents in question. If the three propositions put forward on behalf of HTIE are correct then there is no reality to that suggestion and the making of an order of the type sought by Thema would, in those circumstances, be redundant.

3.3 In those circumstances it seems to me that the issue of the validity of those three propositions needs to be determined at this stage. However, it is clear that those issues involve not just Thema but also UBI Banca, *Kalix* and TAM.

3.4 I, therefore, propose to direct a hearing as to the status (so far as privilege is concerned) of the documents in question by reference to whether any privilege that might ordinarily arise in respect of legal advice given to Thema can be relied on by Thema against UBI Banca, *Kalix*, HTIE and also TAM.

4. Conclusions

4.1 I, therefore, propose to direct a hearing of that question. I will discuss with counsel how such a hearing can be arranged in early course.

4.2 In the meantime the parties should consider putting in place an appropriate regime to ensure that any documents that might come within the rubric of those to which HTIE's application is directed are not disclosed as a result of the rolling discovery procedure which I have directed in a judgment arising out of a separate application in the Thema related proceedings but also delivered on this day. I will hear counsel further on that question also.