Neutral Citation Number: [2009] IEHC 565

THE HIGH COURT

COMMERCIAL

2009 2938 S

BETWEEN

AFORGE FINANCE S.A.S. AND AFORGE GESTION S.A.S.

PLAINTIFFS

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

2009 3097 S

BETWEEN

PINET S.A.

PLAINTIFF

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

AND

THE HIGH COURT

COMMERICAL

2009 3098 S

BETWEEN

AFORGE GESTION S.A.S., ALLOCATION SEQUENCE 1 "C", AXIS 2 SICAV "C", AXIS 3 SICAV "C" AND AXIS 4 SICAV "C")

PLAINTIFFS

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 21st December, 2009

1. **Introduction**

1.1 The above three proceedings are, for all practical purposes, identical. In each case the relevant plaintiffs, whom I will for convenience refer to as "Aforge", have respectively issued a summary summons seeking an account of various matters arising out of the carrying out by the defendant ("HTIE") of its role (to use a neutral term) in the operation of a fund maintained by a company called Thema International Fund plc("Thema").

1.2 At least so far as general factual background is concerned, these proceedings arise out of the same set of circumstances as I have had to deal with in a series of connected cases ("the Kalix cases"), which were the subject of a judgment in Kalix Fund Limited & Anor v. HSB Institutional Trust Services (Ireland) Limited & Anor [2009] IEHC 457. In general terms these proceedings and the Kalix cases stem from very substantial losses apparently suffered by investors in a fund maintained by Thema ("the Thema Fund") arising out of the collapse of the financial empire controlled by Bernard Madoff. As can be seen from the judgment in Kalix, most of the proceedings then under consideration stemmed from claims made by investors in the Thema Fund, which is a UCITS Fund for the purposes of the European Communities (Undertakings for Collective Investments in Transferable Securities) Regulations 2003 ("the UCITS Regulation"). For the reasons set out in my judgment in Kalix it has been determined that a large number of cases should be linked and brought to trial in the manner described in that judgment. A decision has yet to be made as to the precise sequencing of the trial of the various issues which arise in those proceedings.

1.3 In addition, it is clear that one of the bases on which many of the plaintiffs involved in the Kalix, cases seek to impose a liability on HTIE results from an assertion that HTIE owed fiduciary duties, both to Thema as the operator of the Thema Fund and investors in Thema (such as Kalix itself). Thus one of the issues which will undoubtedly arise at some stage in the course of the Kalix cases is as to whether, in fact, HTIE owes a fiduciary duty to any of the relevant plaintiffs, and if so the extent of any such duty.

1.4 In substance, Aforge makes a more limited claim in these proceedings. Aforge simply claims to be entitled, at this stage, and in advance of making any claim for wrongdoing against HTIE, to be entitled to an account of various matters arising out of the manner in which monies invested in the relevant UCITS fund were dealt with by HTIE. The stated basis on which Aforge claims to be entitled to an account at this stage is that, it is said, HTIE owes fiduciary duties to Aforge and is, therefore, it is said, obliged, as a matter of right or law, to account to Aforge.

1.5 In order to identify the stage which these proceedings have reached and the issue which I now have to decide it is necessary to turn to the procedural history of these cases.

2. **Procedural History**

2.1 As indicated earlier, summary summonses were issued in July of this year and, appearances having been entered, each of the proceedings was admitted to the commercial list of this Court by order of Kelly J. of the 12th October, 2009. In each case the admission of the proceedings to the commercial list was followed by the issuing of a motion returnable on the 18th November, in which the following relief was claimed:-

> *"An order or orders pursuant to O. 2, r. 1(3) and/or O. 37, r. 13 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court against the defendant for an account in the terms claimed in the special endorsement of claim on the summary summons herein."*

2.2 The accounts claimed in the special endorsement of claim were all in the following form viz:-

> *"1. An account of all transactions effected by it in the assets of Thema International Fund plc consisting in part of the amount(s) that had been subscribed by the plaintiffs for participating shares in the capital of Thema International Fund plc.*
>
> *Without prejudice to the generality of the foregoing, the following specific claims are also made against the defendant.*
>
> *2(a) An account and valuation of the assets which the defendant or its agent held on behalf of Thema International Fund plc on 28 November 2008, the last date as of which a Net Asset Value calculation of Thema International Fund plc was issued by it to and published by the Irish Stock Exchange and as of 14 December 2008, the date on which Thema International Fund plc announced a suspension of dealings in its shares.*
>
> *(b) An account and valuation of all assets of Thema International Fund plc acknowledged or stated or believed by the defendant to be held on behalf of or at the direction of or to the order of the defendant as at each of 28 November 2008 and 14 December 2008 by any other party, which the defendant had appointed as sub-custodian or otherwise, for the purpose of taking and holding custody of such assets.*
>
> 3. An account of the manner in which at all times since the date of first subscription for participating shares in Thema International Fund plc by the plaintiffs the defendant as custodian of Thema International Fund plc discharged its duty of safekeeping and segregating the assets entrusted to its care, being assets of Thema International Fund plc, representing amounts subscribed for participating shares in its capital by the plaintiffs and other parties.
>
> 4. An account of the manner in which at all times since the date of first subscription for participating shares in Thema International Fund plc by the plaintiffs, the defendant, by itself, its agent, its sub-custodian or any other party, had and maintained custody of the assets which supposedly had been, and which it confirmed from time to time a been, acquired or dealt in by Thema International Fund plc, such account of the manner of custody to include (without limitation)
>
> (a) the nature of the legal title to assets acquired;
>
> (b) the procedures for authorising and making payment out of the funds of Thema International Fund plc for the purchase of assets;
>
> (c) the procedures for confirmation of due delivery or registration of ownership of such acquired assets against such payment;
>
> (d) details of all procedures undertaken by the defendant at any time since the acquisition of such assets to confirm, verify and/or audit the existence, ownership and valuation of those assets, including details of the dates

and results of such procedures;

(e) details of all auditing, review, verification or other inquiries conducted by the defendant into' the competence, probity and discharge of its duties by each sub-custodian or other agent;

(f) full contractual details of arrangements with all sub-custodians or other agents; and

(g) the procedures of the defendant for verification of transactions in assets by it or on its behalf by its sub-custodian or other agents.

5. Such further proper accounts, inquiries or other directions or orders as may be necessary or appropriate."

2.3 The motion referred to in para. 2.1 came on for hearing before me. Counsel for Aforge set out the basis on which it was asserted that Aforge was entitled to an account at this stage. While there initially appeared to be some difference between counsel as to the proper interpretation of the rules relevant to an application such as this, it became clear in the course of the hearing that there was, at least in general terms, broad agreement as to the proper manner in which such an application comes before the court. I will refer to those issues shortly.

2.4 However, in the course of his reply, counsel for HTIE suggested that the proper way for the court to deal with these matters was to adjourn further consideration of the entitlement, if any, of Aforge, to an account at this stage so that that issue could be dealt with, at an appropriate stage, in the context of the other proceedings which had been linked with the Kalix cases. As a fallback position counsel suggested that, if I was against him on his first proposition, I should afford HTIE an opportunity to put in some further evidence which, it was said, might be relevant to the question of whether it was appropriate to treat HTIE as having fiduciary duties towards Aforge. At the close of the hearing I indicated to the parties that I would determine, at this stage, how these proceedings should progress. This judgment is directed to those issues. As indicated above it is first necessary to consider how proceedings which seek an account should be progressed, and I now turn to the relevant provisions of the rules.

3. **The Rules**

3.1 Order 2 of the Rules of the Superior Courts deals with procedure by way of summary summons. Sub-rule 1 deals with liquidated claims. Sub-rule 2 deals with actions for the recovery of possession of land. The rule with which I am concerned in this case is sub-rule 3 which allows "claims in which the plaintiff in the first instance desires to have an account taken" to be brought by summary summons. There is no dispute but that, therefore, these proceedings are properly brought by summary summons in that what Aforge seeks is to have an account in the first instance taken.

3.2 Order 37 deals with the hearing of proceedings commenced by summary summons. It is clear from the first sentence of r. 1 of O. 37, that the initial provisions of O. 37 (which deal with the fact that, where an appearance has been entered, the matter is to proceed by motion for liberty to enter final judgment before the Master) relate to each of the types of proceeding that can be brought by summary summons, other than those for an account. It is clear, therefore, that the general provisions of O. 37 have no application to proceedings in which an account in the first instance is what is sought. It is rules 13 to 15 of O. 37 that deal separately with the procedure to be followed in the case of a summary summons endorsed with a claim for an account. Rule 13, which is not material here, simply provides that the Master can make an order for accounts "with all necessary inquires and directions" where the defendant fails to appear. Rule 14 requires that, in the event that the defendant does not, having appeared, "by affidavit or otherwise, satisfy the court that there is some preliminary question to be tried", the court should make the relevant order for proper accounts with all necessary inquiries and directions. Rule 15 simply provides that the proper procedure to be followed in bringing the matter before the court is by motion supported by an affidavit.

3.3 Its seems clear, therefore, that the stipulated procedure in summary summons cases where a plaintiff seeks an account in the first instance, and where the defendant enters an appearance, is that the matter should be brought before the court (and not the Master) by motion grounded on affidavit. The defendant is then required to satisfy the court that there is some preliminary question to be tried. The rule is silent as to the precise procedure to be followed in the event that the defendant does so satisfy the court that there is a preliminary question to be tried. In those circumstances, it seems to me to be clear that the court is at large as to the manner in which any preliminary question validly raised by a defendant is to be determined.

3.4 The application in this case was, of course, properly brought before the court by Aforge on a motion grounded by affidavit. In those circumstances it seems to me to be clear that the two questions which I need to address at this stage are (1) as to whether HTIE has, in the words of r. 14, satisfied me that there is a preliminary question to be tried and, if so, (2) what is the appropriate mode for conducting such a trial. Before going on to deal with those questions I should, however, touch briefly on the asserted basis for the entitlement of Aforge to an account. I turn to that question.

4. **Entitlement to an Account**

4.1 As pointed out by Delaney and McGrath in Civil Procedure in the Superior Courts (2nd Ed.) at para. 23-07, the taking of accounts can be ordered by the court at any stage of proceedings, but normally arise ancillary to the prosecution by a plaintiff of a substantive cause of action. In those circumstances it is a matter for the court to determine whether any particular matter is more conveniently dealt with by directing that an account be taken, rather than that the relevant issues be tried before the court. Such an account is, therefore, part of the process of determining the legal rights and obligations of parties to litigation rather than an entitlement in itself.

4.2 However, as Delaney and McGrath also point out, O. 2, r. 3 provides that the summary summons procedure may be used when the plaintiff in the first instance wants to have an account taken. However, it logically follows that a plaintiff invoking the summary summons procedure and seeking an account in the first instance (and that, by definition, means that the account sought is not as an ancillary relief to a substantive claim) must establish an entitlement as of right to the account sought. Where the only relief claimed is for an account in circumstances where no allegation of wrongdoing is made, then it follows that the account can only be ordered where the plaintiff bringing the claim is legally entitled to an account of the matter sought. See for example Rapid Metal Developments (Australia) PTY Limited v. Rosato [1971] Qd R. 82. The most obvious example of such circumstances will arise where, as here, it is said that the defendant owes a

fiduciary duty to the plaintiff and is, thus, obliged to account. In Moore v. McGlynn [1984] 1 I.R. 76, Chatterton V.C., at p. 86, made clear that the obligation of a trustee to keep accounts and provide information arises by virtue of the relationship of trustee and beneficiary and independently of any question of whether a breach of duty may have occurred. The trustee relationship is, therefore, the most common example of a case where a plaintiff beneficiary will be entitled to an account in the first instance without asserting any wrongdoing on the part of the trustee concerned.

4.3 Given that, therefore, summary proceedings under O. 2, r. 3 arise only in circumstances where the plaintiff can establish an entitlement as of right to the account concerned, it seems to me that the term "preliminary question" as used in O. 37, r. 14 must logically refer to a question which (1) might be relevant to the entitlement of the plaintiff concerned to an account as of right or, (2) concern whether there might be any circumstances in which it would be appropriate for the court not to direct an account at that stage or, (3) relate to issues concerning the extent of the matters for which it might be appropriate for the defendant concerned to account. Those are the only sort of issues that are likely to arise before the court determines whether an account in the first instance should be directed.

4.4 On the facts of this case, HTIE has put in a replying affidavit and has addressed arguments as to why it is not obliged to account to Aforge or, as a fallback position, why the extent of the obligation to account asserted on behalf of Aforge is, in its view, excessive. It should be noted that the HTIE has agreed, without admitting any legal liability so to do, to make certain information available. That offer did not go far enough to satisfy Aforge.

4.5 For the reasons which I have sought to analyse it seems to me, therefore, that the issues which I now need to determine are as follows:-

I. Has HTIE, by affidavit or otherwise, satisfied me that there is a preliminary question to be tried as to whether;

(i) HTIE has an obligation to account in the first instance and/or

(ii) The extent of any account that should be directed, and

II If so, what is the appropriate method for trying that preliminary question.

4.6 Finally, I should note that the jurisprudence of the courts concerning the circumstances in which a defendant may be entitled to have some or all of a plaintiff's claim for a liquidated sum (in proceedings commenced by summary summons) remitted to plenary hearing do not seem to me to be of any great relevance to the issue with which I am concerned. There is, of course, something of an analogy between the cases in that, on this motion by Aforge, I am required to be satisfied that there is a preliminary question to be tried, while on a motion for summary judgment, the Master or the Court needs to consider whether issues have been raised by the defendant concerned such as require the case to go to plenary hearing. While the analogy is far from complete it may be that the proper approach of the court to a question such as the one facing me should at least be guided by the summary judgment jurisprudence so that, in particular, the court should direct the preliminary question concerned to be tried unless it is clear that no injustice could be caused (on the basis of the evidence and the argument), by not so doing.

4.7 In any event I now turn to the issues which I have identified as requiring to be addressed. I turn first to the issue as to whether HTIE has satisfied me that there is preliminary question to be tried.

5. **Is there a preliminary question**

5.1 The case which Aforge makes is that the circumstances surrounding the investment by Aforge in the Thema Fund, which fund was, under the provisions of the UCITS Regulation (and its parent Directive, Directive 85/611/EC) ("the UCITS Directive") entrusted to HTIE, creates a situation where, as a matter of the law of equity in this jurisdiction, HTIE is to be regarded as a trustee of those funds, such that HTIE has an obligation to account for its management of the funds concerned in the same way as any other trustee. The first key question is as to whether HTIE is, properly speaking, a trustee. It is of some relevance to note that, in the UCITS Regulation, the role of a party such as HTIE in respect of a UCITS fund is defined as "trustee". However, it is argued on behalf of HTIE that the use of the term "trustee" in the UCITS Regulation does not imply that it was the intention of the UCITS Regulation to expand the legal obligations of the custodian of a UCITS fund beyond whatever obligations might arise under the UCITS Directive itself. The UCITS Directive places certain obligations on a custodian but whether those obligations include an obligation to account, either to the fund or to investors in the fund, beyond the specific accounting obligations that are expressly set out in the UCITS Directive is, in my view, an issue of some complexity. There is, in my view, therefore, clearly a number of very real and substantive issues that need to be addressed before it could be determined that Aforge is entitled to an account in the first instance from HTIE. Without in any way being exhaustive, it seems to me to be necessary to determine the following matters:-

(a) Does, on the basis of the UCITS Directive alone, a custodian have an obligation to account to a fund, or an investor in a fund, to any extent beyond the obligations expressly set out in the UCITS Directive.

(b) Does, the UCITS Regulation impose any wider obligation on a custodian than that mandated by the UCITS Directive.

(c) On the basis of the answers to (a) and (b), does either the UCITS Directive or the UCITS Regulation impose any unmet obligation to account on HTIE and if so, the extent of any such obligation.

(d) In the event that neither the UCITS Directive nor the UCITS Regulation imposes any such unmet obligation, can the relationship between the parties be properly described as that of trustee and beneficiary so as to give rise to a fiduciary relationship under the law of equity in this jurisdiction, giving rise, in turn, to an obligation to account and if so the extent of any such obligation.

5.2 All of the above are, in my view, important and substantial issues involving questions of interpretation of European and Domestic Legislation and the proper application of principles of the law of equity. I am more than satisfied that HTIE has put forward arguments under those headings which make it clear that there is a preliminary question to be tried as to whether there is a proper legal basis for the suggestion that HTIE is obliged, at this stage, to account to Aforge, in its capacity as an investor in the Thema Fund, beyond the express accounting obligations to the Thema fund and, through it, to its investors, that are set out in the UCITS Directive. The extent of any such obligation, if it exists, will also need to be determined. That leads to the second question which is as to how that preliminary question should be determined. I now turn to that question.

6. **How should the preliminary question be tried**

6.1 Counsel for Aforge says that there are no disputed questions of fact which require to be tried and that, in those circumstances, the proper vehicle for a determination of the preliminary question should be through the medium of the motion which is already before the court. Counsel for HTIE suggests that the preliminary question should be linked to the other issues which arise in the Kalix cases and should be tried as part of that process.

6.2 As pointed out earlier there is no express provision in the rules as to how a preliminary question arising in a case such as this should be determined. In the commentary on the then rules in Wiley, the Judicature Acts (the equivalent rules to O.37 rr. 13 to 15 being O. XV rr. 1 and 2) no procedure or practice is set out as to the manner of trial of such a preliminary question. It seems to me that the court should, therefore, direct a form of trial for such a preliminary question as is most appropriately suited to the nature of the questions which have been raised by the defendant concerned.

6.3 There may well be circumstances where a plenary trial with witnesses will be required if there be significant factual disputes, the resolution of which will be required to determine whether a fiduciary relationship exists. However that does not appear to be the case here. It seems to me, therefore, that, at the level of principle, I should direct that a preliminary question be tried as to whether HTIE has an obligation in all the circumstances to account to Aforge in the first instance and, if so, the extent of any such obligation. That issue should be tried on the affidavits which the parties have already filed, together with such further affidavits as either party might wish to file. I will discuss with counsel, subsequent to the delivery of this judgment, a regime for the filing of any additional affidavit evidence.

6.4 That leaves only one further matter for determination. Counsel for HTIE has, as I pointed out, suggested that the trial of the question to which I have just referred should be linked with those other proceedings involved in the Kalix process. Subject to one caveat (albeit an important caveat) it seems to me that there is merit in that proposal. As pointed out earlier a part of basis on which both Thema, and the investors in Thema, assert a liability on the part of HTIE in the Kalix cases is based on a contention that HTIE owes a fiduciary duty both to Thema and to those investors. The existence of a fiduciary relationship is also at the heart of the case made by Aforge for its entitlement to an account in the first instance. It is clear, therefore, that a determination of the question of whether it is proper to characterise the relationship between a custodian such as HTIE and either the fund of which it is custodian or investors in that fund, as being a fiduciary relationship, is a matter with potentially far-reaching consequences, not just for these proceedings but also for the relationship between a custodian holding UCITS funds in Ireland and such funds and investors in such funds. It is an issue which requires careful consideration and it is also an issue which has the potential to affect the rights of all parties, not just to these proceedings but also to the Kalix cases. At the level of principle, it seems to me, therefore, that the question of the fiduciary relationship (if any) between HTIE and other interested parties is one which should be determined across the range of proceedings so as to bind all parties to whatever conclusion might be reached.

6.5 However, the caveat to which I have referred stems from the fact that, if Aforge be correct, it is entitled to an account now and not an account at some later stage when the Kalix cases may have reached a hearing, which process will obviously involve a whole range of issues of liability and quantum. It does not seem to me that it would be appropriate to defer a decision on this question until all of the Kalix cases have reached the stage of being ready for trial, for by so doing I would be significantly delaying Aforge's entitlement to an account in the event that it should persuade the court that it is entitled to such an account. In order to meet that problem, it seems to me that it will be necessary to address the question of whether HTIE owes a fiduciary duty to Aforge sooner rather than later. With that in mind, while I intend to link these proceedings into the Kalix process, I do so on the basis that that linkage should not be a means of delaying an early resolution of the question of whether a fiduciary relationship, giving rise to obligations to account, exists in the circumstances of this case. Rather I do so for the purposes of ensuring that those other parties, who have a real interest in the question as to whether there is a fiduciary relationship between HTIE and the Thema fund or its investors can, to the extent that it may be appropriate, be heard in the determination of that issue.

7. **Conclusions**

7.1 In summary, therefore, I propose to determine that there is a preliminary question that needs to be tried, being the question set out at para. 5.1 and 5.2 above. I further direct that that issue can be tried on this motion with such further evidence as the parties may be entitled to file in accordance with directions which I intend to discuss with counsel presently. I direct that the hearing of that preliminary question be put in for mention on the next date when the Kalix cases generally are before the court with a view to giving further directions as to the time of trial of the question of principle which arises across the whole range of cases as to whether there is, in fact, a fiduciary relationship between HTIE and Thema and its investors.

7.2 In directing that there be a single trial of that matter across the whole range of cases, I would emphasise the comments which I made in my judgment in Kalix to the effect that any party who has nothing material to add to the debate should not be expected to be paid its costs simply by turning up for the hearing. In the light of that stricture I will consider on the aforementioned date the precise structure of the hearing which will be required.