Neutral Citation Number: [2009] IEHC 457

THE HIGH COURT

2009 3152 P

BETWEEN

KALIX FUND LIMITED

PLAINTIFF

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

AND

THE HIGH COURT

2009 7819 P

BETWEEN

UNIONE DI BANCHE ITALIANE SOCIETA COOPERATIVA PER AZIONI TRADING AS UBI BANCA

PLAINTIFF

AND

THEMA INTERNATIONAL FUND PLC

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 16th day of October, 2009

1. Introduction

1.1 These two proceedings are amongst a large number of cases which have been brought arising out the collapse of Bernard L. Madoff Investments Securities LLC ("BLMIS") an investment service formerly controlled by Bernard Madoff the disgraced and imprisoned financier. The respective plaintiffs ("Kalix") and ("UBI Banca") were investors in funds maintained by the first named defendant in the UBI Banca proceedings, Thema International Bank plc ("Thema"). As a result of the collapse of BLMIS it would appear that those investors lost very substantial sums. Both bring their respective proceedings for the purposes of recovering those funds.

1.2 However, for the purposes of the application with which I am concerned, it is also important to note that there are a large number of other proceedings brought by other investors in the relevant fund. In addition there are proceedings brought by Thema against HSBC Institutional Trust Services (Ireland) Limited ("HTIE") (who are, of course, the defendant in the Kalix proceedings and the second named defendant in the UBI Banca proceedings). The proceedings between Thema and HTIE arise out of the same circumstances as the proceedings brought by both Kalix and UBI Banca and, indeed, the other investors. Furthermore, it is, on one view, of relevance to note that there is a further set of proceedings in being in which AA (Alternative Advantage) Plc ("AA") has brought proceedings against HTIE, arising out of an analogous allegation against HTIE concerning losses which also flow from the collapse of BLMIS although relating to a separate fund.

1.3 It is in the context of that multiplicity of litigation arising out of the collapse of BLMIS that the two applications currently before the court arise. HTIE has brought an application in both proceedings which seeks an order staying the relevant proceedings pending a determination by this Court of the proceedings in which Thema sues HTIE (the "Thema proceedings"). This judgment is directed to that issue. It is clear, however, that the real question that arises as and between the parties is as to the proper course of action that the court should adopt when confronted with the multiplicity of actions currently in being or contemplated. In those circumstances it is appropriate to turn first to the general background of the proceedings.

2 Background

2.1 Thema is established in the State under the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (the "UCITS Regulations") and their parent directive, Directive 85/611/EC, as amended (the "UCITS Directive"). As such Thema operates as a UCITS fund vehicle and, as is stated by the respective plaintiffs, was set up as an umbrella open-ended investment company with variable capital and segregated liability between its sub-funds so that the assets of one sub-fund are not available to meet the liabilities of another. Kalix and UBI Banca are each investors in a Thema sub-fund ("Thema Fund"), which is also established under the UCITS regime. The common defendant in all proceedings, HTIE, is the custodian/trustee of Thema Fund, on foot of a custodian agreement between it and Thema.

2.2 BLMIS was appointed as sub-custodian to the assets of Thema Fund. Kalix, UBI Banca and Thema all claim that, in appointing BLMIS as sub-custodian, HTIE failed to carry out any or any adequate or appropriate check or due diligence or monitoring or supervision of the performance of BLMIS as sub-custodian of Thema Fund. All proceedings also involve the question of the application of the UCITS Regulations and the UCITS Directive.

2.3 The Kalix proceedings concern an assertion by Kalix that it is the beneficial owner of shares in Thema Fund. Kalix alleges that HTIE acted in breach of contract, in breach of trust, in breach of duty and/or in breach of the UCITS Regulations and the UCITS Directive in relation to the appointment of BLMIS as sub-custodian to Thema. In the UBI Banca proceedings, the plaintiffs claim, in addition, that there was a breach of the terms of the prospectus issued by Thema in respect of Thema Fund, and on which UBI Banca say they relied when investing in Thema Fund. UBI Banca further claims that there was a breach of duty on the part of Thema and HTIE and a breach of the UCITS Regulations and UCITS Directive. In the Thema Proceedings, Thema alleges that HTIE acted in breach of the custodian agreement, in breach of trust, in breach of duty and / or in breach of the UCITS Regulations in relation to the same issues.

2.4 As has been pointed out, the UBI Banca proceedings stem from the same facts as the Kalix and Thema Proceedings. HTIE is, of course, also seeking a stay on those proceedings pending the outcome of the Thema Proceedings, which application Herbert J. directed was to be heard after the hearing of the application for a stay of the Kalix proceedings.

2.5 To date, some 47 or so other sets of proceeding have been brought in this jurisdiction against HTIE or HTIE and Thema by purported beneficial or registered shareholders in Thema Fund. Thema has been named as a defendant to forty three of those proceedings.

2.6 Kalix is an investment company incorporated in the British Virgin Islands and registered as a public fund within the meaning of the British Virgin Islands' legislation on mutual funds. HTIE is a limited liability company carrying on the business of, *inter alia*, specialised trustee and custodian services. On 31st May, 2005, Kalix acquired 191,997.7628 shares in Thema Fund. The shares were acquired by way of transfer to Kalix in settlement for the allotment of shares in Kalix to an underlying investor in Kalix. Kalix redeemed some shares in 2008 and as such currently holds 97,140.6885 shares in Thema, valued on 28th November, 2008, at US$35,652,575.49. Kalix claims that it was at all times the beneficial owner of the aforementioned shares in Thema.

2.7 UBI Banca is an Italian Bank which invested €12,900,000 in Thema Fund. This investment was made in three tranches from 1st June, 2004 to 1st July 2005. On foot of this investment, UBI Banca was the holder of 96,603.3545 ordinary Euro class shares in Thema Fund. The purported value of the said shares as of 28th November, 2008 was €17,485,207.16

2.9 Pursuant to the Article 14 of the UCITS Directive and Regulation 37(1) of the UCITS Regulations, the assets of Thema, being the funds invested by Kalix and others, were required to be entrusted to an eligible third party, a trustee/custodian, for safe-keeping. Pursuant to this requirement, the assets were entrusted to HTIE, under an original custodian agreement of 30th May, 1996, which was supplanted by a further agreement of 21st August, 2006, (together the "Custodian Agreement"). Essentially the Custodian Agreement required HTIE to keep safe all assets delivered to it under the Custodian Agreement.

2.10 Monies invested in Thema Fund were then channelled to the, as is now clear, fictitious "hedge fund" operated by BLMIS and / or other companies controlled by or affiliated to Bernard Madoff. Certain parties have described the Thema Fund as a "feeder fund" for BLMIS, although this depiction is disputed by Thema.

2.11 Against that general background it is next necessary to turn to the procedural history of the relevant cases including the separate proceedings brought by AA. I now turn to that procedural history.

3. Procedural History of Relevant Cases, including AA Proceedings

The Kalix Proceedings
3.1 The Kalix proceedings were instituted by plenary summons on 3rd April, 2009, and were entered into the commercial list on 27th April, 2009. A statement of claim was delivered on 22nd May, 2009. On 15th June, 2009, proceedings were adjourned to 13th July, 2009 to enable HTIE to consider whether it wished to bring a stay application, which application was brought by motion dated 8th July, 2009. By notice of motion dated 9th September, 2009, HTIE applied to join Thema and the investment managers to Thema, Thema Asset Management Limited and Bank Medici AG (the "Investment Managers"), as third parties to those proceedings. Subsequent to the hearing before me last week, I was told that the application to join those parties as third parties was successful and an order in that regard was made on Monday last, 12th October. In short therefore, the only pleading filed to date in the Kalix Proceedings is the statement of claim. In the Kalix proceedings unlike the UBI Banca proceedings, Thema is a third party, HTIE not having sought that Thema be joined as a co-defendant rather than a third party when the third party application to which I have referred was moved.

The UBI Banca Proceedings
3.2 The UBI Banca proceedings were instituted by plenary summons on 26th August, 2009, and were entered into the commercial list on 9th September, 2009. A statement of claim was delivered on 16th September, 2009. As is clear, therefore, a difference between the Kalix proceedings and the UBI Banca proceedings is that while HTIE is a defendant in both proceedings, Thema is a defendant in only the UBI Banca proceedings, but is a third party in the Kalix proceedings.

The Thema Proceedings
3.3 The Thema Proceedings were instituted by plenary summons dated 19th December, 2008, and entered into the commercial list on 2nd February, 2009. The statement of claim was delivered on 16th March, 2009. A notice for particulars was served on 9th April, 2009, and replies to particulars were served by Thema on 8th June, 2009. A defence was delivered by HTIE on 28th July, 2009. Thema was directed to deliver a reply by 4th September, 2009, but had not yet done so by the hearing of these proceedings. On 14th August, 2009, Thema served a notice for particulars arising out of HTIE's defence, which was replied to by HTIE on 10th September, 2009.

3.4 On 30th July, 2009, this Court made an order joining the Investment Managers as third parties to the Thema proceedings. An appearance has been entered by Bank Medici AG and one is anticipated from Thema Asset Management Limited.

3.5 On 29th June, 2009, this Court directed that any request for discovery and response thereto be exchanged by 12th

October, 2009, and that the parties be at liberty to issue appropriate notices of motion for 19th October, 2009, in the event that any dispute or issue arises in relation to discovery. On 11th September, 2009, HTIE requested voluntary discovery from Thema. By letter dated 15th September, 2009, Thema's solicitors confirmed receipt of HTIE's request for discovery and indicated that they would furnish Thema's letter seeking voluntary discovery once same was finalised. As such, while pleadings are closed in the Thema proceedings, discovery remains outstanding.

The AA Proceedings
3.6 On the same day that the Thema proceedings were instituted, 19th December, 2008, a separate fund, AA, brought proceedings against HTIE (the "AA Proceedings"). The AA Proceedings are brought in respect of an unrelated fund of which HTIE was also the custodian and with which BLMIS was also involved.

3.7 The pleadings in the AA Proceedings and the Thema Proceedings are identical, save to the extent necessary for reflecting the fact that the AA fund was not governed by the UCITS regime. The two sets of proceedings have, therefore, for obvious reasons, moved in tandem with each other.

3.8 As will be seen from the above procedural history some progress has been made in the Thema proceedings while very little progress has been made in the Kalix and UBI Banca proceedings. It should also be noted that the remainder of the proceedings brought by investors in the Thema Fund ("the Investor proceedings" – which term also includes the Kalix and UBI Banca proceedings) are also at a relatively early stage. I was told that some, but by no means all, of those proceedings exceed the normal threshold for entry into the commercial list of this Court. Given the fact that none of the relevant proceedings, with the exception of the Thema proceedings, have even approached a stage where pleadings are closed and given the fact that the Thema proceedings themselves are a long way short of having all of the issues of law and fact that might arise clarified by the exchange of witness statements, expert reports and outline written legal submissions, it is, of course, not possible to say with certainty precisely what degree of overlap there may be between the issues which arise in the various proceedings. However, it is at least possible to give an initial account of the issues which are likely to be common, or not common, to the various proceedings. I therefore turn to that question.

4. Issues common to both Investor Proceedings and the Thema Proceedings
4.1 As each of these proceedings arise out of the role of BLMIS as sub-custodian to Thema Fund and out of alleged deficiencies in the manner in which HTIE acted as custodian to Thema Fund, it is hardly surprising there appear to be common issues.

Breach of duty
4.2 Thema, Kalix and UBI Banca argue, that as the custodian of the fund, HTIE owed them a duty of care in respect of the investment funds. Each of those plaintiffs claim that HTIE failed to exercise care and diligence in appointing BLMIS as sub-custodian to Thema Fund, and in particular claim that HTIE failed to ensure that:

> I. BLMIS had the expertise, competence and standing to discharge its responsibilities and/or keep safe any assets entrusted to it;
>
> II. BLMIS would at all times act in accordance with applicable law;
>
> III. BLMIS did not deal with the assets of Thema Fund in any capacity such as would compromise the ability of HTIE or Thema or any other person to monitor BLMIS;
>
> IV. BLMIS was honest, trustworthy and of integrity;
>
> V. BLMIS would monitor the assets of Thema Fund separately from its own assets and free from all charges and/or liabilities and would not use the said assets for its own end; and/or
>
> VI. BLMIS would and/or was able to re-deliver the assets which it had represented were held for Thema to HTIE and/or Thema or to its order, when called upon to do so.

4.3 Thema, Kalix and UBI Banca further claim that HTIE was negligent and or reckless in its monitoring of BLMIS as sub-custodian of the assets of Thema Fund and as such facilitated the misappropriation of the assets by BLMIS. Each of the plaintiffs argue that HTIE negligently failed to take account of various "red flags" in relation to the workings of BLMIS and Mr. Madoff.

Breach of statutory duty under the UCITS Regulations and the UCITS Directive
4.4 The other claim by Kalix, Thema and UBI Banca is for breach of statutory duty arising out the terms of the UCITS Regulations and Directive. Article 16 of the UCITS Directive, as amended, provides:

> "A depository shall, in accordance with the national law of the State in which the Investment Company's registered office is situated, be liable to the investment company and the unit- holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations, or its improper performance of them."

This is implemented in Irish law by Regulation 43 of the UCITS Regulations, which provides:-

> "The trustee shall be liable to the investment company and the unit holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them."

Breach of trust
4.5 Kalix, Thema and UBI Banca further claim that HTIE, as trustee of Thema Fund, was in breach of its duties as trustee in the appointment of BLMIS as sub-custodian, without adequate care or due diligence and in its failure to adequately supervise BLMIS in its role as sub-custodian. The arguments for this claim as similar to those listed for breach of duty.

5 Issues Specific to the Kalix Proceedings

Clarification of position of Kalix in relation to shareholder's rights
5.1 As Kalix is not a registered shareholder of Thema, its shares being held through an electronic settlement nominee, there is a question as to what rights Kalix can assert. HTIE argues that only a registered shareholder can have rights in relation to a company's shares. In turn, Kalix places reliance on the definition of "unit-holder" in the UCITS Regulations, which is as follows:-

> "any person who by reason of the holding of units in the undertaking or by reason of having invested capital in the undertaking is entitled to any of the investment or relevant income of the undertaking."

5.2 Kalix further argues that the terms of the UCITS Regulation provides that a custodian /trustee must act in the interests of the unit-holder. Even if Kalix if found to have shareholder's rights, HTIE argue that the correct plaintiff in any proceedings is Thema and not the individual shareholders, under the rule in *Foss v. Harbottle* (1843) 2 Hare 461.

Damages for missed opportunity

5.3 Kalix further argues that monies were invested into Thema Fund because of the liquidity afforded by that fund. Thema provide fortnightly redemption facilities, whereby an investor, such as Kalix, could request redemption of its shares. Kalix claims that these monies would then have been available to them to invest elsewhere, which opportunity has now been lost.

Damages for conversion and/or detinue
5.4 Kalix is also seeking damages for conversion in respect of monies invested in Thema Fund. Kalix is seeking damages for detinue not only in relation to the detention of the monies invested but also additional damages for its detention.

6. Issues Specific to the UBI Banca Proceedings

Breach of Terms of the Prospectus
6.1 UBI Banca claims that it relied on a prospectus issued by Thema for the purposes of soliciting investment. UBI Banca claims that Thema and HTIE breached several terms of the prospectus, particularly those setting out the risk factors identified with the investment and the provisions setting out the role and obligations of the investment manager.

6.2 As the prospectus attached the terms of the Custodian Agreement, UBI Banca also intend to rely upon the provisions of the Custodian Agreement.

7. Issues Specific to the Thema Proceedings

Breach of the Custodian Agreement
7.1 In this respect the contract is the Custodian Agreement, to which only Thema and HTIE were parties. The Custodian Agreement required HTIE to exercise care and diligence in choosing or appointing any third party as agent or sub-custodian in relation to the assets of Thema Fund, and in particular to ensure that:-

> I. any third party had the expertise, competence and standing to discharge its responsibilities and keep safe any assets entrusted to it;
>
> II. any such third party would at all times act in accordance with applicable law;
>
> III. any such third party did not deal with the assets of Thema/Thema Fund in any capacity such as would compromise the ability of HTIE, Thema or any other person to monitor the third party;
>
> IV. any such third party was honest, trustworthy and of integrity;
>
> V. any such third party would maintain the assets of Thema/Thema Fund separately from its own assets and free from all charges and/or liabilities and would not use the said assets for its own ends; and
>
> VI. any such third party would and/or was able to re-deliver the assets which it had represented were held for Thema/Thema Fund to HTIE and/or to Thema or to its order when called upon to do so.

As will be noted the specific contractual obligation alleged by Thema in the Thema proceedings are identical to the duties of care alleged in the investor proceedings as noted at para. 4.2 above.

7.2 Thema argue that these requirements were breached with the appointment of BLMIS as sub-custodian and/or the activities of BLMIS as sub-custodian of Thema Fund. Thema claims that the appointment of BLMIS, without the carrying out of adequate or appropriate checks or monitoring on an ongoing basis, facilitated BLMIS in depriving Thema and Thema Fund of substantially all of the assets which it had entrusted to HTIE under the Custodian Agreement.

7.3 Thema further claim that, despite demand, HTIE failed, refused or neglected to return or account for the assets entrusted to it under the Custodian Agreement, in breach of said Agreement.

7.4 Insofar as the AA proceedings are concerned it has already been noted that the pleadings in those proceedings are identical to those in the Thema proceedings, save for necessary amendments to reflect the fact that the fund involved in the AA proceedings is not a UCITS fund. In those circumstances it seems that, with that exception, the issues which will arise in the AA proceedings are likely to be the same as those which will arise in the Thema proceedings.

7.5 Against that review of the issues in the various proceedings as they currently appear it is next necessary to turn to the law.

8. The Law

8.1 It is not disputed by the parties but that this Court has a broad power to give directions for the conduct of proceedings entered in the commercial list. As O. 63A, r. 5 of the Rules of the Superior Courts states, such directions can be given "as appears convenient for the determination of proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings". It is also not disputed but that this Court has an inherent jurisdiction to stay proceedings in certain circumstances. See for example *McGrory v. ESB* [2003] I.R. 407. However, there is a dispute between the parties as to the precise extent to which a court has a jurisdiction to stay proceedings in circumstances such as those asserted in this case.

8.2 The term "stay" covers a range of circumstances. In some of the cases the imposition of a stay amounts in substance to the bringing of the proceedings concerned to an end. While it may now be more common for a court exercising the jurisdiction first identified in *Barry v. Buckley* [1981] I.R. 306 to strike out or dismiss the proceedings as being bound to fail, in the earlier exercise of the relevant jurisdiction the proceedings were frequently stayed. However, the substance of granting a stay in such circumstances was that the proceedings were, for all practical purposes, at an end. Likewise, where proceedings may be found to amount to an abuse of process (for example, where it is sought to re-litigate issues which have already been determined in previous proceedings) a stay may be imposed which amounts to bringing proceedings to an end.

8.3 A second category are cases, such as *McGrory*, where the proceedings concerned are not brought to an end but are prevented from progressing unless and until a party complies with a necessary procedural obligation (in the case of *McGrory* submitting to a medical examination). Likewise, proceedings are frequently stayed pending arbitration. In those circumstances the stay amounts to a prevention on the proceedings continuing until an arbitrator has determined those issues which the parties had, by contract, agreed should be remitted to arbitration. In substance the court proceedings are, for all practical purposes, at an end in that the contentious issues between the parties will not fall to be resolved by the court but rather by the arbitrator. The proceedings can, of course, in certain circumstances be reactivated not least for the purposes of enforcing the award of the arbitrator. It might, perhaps, be correct to describe stays pending arbitration as being somewhere in between the two types of cases previously mentioned.

8.4 Whether it be a permanent stay, which has the effect of bringing the relevant proceedings to an end, or a conditional stay, which prevents the proceedings from progressing until compliance with procedural obligations has been achieved, or a hybrid of both, stays in such types of cases amount to a legitimate court response to inappropriate action on the part of one or other party. Proceedings may have been commenced which the court considers should not have been commenced in the first place or should not be progressed pending arbitration. A party may have refused or failed to comply with a legitimate procedural requirement or other step which renders it inappropriate to allow the case to continue, unless and until that requirement or step is taken.

8.5 However, no such considerations apply here. There is no suggestion that any of the relevant plaintiffs, whether Kalix, UBI Banca, the other investors or Thema have acted in any way inappropriately, either in maintaining any of the relevant proceedings or in any steps which they have taken in the course of those proceedings to date. The stay sought in these proceedings is on an entirely different basis. It is suggested, in substance, that no further steps should be taken, as a matter of directions, in either the Kalix or UBI Banca proceedings (and by inference in each of the other investor proceedings) until such time as the Thema proceedings have been completed.

8.6 Perhaps a closer analogy to the circumstances with which I am faced in these proceedings can be found in those cases where proceedings in one jurisdiction are stayed because there are already in being proceedings in relation to the same subject matter in another jurisdiction. Proceedings may be stayed where those latter proceedings are at a more advanced stage, and where other factors that may be relevant in determining which proceedings ought progress to trial favour the alternative jurisdiction. See for example, *Reichold Norway ASA & Anor v. Goldman Sachs International* [1992] 2 All E.R. 174, and *Racy v. Hawila* [2004] EWCA 209. The underlying rationale behind those cases is the understandable desire on the part of courts in all jurisdictions to avoid a situation where there may be conflicting decisions on the same issue. In those circumstances it is highly undesirable that two courts in two separate jurisdictions should have to consider the same specific question with the consequent risk of differing decisions. Likewise, there may be circumstances where two different courts, within the same jurisdiction, may have to consider how best to deal with competing litigation which has been properly commenced in the respective courts. Similar points arise where a quasi judicial non court body has jurisdiction over the same or closely connected issues. See for example *LTW Developments Plc v. Della* [2003] NSWCA 140. It was suggested in the course of argument that the principles that apply to the staying of proceedings in circumstances such as those which I have outlined (*i.e.* where there are different bodies, be they be courts in different jurisdictions, different courts in the same jurisdiction, or courts and non court bodies seized of the same or closely analogous issues) apply with even greater force in circumstances such as those with which I am faced in these proceedings. While the principles and considerations which underlie the jurisprudence to which I have referred may be of assistance in helping to formulate the test by reference to which any jurisdiction might be exercised, it seems to me that there is one very important difference between the cases to which I have referred and the situation with which I am faced. The underlying problem in each of the types of cases to which I have referred is that there are two different bodies which have, *prima facie*, jurisdiction over a legally binding process dealing with more or less the same question. Where all of the relevant proceedings are before the same court (or can by a simple administrative step be brought before the same court) then it seems to me that one of the most important considerations that applies in those cases disappears. The risk of conflicting decisions does not arise where all of the relevant cases can be brought before the same court and can, if thought appropriate, be assigned to the same judge so that all issues in all cases will ultimately be determined by the same judge, thus removing any risk of conflicting decisions.

8.7 As the argument developed in the course of the hearing before me, it became clear to me that whether one describes a direction of the type sought as a "stay" or merely a procedural direction that has the effect of freezing one case until another case has been determined, is largely a question of semantics. Indeed given that the term "stay" applies more frequently to cases such as those which I have identified where there is some substantive or procedural inappropriateness justifying court intervention or a real risk of conflicting decisions, it may not be particularly helpful to refer to the order sought by HTIE in both of these proceedings as a stay at all. It seems to me to be more appropriate, therefore, to consider whether HTIE are entitled to obtain a procedural direction to the effect that no further steps be taken in the Kalix or UBI Banca proceedings until such time as the Thema proceedings have completed. That leads to a consideration of the jurisdiction of a court to make such a direction and the criteria, in general terms, which should be applied in considering whether it is appropriate to make any such direction in the circumstances of a particular case.

8.8 It does seem to me, at the level of principle, that a court has a discretion, in ordering its business, to ensure that

scarce court resources and the resources of parties to litigation are not inappropriately wasted by an unnecessary duplication of litigation. In addition it is, of course, important that measures are taken to minimise the risk of any inconsistent determinations arising from different proceedings. It is for reasons such as those, that the practice has grown up over recent years of cases being linked as a purely procedural measure to ensure that a series of cases which have common factors are assigned to a single judge, who will determine all relevant issues across the range of cases concerned.

8.9 Likewise, even within a single case, it is clear that the court retains a discretion to direct that a sequenced rather than unitary trial of all relevant issues should take place. See *Cork Plastics Manufacturing v. Ineos Compounds Ltd* [2008] IEHC 93. *Cork Plastics* also contains a discussion of the factors which are likely to be relevant in considering whether a unitary or sequenced trial ought be directed.

8.10 Again at the level of principle, it seems to me that similar (but not necessarily identical) considerations apply where the court is faced with a number of actions involving, at least to some significant extent, the same or similar issues.

8.11 It seems to me to follow that the court has an inherent jurisdiction to manage the conduct of a series of cases which are connected by reason of having significant factual or legal overlap for the purposes, in the words of *Re Norton Healthcare Limited* [2006] 3 I.R. 321, of bringing about "a just and expeditious trial whilst seeking to minimise costs". Applied to a number of cases, the obligation is to ensure that each party to each of the cases nonetheless will achieve, as best as can be done, a just and expeditious trial, but also that, across the range of cases, costs be minimised and scarce court resources not be wasted.

8.12 Again at the level of principle, it seems to me that in assessing how to manage a series of cases, connected in the fashion in which I have identified, the court needs, amongst other things, to take into account the following factors:-

> A. The fact that each individual plaintiff is entitled to have that plaintiff's proceedings determined in an expeditious manner, subject only to ensuring that there is no disproportionate added expense or drain on court time imposed;
>
> B. A consideration of the extent to which the first case to be tried is likely to bind all other cases in whole or in part. For example in any set of common litigation where there is a legal issue arising in each case which may be significant or, indeed, determinative of important issues (such as liability) it is, in practical terms, so that the first case which happens to be tried (no matter how the matter is managed or not managed) will determine that legal issue in a way that will, in substance, bind all subsequent cases. Factual decisions relevant to, for example, a defendant's liability may or may not be in the same category depending on the extent to which a plaintiff who was not involved in the first case may be taken, either as a matter of law or as a matter of practicality, to be bound by the decision in that case. Obviously the greater the extent to which all other proceedings will be governed by the first case to be run, the more value there is in ensuring that the cases generally are managed in a fashion which allows the common issues to be resolved in a speedy fashion, but does not permit any unnecessary additional expense to be incurred in progressing and bringing to trial other proceedings save to the extent that those other proceedings involve issues which will or may need to be litigated in any event.
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> C. The need to ensure that any measures adopted which have the effect of preventing one or more cases from progressing in the way in which they might ordinarily be expected to progress, were they to be considered on a stand-alone basis, are no more than is necessary and proportionate to a achieve the end of preventing unnecessary expense or use of court time. In that context it is relevant to note the process which I have put in place in *Kelly & Anor v. Lennon* [2009] IEHC 320. In that case some but not all of the issues which arose in the relevant proceedings were governed by an arbitration clause. For the reasons set out in my judgment in that case, I came to the view that the arbitration clause was binding and that there was no legitimate basis on which the issues governed by the arbitration clause should not be remitted to arbitration. However, there were other issues in the case which had not been referred to arbitration. In those circumstances I placed a stay on any further progress of the proceedings insofar as they related to the issues which were remitted to arbitration. However, I allowed the case to proceed to the close of pleadings on the other issues. Having formed a view that, on balance, it was more appropriate that the issues remitted to arbitration should be tried first, I directed that the court proceedings should not progress beyond the close of pleadings until the arbitration had been completed. It seems to me that a party should, in principle, be allowed to progress their proceedings as far as can be done without risking any disproportionate duplication, expense or waste of court time.

8.13 It also seems to me that a decision on whether the various issues which arise across all of the relevant proceedings concerned need to be tried at one trial or in a series of sequenced trials (whether relating only to one or a number of cases) is a matter that should be determined by reference to the general considerations which I set out in *Cork Plastics* coupled with the additional considerations which I have identified as being applicable to a series of cases. It should be noted, in that context, that there is no reason in principle why a large number of cases could not come to trial at the same time but that, in the context of a sequenced trial of all of the cases, the issues which arise in the various cases could not be tried in a logical fashion with only those parties who had a logical and legitimate interest in the particular set of issues then currently being tried, having an entitlement to be heard in respect of those issues. Before passing from this latter point, it should also be noted that parties whose interests may be affected by a particular decision will, in most cases, be entitled to be heard before any decision is made which is binding on that party, and which is material to the interests of the party concerned. It does not, however, follow that a party who has nothing to add to the argument or factual basis relevant to the issue concerned would be entitled to the costs of being present while the issue was, in substance, being tried between other parties. Even in relatively straightforward litigation it is, as I have pointed out, the case that the first case to run of a series may well determine either as a matter of law or as a matter of practicality issues likely to arise in subsequent cases. It does not follow that each of the parties to the subsequent cases are entitled to be heard in the case first to be run. Even if a series of cases are run together it does not follow that a party who has nothing to add to an issue but who may, in some way, be said to be affected by the issue can be entitled to expect to be paid its costs of attendance unless it has something material to add to the process.

8.14 On the basis of that general approach, I now turn to the facts of these connected cases.

9. Application to the Facts of these Cases

9.1 I have sought, in sections 4 to 7 above to analyse the issues which seem likely to arise in the various proceedings. While there are some differences between the issues which may arise in the Kalix proceedings as opposed to the UBI Banca proceedings (for example UBI Banca is a direct investor in Thema Fund while Kalix is not), it seems to me that both cases can conveniently be bracketed together and described as the investor proceedings. There are, therefore, what might reasonably be called the investor specific issues, which are those issues which arise in relation to the question of the extent to which individual investors can maintain proceedings, whether as a matter of general law or specifically under the UCITS Regulation. There seems no doubt but that there are some issues which arise in the investor proceedings that could not be dealt with in the context of the Thema proceedings. For example, a claim is made in respect of consequential loss arising out of the knock-on effects of the relevant investors not having had access to their funds. The extent to which any such loss can, as a matter of law, be recovered is a matter which could only be determined in relevant investor proceedings. Likewise whether the factual circumstances to justify any such claim exist could only be determined in specific proceedings brought by the investor concerned.

9.2 In addition there are, on the basis of the arguments identified in the affidavit evidence filed on both sides, a range of issues which may or may not ultimately need to be determined in some or all of these connected cases. For example, the possibility that an individual investor might be fixed with a contribution to that investor's own loss, by reason of knowledge on the part of that investor concerning the investment of monies in BLMIS, is raised. It is not clear at this stage as to whether there is any factual basis for any such case being made and, if so, whether it applies to all or only some of the investors. On the other hand it undoubtedly seems to be the case that there will be issues which will arise in the Thema proceedings as to the extent to which Thema may have to bear some or all of the losses by virtue of the allegation made by HTIE concerning Thema's involvement in directing monies to BLMIS.

9.3 Likewise, it is clear that the extent to which the Thema proceedings will be determinative of a significant number of issues in the investor proceedings, is highly dependent on the result of the Thema proceedings. If Thema succeed in full against HTIE, then the investors are likely to recover their entire investment but would need, nonetheless, to run the investor cases if they wished to maintain a claim for consequential loss. If Thema succeed in part, then the investor cases would need to run so as to allow the investors an opportunity to attempt to persuade the court that any balance not recovered by Thema can nonetheless be recovered by the individual investors (together with any consequential loss claim that might be made). If the Thema proceedings fail in their entirety, then different considerations apply depending on the reason for that failure. If the Thema proceedings fail because of fault on Thema's part, then the investor cases would need to run in any event. If the Thema proceedings fail because no liability is established as against HTIE, then questions may well arise (which could not be resolved on a motion such as this) as to the extent to which any such findings might bind individual investors who would not, of course, have been parties to the Thema proceedings. Obviously determination on questions of law (such as the appropriate interpretation of the UCITS Regulations) would be likely to govern any further case. The extent to which, either as a matter of law, or as a matter of practicality, it might be open to an individual investor to revisit facts found in proceedings to which they were not a party, is a debatable matter.

9.4 Likewise the extent to which there would be anything of substance left in the Thema proceedings were some of the investor proceedings to run first would depend very much on the result of those proceedings. If investor proceedings failed, for example, on the basis of the investors not being able to persuade the court of a right to directly enforce as against a custodian, then all issues concerning HTIE's conduct would remain open in the Thema proceedings. On the other hand a failure of investor proceedings on a similar basis to that discussed in the preceding paragraph would give rise to similar considerations as to whether such a finding bound Thema. In addition, there is the undoubted question as to the effect that Kalix and/or UBI Banca successfully maintaining proceedings would have on the other investor proceedings. Issues of both liability and quantum arise. While it is undoubtedly true that the investor proceedings would only relate to that portion of the fund directly attributable to the relevant investor plaintiff, I am not sure that there is, as a matter of practicality, any great questions relevant to quantum that would remain to be decided in other investor proceedings. If, for example, Kalix and UBI Banca succeed in full, then their claim, it is true, would only relate to their portion of the fund. However, it would be difficult to envisage that there would be any remaining issues in any of the other investor proceedings so far as quantum is concerned except perhaps where a claim for consequential loss is made. It is, of course, the case that there might, arguably, be other liability questions which would remain. There are at least two bases upon which such issues might arise. Firstly, there is the question, on which I have already touched, that there may be questions as to direct investor contribution by reason of investor knowledge or the like. Secondly, there is a question, which was touched on in the argument before me, arising out of the need to establish a causal link between any actions of HTIE which might give rise to a liability and any particular loss. There is at least an argument that there might be questions arising from the need for an individual investor to establish a causal link between any action on the part of HTIE giving rise to a liability and the loss of that investor concerned, which could be referable to the time at which the investor concerned made its investment and the time at which any action of HTIE giving rise to liability occurred. Whether there are, in truth, any such issues is also a matter which is not clear at this stage. I merely note that it is a question which may arise.

9.5 Taking an overview of all of the issues, it seems to me that it is possible to reach some general conclusions. Firstly, none of these proceedings have reached the stage where there is any great degree of clarity about the true issues, whether of law or of fact, that are likely to be tried. Some greater degree of clarity arises in the Thema proceedings because the pleadings have closed, but nonetheless experience teaches that the real issues which are likely to require court time for resolution only become clarified, certainly in cases managed in the commercial list, when witness statements have been exchanged and outline written submissions have been filed. It is, it seems to me, premature to reach any very strong view as the issues which are likely to really require significant court time for resolution.

9.6 It follows that it is not possible, at this stage, to reach anything other than a tentative view as to the extent to which hearing either the Thema proceedings first or the Kalix and UBI Banca proceedings first would lead to a situation where there was little left to determine in the other proceedings. This is so partly because the real issues that are likely to require court resolution are far from clear that this stage. It is also true that, in any event, for the reasons which I have sought analyse, the extent to which either the Thema proceedings or the investor proceedings might resolve issues which also arise in the other proceedings is quite dependent on the result of the proceedings first tried.

9.7 I am also of the view that, in general terms, and subject to the circumstances of an individual case or cases, a court should be most reluctant to prevent any progress at all in one party's case simply because it may be that some or, indeed, many or even all of the issues in that case may come to be determined in another case which is more advanced and likely to come to hearing first. Even in more straightforward circumstances where, for example, a significant number of plaintiffs seek damages based on the same cause of action and the same factual matrix, it would seem to me to be an

excessive intervention by the courts to prevent all bar one of the plaintiffs' cases from progressing in an orderly fashion simply because it was more or less inevitable that one case would ultimately become the test case for them all. On the other hand a court should be mindful to ensure that allowing all cases to progress should not involve unnecessary expense by the duplication of work which is likely to be wasted in all but one case. For example, requiring a detailed exchange of expert reports in all cases when it is clear that only one case is likely to go to trial on the expert issues involved, would amount to unnecessary duplication and expense. However, a court should be careful to attempt to fashion an appropriate procedure which enables each plaintiff to progress their own proceedings, while at the same time preventing any unnecessary duplication. It seems to me that such a course of action can be adopted in this case.

9.8 I propose to set out my general conclusions as to the way in which all proceedings connected with BLMIS should be managed. When the parties have had an opportunity to consider those conclusions I will list the matter again for the purposes of giving specific directions in each of the cases. I, therefore, turn to my conclusions.

10. Conclusions

10.1 All proceedings in which an allegation is made against Thema or HTIE (whether involving only those defendants or other defendants and whether either or both of those parties is a defendant, third party, or otherwise joined) should be linked for the purposes of case management and trial with a view that the management of all such proceedings should be conducted together by a single judge.

10.2 In that context I am minded to favourably consider applications to admit into the commercial list all cases that come within the definition at (10.1) above even if such cases, on a stand-alone basis, would not warrant entry in to the commercial list. It seems to me that the overriding consideration of the efficient administration of justice requires that all these cases be dealt with together.

10.3 I do not propose giving any directions which would place a barrier on the orderly progress of all of the linked cases subject to the following caveat. It does not seem to me that it is appropriate that there be any unnecessary duplication either in pleading, witness statements as to fact, expert reports, or, when it comes to it, written submissions for trial. The extent to which every issue which might theoretically arise in each individual case should necessarily require to be exhaustively pleaded or be the subject of the preparation of evidence or submissions, should depend on the extent to which the issue concerned is going to be ultimately determined in the trial of that case. In that context I see no reason why pleadings already in existence which fully set out the issues between parties in the same position cannot simply be adopted by agreement as governing each individual case to which they are applicable without the necessity of the pleadings being repeated in each individual case.

10.4 It seems to me that when the issues which will truly require to go to trial have been more specifically defined, it will be possible to form a better view as to whether the issues as and between Thema and HTIE should be tried before or after the stand-alone issues that arise between the investors and HTIE. It seems to me that, in general terms, what should be aimed at is that the Kalix and UBI Banca proceedings together with the Thema and AA proceedings should be got ready for trial. When a clearer picture emerges as to all of the issues that will truly require to be determined, a decision can be made as to the precise sequence in which those issues can be tried. There is no reason why issues which are common to all or many of those proceedings cannot be tried together. For example, the issues which relate to whether any actions of HTIE give rise to a cause of action at the level of principle under the UCITS Regulation are common to all cases (other than the AA proceedings), and there is no reason why those issues cannot be tried together as issues in the trial of both the Kalix, UBI Banca and Thema proceedings. Likewise, those issues which are specific to the investor proceedings can be tried separately. Which part of a sequenced trial should take place first is a matter to be determined at a latter stage.

10.5 In that context, however, it seems to me that it should not be necessary to progress any of the other investor proceedings save to the extent that there may potentially be issues specific to an individual case which should be progressed sufficiently to allow that case, should it be necessary, to come to immediate trial as soon as the issues in the Kalix, UBI Banca and Thema proceedings have been fully clarified. Likewise, should it transpire that it is appropriate to run a further test case or test cases from amongst the class of investor proceedings because discreet issues arise which would not be covered by a decision of the investor specific issues in either Kalix or UBI Banca, then consideration will be given to allowing such additional case or cases to progress to trial to enable those additional issues also to be resolved. In that context it should be noted that any issue which is entirely specific to an individual investor case can be progressed through pleadings etc. but is unlikely to come to trial until all of the issues of more general application have been determined.

10.6 What is envisaged is, therefore, that the Kalix, UBI Banca, Thema and AA cases (together with any additional cases necessary to complete the overall picture) should, in principle, be tried together. However, it is not my current view that that means that all issues in all cases should come to trial at the same time. Rather when the totality of all of the issues that arise in each of the cases has been clarified not just by pleadings but by all other pre-trial steps, a final decision on the precise sequence in which those issues will be tried will be made. For the purposes of that decision an overall view of the totality of the proceedings will be taken and there is no reason in principle why issues common to a number of cases may not be tried together.

10.7 I am mindful of the fact that there is some risk that in following the procedure which I have outlined, some costs may be wasted by progressing proceedings which may ultimately not have to be heard. However, it seems to me that the risk of not following the procedure which I have outlined is greater. There is a risk that proceedings which have not been progressed at all will need to be restarted so that remaining issues can be decided. If I were to accede to the motion brought on behalf of HTIE then it follows that no further progress could take place in any of the investor proceedings until such a time as the Thema proceedings were completed. It would then be necessary to restart the investor proceedings to deal with whatever issues remained for determination. For the reasons which I have analysed earlier in this judgment it is impossible to say at this stage whether those remaining issues would be many or few and indeed that question is, in itself, partly dependent on how the Thema proceedings might be resolved. However, under the procedure which I now set out, all common issues will be ready for trial at more or less the same time. While that may involve some additional expense only those issues which can conveniently, efficiently and justly be tried together will be tried together. However, as soon as any set of issues have been determined, the next set of issues which logically arise can immediately go to trial if they remain necessary of resolution in the light of the decision taken on the earlier issues. On that basis, there should be no significant delay in any relevant party getting a determination of all issues which are material to its interests. It seems to me that such a course of action is more calculated to lead to a just, efficient and timely disposal of all of the proceedings

and to minimize the risk of the waste of court time.

11. Summary

11.1 In summary, therefore, the Kalix, UBI Banca, Thema and AA proceedings will be linked, managed together, come to trial together, but that trial will be a sequenced trial. The order in which issues will be tried will be determined nearer to the trail date when the precise issues are clearer. Not all parties will necessarily be required to participate at each part of the sequence. Other investor cases will be progressed but only where that progress avoids duplication and is necessary to ensure that all issues are resolved in a timely fashion.

11.2 As indicated earlier when the parties have had an opportunity to review this decision, I propose listing the matter for a further hearing on the relevant precise directions that should be given in respect of each of the proceedings.