Neutral Citation: [2016] IEHC 363

THE HIGH COURT

COMMERCIAL

[2009 No. 5142 P]

[2009 No. 211 COM]

BETWEEN

ALICO LIFE INTERNATIONAL LIMITED

PLAINTIFFS

AND

THEMA INTERNATIONAL FUND PLC AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2009 No. 5116 P]

[2009 No. 219 COM]

BETWEEN

SHMUEL HARLAP

PLAINTIFF

AND

THEMA INTERNATIONAL FUND PLC AND

HSBC INTERNATIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on 26th day of May, 2016

1. In this application the first named defendant seeks a declaration pursuant to O. 25 of the Rules of the Superior Courts or otherwise that:

> (a) the first defendant does not owe any actionable duty to the plaintiff in circumstances were the plaintiff is not a unit-holder in the first defendant.
>
> (b) even if the plaintiff was a unit-holder in the first defendant, any duty to the plaintiff is barred as a result of the rule in *Foss v. Harbottle* (1843) 2 Hare 461 and/or the related rule against reflective loss.

In the alternative the first named defendant seeks an order striking out the plaintiff's claim as disclosing no reasonable cause of action whether pursuant to O. 19, r. 28 of the Rules of the Superior Courts or otherwise. The second named defendant seeks similar relief. Identical motions have been brought in each of these two actions which have been heard jointly.

Order 25
2. Order 25 of the Rules of the Superior Courts provides as follows:-

> *"1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.*
>
> *2. If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just."*
>
> *3. These motions were brought by consent of the parties, the plaintiffs having indicated that they did not object*

to the trial of these issues as preliminary issues in their respective proceedings.

Background to the applications

4. The proceedings arise out the role of Mr. Bernard Madoff and Bernard Madoff Investments Securities LLC ("BLMIS") and/or companies controlled or affiliated to Mr. Madoff and BLMIS in respect of the assets of the sub-fund operated by the first named defendant ("Thema"). It is common case that Thema is an Irish investment company governed by the provisions of the Companies Acts and by the provisions of the European Communities (Undertaking For Collective Investments in Transferable Securities) Regulations 2003, as amended ("the Regulations"). The Regulations have been amended and subsequently replaced since the issuance of these proceedings but for the purposes of these proceedings and this application the relevant regulations are S.I. 211/2003. The Regulations transposed into Irish law the provisions of Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ("The Directive"). The Directive has been amended on a number of occasions; the most recent amendment to the UCITS Directive was made pursuant to Directive 2014/91/EU (UCITS V). For the purposes of these proceedings and this motion the relevant text is that of the first UCITS Directive as recast.

5. As it well known, Mr. Madoff operated an enormous ponzi scheme and on 13th December, 2008, by order of the United States District Court for the Southern District of New York all of the assets held by BLMIS were frozen and Mr. Irving H. Picard was appointed as trustee for the liquidation of BLMIS by further order of the U.S. Court of 15th December, 2008. The frozen assets included those of the Thema fund. Since his appointment, the Trustee has been engaged in worldwide litigation arising out of the liquidation of BLMIS. The Trustee has sued both of the defendants in courts in the United States. The case is still ongoing.

6. It is common case that the entire Thema fund has been lost as part of the Madoff fraud. These proceedings were instituted by the plaintiffs in June, 2009. The plaintiffs each claim that they were investors in the Thema fund though they accept that they are not shareholders in Thema. The plaintiffs further contend that as a consequence of their respective investments they are each a unit-holder in the Thema fund and that Thema and the second named defendant as a custodian of the Thema fund consequently owed them obligations which they each failed to meet.

7. Alico Life, the plaintiff in the first action, claims the notional value of its investments in the Thema fund of US$1,731,034.05 and €1,425,592.20 and further claims damages by way of missed opportunity and/or by way of reasonably assumed investment growth. Mr. Shmuel Harlap, the plaintiff in the second action, claims the notional value of his investment in the Thema fund of US$2,749,289.56 and €2,216,914.61 and further claims damages by way of missed opportunity and/or by way of reasonably assumed investment growth. These proceedings were effectively stayed to await the outcome of proceedings brought by Thema against the second named defendant in these proceedings, HTIE ("The Thema proceedings").

The defendants

8. Thema is an open ended investment company regulated by the Central Bank of Ireland in accordance with the Regulations and the Directive. It is an open ended investment company where investors invest by subscribing for shares and becoming shareholders and realise in their investment by the redemption of their shares. The investment company invests the money subscribed in accordance with the investment objective set out in the prospectus of the company. It is referred to a UCITS.

9. Pursuant to the Directive and the Regulations, Thema was required to appoint an appropriately qualified and supervised independent party for the safe keeping of its assets. In the Directive this party is referred to as the depositary and in the Regulations it is referred to as the trustee. Sometimes it is also referred to as the custodian. Initially Thema entered into a custody agreement dated 30th May, 1996, with Bermuda Trust (Dublin) Limited for the custody and safe keeping of the assets entrusted to Thema by its shareholders. Bermuda Trust (Dublin) Limited renamed itself HSBC Institutional Trust Services (Ireland) Limited (HTIE). HTIE entered into a sub custody agreement with Bank of Bermuda and Bank of Bermuda appointed BLMIS as sub custodian in respect of, inter alia, substantially all of the assets of the Thema fund. Ultimately HTIE entered into a sub custody arrangement directly with BLMIS. The principal obligation of HTIE as the depositary of the assets in the Thema fund was to hold the assets and to comply with the obligations set out in the Directive and the Regulations as discussed more fully below. On the last dealing day for the Thema fund, 28th November, 2008, the net asset value of the Thema fund amounted to a combined value of €483,144,279.24 (Euro class) and US$498,799,662.15 (Dollar class) totalling US$1,122,055,700. This was all lost, or possibly, may never have truly existed, as a result of the fraud.

The Thema proceedings

10. In December, 2008 Thema issued proceedings against HTIE arising from the Madoff fraud. Thema alleged various wrongs by HTIE and its agents including breaches of the UCITS Regulations, breach of contract, breach of fiduciary duty and tortious breaches. Thema sought the return of the net asset value of the Thema fund on the last dealing day prior to the order of the U.S. Court freezing the assets held by BLMIS. HTIE fully defended the Thema proceedings. They progressed over a number of years with approximately 20 interlocutory applications brought by the parties and over 36 orders were made by the court during those proceedings. The discovery process in the Thema proceedings took almost three years. The trial commenced on 30th April, 2013, and ran for approximately four weeks. The proceedings were adjourned on 29th May, 2013, and on that date Thema and HTIE entered into a conditional settlement. The settlement of the proceedings was conditional upon, *inter alia,* Thema obtaining shareholder approval for the terms of the settlement at an extraordinary general meeting ("EGM") to be held within a specified period of time. Thema informed its shareholders of the proposed terms of settlement and of the EGM to be held to consider whether or not to accept the settlement terms. At the EGM on 23rd July, 2013, 99.47% of the votes cast accepted the settlement. Following the approval of the settlement terms, HTIE remitted the settlement monies to Thema and thereafter the Thema proceedings were struck out.

11. Since receipt of the settlement monies, Thema has engaged with the trustee of BLMIS in order to resolve a complaint lodged by him in the US Courts against various defendants including the defendants in these proceedings. Pending the determination of the trustee's, claim, Thema has not distributed the settlement monies to its shareholders.

The test applicable

12. The first issue between the parties was the basis the Court should approach the applications. The plaintiffs argued that the motions in effect were applications to strike out the proceedings in their entirety on the basis that they disclose no reasonable cause of action. Therefore the court should approach the application on the basis of an application to strike out the proceedings and the principles laid down in *Barry v. Buckley* [1981] I.R. 306 and *Sun Fat Chan v. Osseosus Ltd*. [1992] 1 I.R. 425. In advancing their cases, the defendants were each conceding that they were not in fact seeking the alternative relief based upon O. 19 and the inherent jurisdiction of the court set out in their respective notices of motion and I have proceeded to deal solely with the two reliefs sought pursuant to O. 25 of the Rules of the Superior Courts. The defendants submitted that the strike out jurisprudence did not

apply to applications brought pursuant to O. 25. I agree with the submissions of the defendants. Order 25 motions take the form of the full hearing of a point of law on the basis of agreed or uncontested facts and a final disposing of the argument prior to the trial of the action. It does not necessarily involve the disposal of the action itself, though frequently a successful application by a defendant under O. 25 will have that result. It is essentially a different type of application to those brought pursuant to O. 19 or the inherent jurisdiction of the courts and the fact that the two distinct applications may frequently result in identical outcomes should not obscure the fact that they are fundamentally different and involve different considerations by the court in determining the motions. It is telling that the plaintiffs did not refer any authority where an application pursuant to O. 25 was dealt with on the basis of the jurisprudence applicable to strike out applications. That being so, it seems to me that the correct approach of the court is to adopt the same standard that would apply to any issue at the trial: the balance of probabilities.

The first relief

13. Central to the issue for decision in this case is the meaning of "*unit-holder*" in the Directive and the Regulations. As it derives from a directive of the European Union it is necessary to give the terms an autonomous interpretation. It is also necessary to have regard to the principle of legal certainty in construing both the Directive and the Regulations. When construing the Regulations implementing the Directive they should be construed in accordance with the ordinary principles of construction of statutes under Irish Law. However, as it was pointed out by Clarke J. in *Aforge Finance SAS & Ors v. HSBC Institutional Trust Services (Ireland) Ltd.* [2011] IEHC 6 at para. 5.15:-

> *"implementing measures must be specific, precise and clear so as to satisfy the need for legal certainty. In other words, persons (including persons from other member states) should be able to ascertain the extent of their legal rights with precision and clarity".*

14. It is also then necessary to take into account the purpose of the underlying Directive and to ensure that the construction of the Regulations is in accordance with the underlying purpose of the Directive. This purposive interpretation should be exercised with caution. As Clarke J. stated in *Aforge* at para. 5.20:-

> *"the requirement for legal certainty in implementing measures means that a court in a member state should be slow to bring in, by the back door as it were, the whole series of imprecise rights and obligations, into a measure designed to harmonise the position across the European Union."*

The Directive

15. The Directive does not define the term "*unit*" or the term "*unit-holder*". Article 1 of the Directive provides as follows:-

> *"1. The Member States shall apply this Directive to undertakings for collective investment in transferable securities (hereinafter referred to as UCITS) situated within their territories.*
>
> *2. For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:*
>
> *-the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and*
>
> *-the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.*
>
> *3. Such undertakings may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies)."*

16. It is clear there are two central requirements of a UCITS. The first is that it is an undertaking the sole object of which is the collective investment in transferable securities of capital raised from the public. The second is that the units of the UCITS are capable of being redeemed or repurchased, directly or indirectly, out of the undertaking's assets at the request of the unit-holder.

17. The other point which emerges from Article 1 of the Directive is that UCITS may take three distinct different legal forms. There may be common funds managed by management companies, in which case the assets are owned directly by the unit-holders; there may be unit trusts, in which case the assets are legally held by a trustee and the unit-holders have a beneficial interest in the assets of the undertaking; and thirdly, there may be investment companies. It is the latter form which is at issue in these cases. The Directive governs all three types of UCITS. This means that the meaning attributed to a unit in a UCITS and a unit-holder must be sufficiently flexible to reflect the three different legal forms a UCITS can take. Some of the provisions of the Directive apply to all types of UCITS and some provisions relate to specific UCITS structures.

18. A central feature of UCITS is that the assets of the UCITS fund are held separately from the fund by a depositary for safe keeping. The Directive sets out the duties and functions of the depositary in relation to the UCITS. They are considered in detail below.

19. Section IV of the Directive sets out the provisions relating to UCITS that take the form of investment companies. Article 12 provides that the member states determine the legal form which an investment company must take. Article 4 requires that a UCITS be authorised by the competent authorities of the member state in which it is situated. Article 4(2) requires:-

> *"[a]n investment company shall be authorized only if the competent authorities have approved both its instruments of incorporation and the choice of depositary".*

Article 14(3) requires that the depositary:-

> *"ensure(s) that the sale, issue, re-purchase, redemption and cancellation of units effected by or on behalf of a company are carried out in accordance with the law and with the company's instruments of incorporation*". [Emphasis added]

Article 37 mandates:-

> *"[a] UCITS must re-purchase or redeem its units at the request of any unit-holder."*

Article 17(2) states:-

> *"[i]n carrying out its role as depositary, the depositary must act solely in the interests of the unit-holders."*

20. Throughout the Directive, with the exception of Section VI, the Directive uses the terms units and unit-holders rather than investors. This is striking as a UCITS is a collective investment undertaking, the sole object of which is the collective investment in transferable securities of capital raised from the public (and which operates on the principle of risk spreading). It is only in the context of the obligations concerning information to be supplied to unit-holders that the term investors is used. Article 27 imposes an obligation on an investment company and, for each of the trusts its manages, on a management company, to publish a prospectus and to publish an annual report for each financial year and a half-yearly report covering the first six months of the financial year.

Article 28 provides as follows:-

> *"1. A prospectus must include the information necessary for investors to be able to make an informed judgement of the investment proposed to them. It shall contain at least the information provided for in Schedule A annexed to this Directive, insofar as that information does not already appear in the documents annexed to the prospectus in accordance with Article 29 (1).*
>
> *2. The annual report must include a balance-sheet or a statement of assets and liabilities, a detailed income and expenditure account for the financial year, a report on the activities of the financial year and the other information provided for in Schedule B annexed to this Directive, as well as any significant information which will enable investors to make an informed judgement on the development of the activities of the UCITS and its results.*
>
> *3. The half-yearly report must include at least the information provided for in Chapters I to IV of Schedule B annexed to this Directive; where a UCITS has paid or proposes to pay an interim dividend, the figures must indicate the results after tax for the half-year concerned and the interim dividend paid or proposed."*

The Regulations
21. The Directive was transposed into Irish Law by S.I. 211/2003 – European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2003. The Regulations contain definitions in which are not found in the Directive. The three types of UCITS are defined:-

> *"'common contractual fund' means a collective investment undertaking being an unincorporated body established by a management company under which the participants by contractual arrangement participate and share in the property of the collective investment undertaking as co-owners;…*
>
> *'unit trust' means a collective investment undertaking under which the property in question is held on trust for the participants;…*
>
> *'investment company with variable capital' means a company so referred to in Regulation 3(3);…*
>
> *3.… (3) Such undertakings may be constituted as—…*
>
> *(c) investment companies with variable capital whose articles provide that—*
>
> *(i) the amount of the paid up share capital of the company shall at all times be equal to the net asset value of the company, and*
>
> *(ii) the shares of the company shall have no par value".*

The Regulations thus mirror the three types of UCITS recognised and authorised in the Directive.

The Regulations also define "*unit*" and "*unit-holder":-*

> *"'unit' includes a share and any other instrument granting an entitlement to share in the investments or relevant income of a collective investment undertaking;*
>
> *'unit-holder' means, in relation to a collective investment undertaking 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 investments or relevant income of the undertaking".*

These definitions must apply to the three types of UCITS. Where the UCITS is an investment company with variable capital (as in this case) the company must be registered as a public limited company. Regulation 11 requires that an investment company should be authorised only if the Central Bank has approved its Memorandum and Articles of Association. Regulation 35 disapplies certain provisions of the Companies Acts from investment companies with variable capital which would otherwise prevent the investment company from functioning effectively as a UCITS and in accordance with the requirements of the Directive.

22. A number of additional critical terms are defined in the Regulations. "*Issue*" is defined as meaning "*the sale of units or shares by a management company or investment company", "'repurchase' means the purchase of shares by a management company or investment company" and "'redemption' means the purchase of units or shares from a holder by a management company or investment company".*

23. In the Regulations, the depositary is referred to as the trustee. Regulation 37 requires that the assets of an investment company be entrusted to a trustee for safe keeping in accordance with the Regulations. The obligations of the trustee are set out, *inter alia, in* reg. 39. Regulation 39(a) provides:-

> *"[t]he Trustee must—*
>
> *(a) ensure that the sale, issue, repurchase, redemption and cancellation of shares effected by or on behalf of a*

company are carried out in accordance with these Regulations and with the company's memorandum and articles". [Emphasis added]

24. Regulation 39(d) requires the trustee to inquire into the conduct of the investment company in each annual period and report thereon to the shareholders. Regulation 44(2) states:-

"[i]n carrying out its role as trustee, the trustee must act solely in the interests of the unit-holders."

25. One of the central regulations from the point of view of this case is reg. 43 which provides as follows:-

"[t]he 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."

26. In Part IX, the Regulations refer to investors. As with the Directive, it is in the context of the provision of information in the prospectus to be issued by the management company or investment company and the publication of annual and half yearly reports. Regulation 74(2) requires that a prospectus shall include certain information "*necessary for investors to be able to make an informed judgement of the investment proposed to them*". Regulation 76 requires that the prospectus be offered to investors free of charge before the conclusion of a contract. Regulation 79 requires that the annual report includes certain information "*as well as any significant information which will enable investors to make an informed judgement on the development of the activities of the UCITS and its results.*" Regulation 82 then provides:-

"[t]he latest annual report and any subsequent half-yearly report published must be offered to investors free of charge before the conclusion of a contract."

Regulation 83 requires that the annual and half-yearly reports be available to the public at the places specified in the prospectus.

27. There is a separate regulation dealing with the provision of the annual and half-yearly reports to unit-holders. Thus, the Regulations make a distinction between the provision of information to investors and the provision of information to unit-holders.

28. Other relevant regulations are reg. 59 and reg. 106. Regulation 59 states that:-

"[s]ubject to Regulation 63(1), (2) and (3), a UCITS must redeem or repurchase units at the request of the unit-holder."

29. Units are to be issued or sold at a price arrived at by dividing the net asset value of the UCITS by the number of units outstanding and the units are to be redeemed or repurchased at a price arrived at by dividing the net asset value of the UCITS by the number of units outstanding (Regulations 60(1) and 61).

30. Regulation 104 confers power on the Central Bank to issue directions in writing to the management company, investment company or trustee, where the Bank is of the opinion that it is in the public interest so to do, or in the interests of the orderly and proper regulation of the UCITS. Regulation 104(2) provides:-

"[w]here a direction under paragraph (1) affects an individual UCITS, that UCITS shall immediately notify its unit-holders of the terms of the direction."

31. This provision is designed to deal with situations where grave difficulties in relation to a UCITS or UCITS generally have come to the attention of the Regulator. The importance of the Regulation is reflected in the requirement to notify the unit-holders of the terms of the direction "*immediately*". Furthermore, reg. 106 states that an investment company which contravened any provisions of these Regulations is guilty of an offence. This would include the failure immediately to notify unit-holders of any direction issued by the Regulator pursuant to reg. 104.

Prospectus

32. The prospectus constitutes the offer by the UCITS to retail investors. In conjunction with the Directive and the Regulations it governs the basis upon which they will invest in the UCITS together with its constitutional documents. It sets out the procedure whereby shares may be issued and redeemed. Page 7 of Thema's prospectus provides:-

"[e]very Shareholder will have the right to require the Company to redeem his Shares in the Thema Fund on any Dealing Day…on furnishing to the Administrator a redemption request. Shares may be redeemed only by written application through the Administrator." [Emphasis added]

33. At p. 8 of the prospectus, it states that:-

"[a]pplicants should provide the following information when redeeming and where there is more than one registered Shareholder, the redemption request must be signed by all Shareholders:-

1. full name and address of the Shareholder(s) making the redemption;

2. the number of Shares or amount of Thema Fund to be redeemed;

3. whether Shares were issued with or without certificate(s) (if Shares were issued in certified form, the certificate(s) must be enclosed);

4. details as to whom payment should be made (unless the predesignated instructions provided on the application form have been completed)." [Emphasis added]

It is thus clear that only the registered shareholder may request the redemption of shares in the Thema fund.

Memorandum and Articles of Association of Thema

34. The Articles of Association define a member and define a shareholder. A member is a person who is registered as the holder of shares or subscriber shares in the register of members for the time being kept by the company. A shareholder is the registered holder of a share of any class "and does not include any individual or entity for whose account the registered holder purchases Shares."

Article 9 of the Articles of Association provides as follows:-

> *"Trusts Not Recognised*
>
> *Except as required by law, no person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or (except only as by these Articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder. This shall not preclude the Company from requiring a Member or a transferee of shares to furnish the Company with information as to the beneficial ownership of any share when such information is reasonably required by the Company."*

35. These provisions are consistent with the provisions of s. 123 of the Companies Act 1963, which provides that no notice of any trust, express, implied or constructed, shall be entered on the register or receivable by the registrar. Section 123 of the Companies Act applies to investment company UCITS as it is not one of the sections which is disapplied in the case of investment company UCITS. Article 20 provides that a redemption request can only be made by the holder of participating shares. Upon a winding up of the company, the assets available for distribution among the members shall be applied to the members of the company (reg. 124), i.e. the registered shareholders.

Submissions of the parties

36. The plaintiffs argued that the Directive is primarily concerned with private retail investors. It regulates undertakings which raised capital from the public for investment in transferable securities. The protections set out in the Directive are designed to protect the investors who put up the capital. They are not directed towards nominee shareholders. The Directive should be given a purposive interpretation so that unit-holder should be interpreted as referring to the retail investor. Article 16 of the Directive and reg. 43 of the Regulations imposes a liability on the depositary/trustee to both the investment company and the unit-holders for loss suffered by either of them arising out of its failure to perform its functions as depositary to safeguard the assets of the UCITS. As it is the retail investor who would actually suffer the loss in such a case, the cause of action must extend to parties such as the plaintiffs who are beneficially entitled to the units in the UCITS and unit-holder must be construed accordingly to include indirect investors in the UCITS.

37. The defendants submitted that where the UCITS is an investment company, a unit in a UCITS is the equivalent of a share in the investment company and a unit-holder is a registered shareholder. This follows from the provisions of the Directive and the Regulations cited above. They argued that it is absolutely essential that there be clarity as to who is the unit-holder. The arguments advanced by the plaintiffs inevitably lead to the conclusion that there can be layers of owners of units in a UCITS and thus of unit-holders. In the absence of clarity on the fundamental point of the identity of the unit-holder it would be impossible for the depositary or the UCITS to carry out their respective functions and obligations. The defendants said that as it is common case that neither of the plaintiffs is a registered shareholder of Thema it follows that the plaintiffs cannot be unit-holders within either the meaning of the Regulations or the Directive. They also point out that the construction contended for by the plaintiffs is completely incompatible with the terms of the prospectus and the Articles of Association. The Articles of Association expressly preclude the Company from recognising any person as holding a share upon trust. Thema must abide by the terms of the Articles of Association and HTIE is bound to ensure that Thema carries out the sale, issue, repurchase, redemption and cancellation of shares in accordance with law and the Regulations and the Memorandum and Articles of Association. As such, they are precluded from recognising anyone other than the registered shareholders as the unit-holder.

The meaning of the "unit" in a UCITS

38. Thema is an investment company UCITS and I am satisfied that a share in this type of UCITS is to be equated with a share in the company. The investment is effected by issuing shares and it is realised by redeeming or repurchasing shares. The Regulations (reg. 3(3)) refer to the par value of the share and this can only be construed as referring to shares in a company. The regulation refers to voting rights which again can only attach to the shares in the company. The definition of unit in the Regulations includes "*a share and any other instrument granting an entitlement to share in the investments or relevant income of a collective investment undertaking".* This definition covers all three types of UCITS and it refers to a share in the technical sense in the respect of a unit in an investment company type UCITS in the first part of the definition. The second part of the definition, "*any other instrument granting an entitlement to share in the investments or relevant income of a collective investment undertaking"*, refers to the instrument provided in respect of the other two types of UCITS. The plaintiffs have not identified any other instrument in respect of an investment company that grants them an entitlement to share in the investment or income of Thema other than a share. Any argument that the second part of the definition applied to an investment company would require that it be possible to invest in units in an investment company UCITS either by way of purchasing shares in the investment company or by way of some other unspecified instrument. This would be contrary to the terms of the prospectus of Thema and its Articles of Association. Therefore, I conclude that a unit in an investment company UCITS is to be equated with a share in the company.

39. This conclusion is in line with the Van Damme Report, a commentary prepared in 1988 by the Commission of the European Union on the Directive entitled "Towards a European Market for the Undertakings for Collective Investment in Transferable Securities". The report stated that *"[in] an investment company constituted under statute, the assets are the property of the company, and instead of unit-holders there are shareholders, who are the joint owners of the company". The report also stated at p. 4 that "the term 'units' is taken to include shares in the case of investment companies".*

40. The Irish regulator issued notices in respect of UCITS. In the notices issued by the regulator, "*units*" and "*unit-holder*" are defined as follows:-

> *"[u]nits: This term applies to shares of an investment company and units of a unit trust or a common contractual fund. Unitholder: This term applies to a shareholder in the case of an investment company, a participant in the common contractual fund and a unit-holder in the case of unit trust."*

While neither the Van Damme Report nor the notices are legally binding, they are issued by experts at European and national level setting out their understanding of the terms. In the case of the notices, they represent the information given to all retail investors by the regulator responsible for approving the Memorandum and Articles of Association of Thema and the prospectus issued by Thema to the public. They spelt out in very clear terms that a unit in an investment company such as Thema was a share in Thema (and that a unit-holder was a shareholder).

41. Applying the ordinary cannons of statutory interpretation to the definition of "*unit*" in the Regulations, I accept that the units in an investment company are the shares in that company. Any other construction would fail to give effect to the overall scheme of the

Directive and the Regulations in respect of investment company UCITS and any other interpretation would fail to recognise the fact that the term has to be given an autonomous interpretation and would offend the principle of legal certainty. During the course of argument, counsel for the plaintiffs accepted that a unit was to be equated with a share in the investment company.

Are the plaintiffs unit-holders in Thema?

42. It is common case that neither of the plaintiffs are registered shareholders in Thema. The defendants argue that as a unit in the UCITS is to be equated with a share in the investment company that therefore the unit-holder must be equated with shareholder. They submit that it is not permissible to look behind the share register of shareholders to identify a unit-holder. It is specifically prohibited by the terms of the Articles of Association which provide that a shareholder does not include any individual or entity for whose account the registered shareholder purchased shares. Thema is obliged to operate in accordance with law and the depositary is obliged to ensure that the fund is operated in accordance with law. This means that they each must abide by the terms of the Articles of Association and beneficial interests cannot be registered on the register of shareholders. They point out that they have no knowledge of the persons who may be beneficially interested in the units. Therefore, they asked, "*how could they perform their functions if they could not even identify a unit-holder?"* They could not notify unit-holders of the terms of any direction issued by the Central Bank as required by reg. 104. They could not hold properly constituted AGMs or EGMs. Critically, the essential feature of a UCITS, the repurchase or redemption of units, may only be carried out at the request in writing of a shareholder. Regulation 33 expressly states that only a registered shareholder may request that the shares be redeemed. The prospectus states that "*[e]very Shareholder will have the right to require the company to redeem his Shares"*. Regulation 39 obliges the depositary to ensure that the repurchase or redemption is carried out in accordance with the Companies Act and the Memorandum and Articles of Association of the company. As the Articles of Association prohibit the recognition of beneficial interests in shares and expressly requires the instruction to redeem shares to be in writing from the registered shareholder, this obligation requires the depositary to have regard solely to the instructions of the registered shareholders. The defendants each argue that the definition of unit-holder in the Regulations is a definition designed to encompass the three possible types of UCITS. The definition provides:-

> *"'unit-holder' means, in relation to a collective investment undertaking 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 investments or relevant income of the undertaking".*

The defendants argue that this means either the person who holds units in the undertaking or the person who invested capital in the undertaking. It does not and cannot mean both in respect of any one unit. They submit that the second part of the definition of unit-holder in the Regulations therefore must apply and can only apply to either common contractual fund UCITS or unit trust UCITS. It does not apply to investment company UCITS.

43. The plaintiffs submit that they were unit-holders within the meaning of the definition of the term in the Regulations. They argue that they had invested capital in the undertaking and that therefore they were unit-holders. They did not accept the construction of the Regulations advanced by the defendants. Specifically they argue that they could be unit-holders in an investment company UCITS where they invested capital in the undertaking even if they were not registered shareholders.

44. The plaintiffs accept that on the interpretation of the Directive and the Regulations they advance, more than one person could be a unit-holder in respect of any one unit. They submit that a nominee registered shareholder is the unit-holder for the purposes of administration of the UCITS but that for "*more substantive*" purposes the retail investor is also the unit-holder. In relation to these unidentified "*more substantive issues"* the UCITS and the depositary were obliged to have regard to the interests of the investors who were beneficially entitled to the shares registered in the name of nominee shareholders. They submit that this was essential in order to give effect to the purpose of the Directive to protect the interests of retail investors who provided the capital. It was argued that it was common place or usual for investors to hold investments indirectly through nominee companies, such as occurred in this case, or other indirect means. The purpose of the Directive would be defeated if the protections afforded to unit-holders were confined in the case of investment companies to registered shareholders.

Discussion

45. The plaintiffs' arguments involve ascribing different meanings to the term unit-holder to different articles in the Directive and different regulations in the Regulations. There is nothing in the Directive or the Regulations to support a dual interpretation of the meaning of the word unit-holder. Unless absolutely required by a compelling construction of the two instruments, such a result would offend the principle of legal certainty. In my opinion the construction of unit-holder advanced on behalf of the plaintiffs fails to meet with this fundamental principle of construction.

46. Secondly, the distinction between administrative matters and substantive issues, as contended by the plaintiffs, is not as clear cut as they suggest. For example, the right to vote at the EGM of Thema in relation to the conditional settlement of the Thema proceedings was a vital substantive matter affecting the value of the units of the unit-holders in Thema. Yet, upon the arguments advanced by the plaintiffs, it was their registered nominee shareholders who were entitled to attend at the EGM and to vote on the conditional settlement, not the persons whose capital was at risk.

47. Another instance where the dichotomy proposed by the plaintiffs could not operate in the manner suggested by the plaintiffs is in relation to notification of unit-holders of directions issued by the regulator. The UCITS is obliged immediately to notify its unit-holders of the terms of the direction. The requirement underscores the importance attached to such notifications. They could have great relevance to the decision whether or not to remain invested in the particular UCITS. In other words, as with the EGM, they are relevant to the central issue to invest or to realise the investment in the UCITS. On the plaintiffs' case, they would not be entitled to receive notice of these directions, while on the defendants' case, they could not comply with the requirement if it was not confined to registered shareholders as they would not even know the identity, let alone the addresses, of the persons they were required to notify.

48. This point is particularly grave as reg. 106 imposes a criminal liability on the investment company, the management company and the trustee (depositary) if they contravene any of the provisions of the Regulations. This would include a failure to notify all of the unit-holders of the UCITS of any direction that the regulator may give to the UCITS **immediately**, as required by reg. 104. This possible criminal offence introduces the principle against doubtful penalisation into the construction of the Regulation. In *Dunnes Stores v. Director of Consumer Affairs* [2006] 1 I.R. 355, Finlay Geoghegan J. stated at p. 361:-

> *"15 The last relevant principle of statutory interpretation is what counsel referred to as the presumption against doubtful penalisation or the obligation to construe a word in a penal statute strictly. In Inspector of Taxes v. Kiernan [1981] I.R. 117, Henchy J. at p. 122 expressed this rule in the following terms:-*
>
> *'Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness*

or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in Tuck & Sons v. Priester (1887) 19 Q.B.D. 629 (at p. 638); Lord Reid in Director of Public Prosecutions v. Ottewell [1970] A.C. 642 (at p. 649) and Lord Denning M.R. in Farrell v. Alexander [1975] 3 W.L.R. 642 (at pp. 650-1). As used in the statutory provisions in question here, the word "cattle" calls for such a strict construction.'

16 In Director of Public Prosecutions v. Tivoli Cinema Ltd. [1999] 2 I.R. 260, Barron J. in the Supreme Court at p. 268 explained the rationale for the principle:-

'The sections are penal sections in that they provide a criminal sanction. Accordingly, before a criminal sanction can be applied the defendant is entitled to know by clear and unambiguous language that such sanction will be applied in specified circumstances.'

17 I am satisfied that the definition of 'grocery goods' in art. 2 of the Order of 1987 must be considered to be words used in a penal statute. Article 11 of the Order of 1987 prohibits the selling below cost of grocery goods. Article 12 prohibits the advertising of grocery goods below cost. Those provisions are relevant to the facts giving rising to these proceedings. Section 20 of the Act of 1972 makes it an offence for a person to act in contravention of a provision of a grocery order."

49. The same principle applies to the construction of the Regulations and therefore they must be construed strictly. A strict construction of the Regulations requires that unit-holders in an investment company UCITS be equated with a registered shareholder or, perhaps more importantly, it precludes the more expansive and critically, imprecise, construction advanced by the plaintiffs.

50. Generally, the interpretation of unit-holders advanced by the plaintiffs introduces very considerable legal uncertainty into the operation of the Regulations. The depositary is obliged under reg. 39(c) to "*ensure that a company's income is applied in accordance with these Regulations and with its memorandum and articles".*

51. If the unregistered beneficial owner is the party entitled to the income (as they must be on the plaintiffs' argument if they are to be considered unit-holders), it would be impossible for the depositary to ensure that the income was paid to such a party of whose very existence the depositary (never mind the UCITS) would be unaware. This construction would result in the imposition of an obligation on the depositary which would be impossible to fulfil. I cannot accept that this is a correct construction of the Regulations.

52. Further, as I have identified above, both the Directive and the Regulations carefully distinguish between a unit-holder and an investor. This distinction must be respected and given effect even while accepting that the Directive and the Regulations are intended to provide protection to retail investors. If in fact there is no distinction between an investor and a unit-holder, as is implicit in the purposive interpretation advanced by the plaintiffs, then the distinction maintained in the Directive and the Regulations between the investor and unit-holder can have no meaning if in substance there is no such distinction.

53. The purposive interpretation contended for by the plaintiffs is predicated upon identifying a failure to protect the retail investor in a UCITS who invests via nominee shareholders. The lack of protection for a retail investor identified by the plaintiffs in argument arises not from the scope of the protection afforded to the retail investor by the Directive or the Regulations implementing the Directive but rather arises from the manner in which the plaintiffs have chosen to effect their respective investments in Thema. While it may well be the norm for retail investors not to invest directly in investment company UCITS, as contended by the plaintiffs, the provisions of the Directive and the Regulations do not reflect this reality, (a fact which has to some extent been recognised by the UCITS V amendments to the Directive). The discrepancy, if discrepancy there be, between the protection afforded to a unit-holder and an indirect investor arises not out of failure to protect investors under the provisions of the Directive and Regulations but rather arises out of the method in which the investor has chosen to hold his investment. If the investor chose to hold the shares directly and to become a registered shareholder, then there would be no deficiency in the protections afforded to the investor by the terms of the Directive and the Regulations. For these reasons I do not accept this argument either.

54. The plaintiffs' argument also fails to take account of the express provisions of s. 123 of the Companies Act, quoted above, or of the Articles of Association of Thema. A shareholder is defined as the registered holder of a share of any class and "*does not include any individual or entity for whose account the registered holder purchases shares".* Article 9 of the Articles of Association expressly precludes Thema from recognising any other rights in respect of any share except an absolute right to the entirety thereof in the holder of the share. The Memorandum and Articles of Association formed the basis on which the plaintiffs invested in Thema. The Articles of Association constitute a contract between the company and the members or the shareholders in this case by virtue of the provisions of s. 25 of the Companies Act. They are bound by the terms of the Articles of Association. The plaintiffs' argument flies in the face of the express terms they agreed to when investing in Thema, and they cannot now resile from those terms.

55. This principle has long been a feature of company law. The reasons for it are not hard to understand. They were best expressed as long ago as 1896 in *Rearden v. Provincial Bank* [1896] 1 I.R. 532 by Porter M.R. at p.567:-

"[i]t cannot be doubted that the intention was to spare the Company the responsibility of attending to any trusts or equities whatever attached to their shares, so that they might safely and securely deal with the person who is registered owner, and with him alone, recognising no other person and no different right; freeing them, in short, from all embarrassing inquiries into conflicting claims as to shares, transfers, calls, dividends, right to vote, and the like; and enabling them to treat the registered shareholder as owner of the shares for all purposes, without regard to contract as between himself and third persons."

56. Both the plaintiffs and the defendants relied upon the decision of Clarke J. in *Aforge Finance SAS & Ors v. HSBC Institutional Trust Services (Ireland) Ltd.,* referred to above, in support of their respective interpretations of a shareholder and a unit-holder in Thema. The issue is whether this decision alters my interpretation of the Directive and the Regulations. At para. 5.20, Clarke J. stated:-

"[h]owever, it seems to me that the requirement for legal certainty in implementing measures means that a court in a member state should be slow to bring in, by the back door as it were, a whole series of imprecise rights and obligations, into a measure designed to harmonise the position across the European Union. This should particularly be so where the relevant instruments have expressly dealt with the topic in question, in this case the duty to report. The situation might be different in circumstances where the relevant measures were silent in respect of a particular duty or obligation and where the court was called on to decide what remedies there might be as a matter of national law, for it is clear that the Directive leaves it up to national law to determine the types of remedies that might be available to an aggrieved party. However, where the Directive and/or the implementing

measure expressly addresses the parameters of a particular obligation, it seems to me that, irrespective of whether the relationship is to be regarded as one of trustee and beneficiary or not, a court should not ordinarily impose additional imprecise obligations under the same heading through the medium of a trustee/beneficiary relationship, which goes beyond the relevant obligations expressly set out in the statutory framework. In those circumstances, it does not seem to me that, even if a trustee/beneficiary relationship is said to exist between the parties, that obligation could carry with it a duty to account which went beyond the duties specified in reg. 39(d) insofar as the obligations of the depository/trustee are concerned."

57. If the Directive is silent, then it is a matter for national law to determine the types of remedies that might be available to any potential plaintiff. The national court ordinarily should not impose additional, imprecise obligations which go beyond the relevant obligations expressly set out in the statutory framework transposing the Directive. In the specific matter for the decision before him, Clarke J. concluded that the duty to account could not go beyond the express duties specified in reg. 39(d). Thus, where a regulation expressly covers an issue, even if there is a relationship of trustee/beneficiary, the duty of the trustee to the beneficiary should be limited to the scope of the obligation carefully set out in the Irish implementing measure.

58. I accept that this is the correct approach for this Court to adopt in construing the Directive and the Regulations and the duties and liabilities arising from the plaintiffs' investments. Article 16 of the Directive establishes the fundamental principle that a depositary (or trustee as it is referred to in the Regulations) shall be liable to the investment company and the unit-holders for loss suffered by them as a result of either its failure to perform its obligations or its improper performance of them.

59. National law of the member states regulates the scope and extent of the liability of a depositary. In the case of Ireland, the liability is transposed and regulated by reg. 43.

60. Thus, the relevant measures are not silent in respect of the existence of the obligations of the depositary. Both the Directive and the Regulations expressly cover the issue of the liability of the depositary to the investment company and the unit-holders. It is left up to national law to determine the types of remedies that might be available to a unit-holder. Specifically, the Directive imposes a liability on the part of the depositary to unit-holders. Article 16 does not impose liability in respect of investors.

61. The plaintiffs argue that reg. 43 imposes a liability on the trustee to the investment company and the unit-holders. They turn to the definition in the Regulations of a unit-holder and argue that the plaintiffs come with that definition as they invested capital in the undertaking and thus are entitled to the investments or relevant income of the undertaking. Further, they submit that the liability to unit-holders provided in Article 16 and reg. 43 is meaningless if it is confined to nominee registered shareholders and so unit-holder should be given a wide construction. The nominee shareholders have not invested the capital that is at risk and therefore will not suffer any loss. It follows, according to the plaintiffs, that unit-holder in the context of Article 16 and reg. 43 must be construed to include the retail investor who actually invested capital, albeit indirectly, and who in fact is the person who suffered the loss.

62. I have already concluded that the definition of unit-holder in the Regulations means a shareholder in the case of an investment company. Specifically, it does not mean the person who invested capital in the undertaking indirectly. I have rejected the argument that there can be more than one unit-holder in respect of any one unit in an investment company in the sense of a legal and a beneficial owner (though this is not to say that there cannot be co-ownership of units). Having rejected the argument that the plaintiffs fall within the definition of a unit-holder as defined in the Regulations, it follows that the plaintiffs do not fall within the scope of reg. 43. Therefore, the liability of the depositary/trustee to the investment company (Thema) and the unit-holders does not extend to the plaintiffs.

63. The construction of Article 16 and reg. 43 advanced by the plaintiffs inevitably requires the court to impose additional, imprecise obligations in respect of unknown investors which would be contrary to the principle of legal certainty and lead precisely to the result deprecated in *Aforge*. The argument does so in circumstances where the Directive and the implementing measures address the parameters of the liability of the depositary/trustee, thereby expressly limiting the liability to the investment company and the unit-holders.

64. This construction of reg. 43 and Article 16 does not deprive retail investors of the protection intended to be extended to them by Article 16 and reg. 43. Rather, retail investors who chose not to become unit-holders by becoming registered shareholders in the investment company must take other steps to ensure that their nominee who is the registered shareholder in respect of their ultimate investment acts on their behalf to secure the prospectus afforded by the Directive and the Regulations to unit-holders.

65. The plaintiffs relied upon the decision in Aforge to argue that a wide definition of the term shareholder should be adopted which included indirect investors such as the plaintiffs in this case. If the wider construction of the term shareholder were adopted, then they would be unit-holders in an investment company UCITS within the meaning ascribed to unit-holders in the Regulations under the first part of the definition. If they were unit-holders within the meaning of the Regulations then they were unit-holders for the purposes of reg. 43.

66. At paras. 5.26-5.28 of his judgment, Clarke J. stated that:-

"[t]here remains the question which arises from the fact that some of those involved in the argument in this case are not directly investors in Thema itself, but rather are entities which have an indirect interest in Thema in the sense that the relevant entities are the beneficial owners of investments in Thema held through an appropriate intermediary or trustee. In general terms, as has been pointed out, there was an issue in these proceedings as to whether such parties could have any entitlement to an account even if the direct investor in Thema had such an entitlement. However, on the basis of the analysis which I have already conducted, it seems to me that this question comes down to one as to whether such parties can be regarded as 'shareholders' in Thema for the purposes of reg 39(d). If they are shareholders, then they are clearly persons to whom HTIE has an obligation to report for the reasons which I have already set out. Having regard to the fact that an intention of the Directive as a whole is to ensure that information concerning UCITS funds should be readily available to the public on an open and transparent basis, then it seems to me that a wide definition of the term 'shareholder', as used in reg 39(d) should be adopted.

5.27 If information is made available to the shareholders in the ordinary way contemplated by the Directive (that is by the information being included in either a prospectus, annual report or half yearly report) then that information is also, under the terms of the Directive, to be made available generally to the public, through the availability of those reports, for the purposes of enabling those who might contemplate investing in the relevant fund to make an informed decision about their investment. As reg 39(d) contemplates that the ordinary way in *which a report on the matters set out in that Regulation will be made to the shareholders is by means of an annual report, then it follows that reg. 39(d) contemplates that the report of the depository/trustee will be come publicly available in the ordinary way by virtue of its inclusion in the annual report of the fund concerned. In those circumstances it seems to me that to impose a narrow definition on the term 'shareholder' in reg 39(d) would be inappropriate.*

5.28 Obviously, if the report of a depository/trustee is actually included in an annual report of the fund, then it hardly matters as to the persons to whom the report is expressly directed for that report would be publicly available in any event. On the other hand if, for some reason, the report of the depository/trustee, in accordance with reg 39(d), is not made available through the auspices of an annual report of the fund, and if, therefore, for the reasons which I have sought to analyse, there is an obligation on the depository/trustee to make such a report available directly to the shareholders, it would seem to me that that obligation must include one to make the report available to any person who reasonably appears to have a beneficial interest in an investment in the fund concerned. I base that view on a proper construction of reg 39(d) in the light of the general purpose of the Directive. That finding should not be taken as expressing any view, one way or the other, as to whether, if it should be determined that a depository/trustee owes fiduciary duties to an investor in a fund, those duties also apply to an indirect investor. That is an issue which may fall to be determined in the Madoff litigation generally."

The plaintiffs argue that this provides support for their submission that a shareholder includes a beneficial investor in the context of the Directive and the Regulations. If an indirect investor (such as the plaintiffs) was within the scope of the term shareholder for the purposes of the right to receive information based upon a purposive interpretation of the text of the Directive and the Regulations, then it must be within the scope of the term for the far more significant right to sue in respect of the total loss of the investment, as apposed to the less significant obligation to account.

67. In my opinion, the judgment of Clarke J. does not support the plaintiffs' submission and in fact the judgment is not of assistance in determining the issue before this Court. Clarke J. made it absolutely clear that the only issue of substance before him was the extent to which the depositary/trustee was obliged to account to the indirect investor in Thema. It is clear that Clarke J. construed the word shareholders in reg. 39(d) of the Regulations as including indirect investors because the information to be provided was precisely the information that was required to be made available to the public in the annual report of the company. The provision of information to potential investors is the one area in the Directive where reference is made to investors in contradistinction to unit-holders. It is to be noted that reg. 82 provides that the latest annual report and any subsequent half-yearly report published by a UCITS must be offered to investors free of charge before the conclusion of a contract. The reference therefore to "*the light of the general purpose of the Directive*" in his judgment refers to the provision of information by way of prospectus, annual report and half-yearly reports to potential investors in the UCITS. It is thus clear why he construed the word shareholder in reg. 39(d) as including indirect investors. This is not at all the same as holding that for all purposes a shareholder within the meaning of all of the Regulations includes an indirect investor. In my opinion to hold otherwise would be to cut across the careful distinction drawn in the Directive and the Regulations between unit-holders and investors and would introduce enormous legal uncertainty into the operation of the Directive and the Regulations for the reasons I have sought to analyse.

Conclusion on the first issue
68. Neither of the plaintiffs are unit-holders in Thema. Insofar as their claims are predicated upon being unit-holders in Thema therefore those claims are no longer maintainable.

69. In addition to the cause of action expressly grounded upon the Directive and the Regulations, the plaintiffs plead that the defendants, either or both of them, owed both a duty of care and a fiduciary duty to each of the plaintiffs in respect of the plaintiffs' investment in the Thema fund. They plead that there were breaches of contract, negligence, breaches of duty, breaches of fiduciary duty and breaches of statutory duty. The issue is whether or not any or all of these claims can survive the determination that neither of the plaintiffs are unit-holders within the meaning of the Directive and the Regulations.

70. In this regard it is important to bear in mind the observations of Clarke J. in *Aforge*, at para. 5.20, cited above, where he warned that a court in a member state should be slow to bring in by the back door a whole series of imprecise rights and obligations into a measure designed to harmonise the position across the European Union, particularly where the relevant instruments expressly deal with the topic in question and that a court should not impose additional imprecise obligations where the issue was addressed by the Directive regardless of whether described as fiduciary obligations or otherwise. The scope of the obligations and duties should be as defined by the Directive.

71. The relevant contracts in these cases are the contracts whereby the investments in the Thema fund were made. However the plaintiffs were not parties to the respective contracts. They are not the shareholders. While the prospectus may have been addressed to them as potential investors, they did not accept the offer set out in the prospectus: the offer was accepted by their nominees, albeit on their behalves. This does not create a contract between the plaintiffs and Thema, still less between the plaintiffs and HTIE. It is noteworthy that no contract is actually identified in the statement of claim despite the fact that damages for breach of contract is claimed. When pressed during argument, counsel for the plaintiffs was unable to identify any contract which could form the basis of the claim by the plaintiffs against either of the defendants. I am satisfied that the plaintiffs cannot maintain a separate claim for breach of contract against the defendants.

72. In view of the fact that neither of the plaintiffs is a unit-holder within the meaning of the Regulations (or the Directive) it follows that the claim for damages for breach of statutory duty is no longer maintainable.

73. The claims in negligence and for breach of fiduciary duty seem to me to introduce by the back door that series of imprecise rights and obligations which Clarke J. has indicated this Court should be slow to recognise into a measure designed to harmonise the position across the European Union. In his judgment in *Aforge*, he noted that even if HTIE owed fiduciary duties to the plaintiffs, this would not impose any obligations to account upon HTIE wider than those to be found in the Directive and the Regulations. It seems to me that this reasoning applies *a fortiori* when one considers the issue of the liability of a UCITS and/ a depositary to indirect investors. The whole architecture of the UCITS regime as set out in the Directive (and the subsequent amendments to the Directive) establishes a careful coherent legal framework designed to apply to all three types of UCITS across the entire European Union and which is to be given an autonomous interpretation. In those circumstances it seems to me that there is no scope for the recognition in one member state of causes of action which are not to be found within the terms of the Directive and the implementing measure (the Regulations). This means that any claim against the defendants in tort or for breach of a fiduciary duty which is not imposed by the Directive cannot be permitted in a member state and therefore these claims also cannot to be permitted ..

74. That being so, it seems to me that neither defendant owes any actionable duty to the plaintiffs in circumstances where the

plaintiff is not a unit-holder in Thema and accordingly the defendants are entitled to the relief sought on the first issue in the notices of motion.

The second issue
75. The plaintiffs' cases against the defendants are grounded upon the contention that they are each unit-holders in Thema and that they each have direct causes of action against both Thema and the depositary (HTIE). For the purposes of deciding on the second issue raised, I shall presume that the plaintiffs are unit-holders within the meaning of the Directive and the Regulations. I must then decide whether the rule in *Foss v Harbottle* applies to their claims and whether as a result they are precluded from bringing these claims. The same exercise must be applied in respect of the rule against reflective loss. Prior to considering these issues, assuming that the plaintiffs are unit-holders in the Thema fund, I must consider whether Article 16 creates a direct right of action by unit-holders against a depositary of an investment company UCITS. Secondly, does reg. 43, which transposes Article 16 into domestic law, create such cause of action?

Does Article 16 confer a right of action upon unit-holders?
76. HTIE submits that properly construed Article 16 does not confer a direct cause of action upon unit-holders. For ease of following the argument, I reproduce the text again:-

> *"[a] depositary 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."*

77. HTIE contrasts this with Article 9. Article 9 is concerned with contractual and unit trust UCITS whereas Article 16 is concerned with investment company UCITS. Article 9 provides:-

> *"[a] depositary shall, in accordance with the national law of the State in which the management company's registered office is situated, be liable to the management 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. Liability to unit-holders may be invoked either directly or indirectly through the management company, depending on the legal nature of the relationship between the depositary, the management company and the unit-holders."* [Emphasis added]

78. HTIE submitted that if Article 16 conferred a direct cause of action upon unit-holders then Article 9 would do likewise *based upon the same language*. If that were the case, there would be no need for the second sentence in Article 9. However, the second sentence had to be given a meaning. It could not simply be ignored. HTIE argued that the second sentence in Article 9 properly interpreted meant that unit-holders may sue directly if there is a legal relationship between the individual unit-holders and the depositary. Alternatively, the depositary is liable indirectly to the unit-holders, who may sue through the management company of the UCITS, if there is no direct relationship between the depositary and the unit-holder. HTIE submitted that Article 16 imposes liability on a depositary to the investment company and the unit-holders. But that does not mean that it creates a direct cause of action by the unit-holders against the depositary. The means by which the rights of unit-holders are to be vindicated are not prescribed by the Directive. Depositaries are to be liable "*in accordance with the national law of the State"*. Thus, the principle of liability is established by the Directive but no more. Article 16 does not create or require that member states create a direct cause of action by unit-holders against depositaries. It would be inconsistent for the court to construe Article 16 as creating a direct cause of action by unit-holders against a depositary when the same words in Article 9 clearly could not be so construed.

79. HTIE then compared the provisions of reg. 43 with reg. 21. Regulation 21 provides:-

> *"[t]he trustee shall be liable to the management 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. Liability to unit-holders may be invoked either directly or indirectly through the management company, depending on the legal nature of the relationship between the trustee, the management company and the unit-holders."*

80. Regulation 21 is concerned with unit trusts and common contractual funds. Regulation 43 is concerned with investment company UCITS. As with Article 9 in the Directive, reg. 21 includes the additional second sentence which is not to be found in Article 16 or reg. 43. If the construction thus advanced in relation to Article 16 is correct then reg. 43 likewise does not create a direct cause of action by unit-holders against a depositary.

81. I accept that the construction of Article 16 advanced by HTIE is correct. Article 16 does not create a direct cause of action by unit-holders in an investment company UCITS against a depositary. It follows that member states are not obliged to provide such a direct cause of action in implementing the Directive, though of course they are not prevented from creating such a cause of action if they see fit.

82. My conclusion accords with the decisions of the Courts of Luxembourg in *Luxalpha* (Luxembourg District Court 4th March 2010, Luxembourg Court of Appeal 15th July 2014 and Luxembourg Supreme Court 2nd July, 2015) which were cited in argument. In *Luxalpha*, the Luxembourg Courts held that the Directive does not "*recognise an express direct action against the depositary for the benefit of a shareholder of an investment company"* and it concluded that a shareholder in a investment company UCITS had no right of direct action against a depositary. The Supreme Court of Luxembourg was of the opinion that the matter was so clear that it was not necessary to refer the issue to CJEU for a decision on this issue. This court must give due weight to these decision of courts of another member state, bearing in mind that this is a harmonising measure which has to be given an autonomous meaning throughout the European Union.

83. The European Commission prepared a consultation paper on the UCITS Depositary Function and on the UCITS Managers' Remuneration dated 14th December, 2010. The authors considered the UCITS depositary liability regime and in particular the rights of UCITS holders action against the UCITS depositary. At p. 15, they state:-

"[a]nother important issue concerns the 'direct' or 'indirect' rights of the those who invest in UCITS to raise claims relating to the liabilities of depositaries. The UCITS Directive currently provides different regimes forUCITS investors depending on the legal form of the UCITS. Article 24 of the Directive currently states: ' liability to unit-holders may be invoked directly or indirectly through the management company, depending on the legal nature of the relationship between the depositary, the management company and the unit-holders.' [formerly Article 9]

> *This article has remained unchanged since 1985 and no similar provision exists for UCITS share-holders. However, it is viewed that UCITS unit-holders and UCITS share-holders should have the same rights regardless of the legal structure of*

the UCITS they invest in. This approach has already been adopted under the AIFM directive, where investors in the fund have the right to claim in relation to the liabilities of depositaries either directly or indirectly through the management company, irrespective of the legal form of the fund."[Emphasis added]

It is thus plain that the Commission authors were of the view that the Directive differentiated between unit-holders in unit trust and contractually managed UCITS on the one hand and investment company UCITS on the other hand in relation to causes of action against the depositary. The authors recommended that the UCITS Directive be amended and the UCITS V introduces a new Article 24(5) which states:-

"[u]nit-holders in the UCITS may invoke the liability of the depositary directly or indirectly through the management company or the investment company provided that this does not lead to a duplication of redress or to unequal treatment of the unit-holders"

UCITS V has not yet been implemented in the State. However, it is clear that it is intended to amend the provisions of Article 24 (formerly Article 16) by, inter alia, conferring a direct cause of action by unit-holders in investment company UCITS against depositaries. Such an amendment would not be necessary if the cause of action already existed under Article 16.

84. For these reasons, I am therefore satisfied that Article 16 does not create a direct cause of action by unit-holders against a depositary.

85. The Regulations are transposing the Directive into Irish law and reg. 43 mirrors the wording of Article 16 save for the omission of words "*in accordance with the national law of the State in which the investment company's registered office is situated*". In my opinion the omission of those words does not alter the inevitable conclusion that if Article 16 does not create a direct cause of action by unit-holders against the depositary then neither does reg. 43 as it copies the wording of the Directive.

86. Furthermore, if Article 16 does not require Ireland to grant a cause of action to a unit-holder in an investment company UCITS against a depositary, as I have held, then it is not open to the Minister to create such a cause of action by way of a statutory instrument. If the cause of action is not required to be created in order to fulfil Ireland's obligations properly to transpose the Directive into Irish law, then it may not be introduced by way of a statutory instrument. It has not been alleged that the Directive has been improperly transposed into Irish law by any party. This reinforces my conclusion that reg. 43 does not go beyond the scope of Article 16.

87. I therefore conclude that reg. 43 does not create a direct cause of action by a unit-holder against a depositary/trustee.

The rule in Foss v. Harbottle

88. The defendants each argue that the plaintiffs' cases are not maintainable as they offend the rule in *Foss v. Harbottle* (1843) 2 Hare 461. This is a well known and well established principle of company law. It was held in *O'Neill v. Ryan* [1993] I.L.R.M. 557 that the rule is concerned with answering the question of who is the proper plaintiff to bring an action in respect of the damage suffered by a company. The proper plaintiff is the company itself, unless the shareholder plaintiff falls into one of the four exceptions to the rule. As these are not relied on by the plaintiffs I shall not consider them any further. The plaintiffs rely on a possible fifth exception to the rule, in the interests of justice, which I shall consider below.

89. The plaintiffs argue that they invested in the Thema fund and had a right to redeem their shares in the Thema fund. They argue that the assets which were lost were the assets of the unit-holders rather than Thema's and therefore the rule in *Foss v. Harbottle* does not apply. They are suing on their own behalves for wrongs done to them. In the alternative, they argue that Article 16 and reg. 43 confers upon them a direct cause of action against the depositary and insofar as the rule in *Foss v. Harbottle* would bar them from bringing such a claim, the rule cannot be consistent with the Directive and therefore cannot be applied by a national court giving effect to a European measure. Further, if the rule would otherwise prevent them from maintaining their claims they assert that there is a fifth exception to the rule which permits a shareholder to sue in respect of damage caused to a company "*in the interests of justice".*

90. The defendants say that the assets lost belonged to Thema and therefore the damage was caused to Thema. Thema is the party entitled to sue in respect of the damage and it has sued in the Thema proceedings. It is the company's cause of action, not a shareholder's. Insofar as the plaintiffs sue in respect of the loss of the assets, it must be a derivative claim, as the assets are company assets. That being so, the proper plaintiff is the company, not a shareholder. Secondly, insofar as the plaintiffs say that the cause of action is not a derivative cause of action, but one which vests in them, the defendants accept that the rule in *Foss v. Harbottle* is not engaged but say nonetheless that the plaintiffs have no right to maintain the suits. They cannot have an individual cause of action as a shareholder as this is contrary to the principle of the distinction between a company and its shareholders. They rely upon the decision of the Supreme Court in *O'Neill v. Ryan.*

91. Neither the Directive nor the Regulations confer a right on a unit-holder to sue. Therefore the rule applies to an investment company UCITS as there is no requirement to disapply the rule in order to give effect to the Directive. Finally, they say that there is no case made out that the plaintiffs should maintain these proceedings "*in the interests of justice".*

92. In my opinion the plaintiffs' arguments do not stand up to scrutiny. The assets which were lost by the fraud were those of the company, Thema, and not those of the plaintiffs. The UCITS regime does not abolish the rule of *Salomon v. A Salomon & Co. Ltd.* [1897] A.C. 22. The case falls squarely within the decision of the Supreme Court in O'Neill v. Ryan. In that case Blayney J. quoted from the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204 at p. 224:-

> *"a personal action [by a shareholder] would subvert the rule in Foss v. Harbottle and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed upon them by the articles of association."*

93. It is clear that a shareholder may not sue in respect of alleged damage to his shareholding arising from damage to the company. It

is this principle, rather than the rule in *Foss v. Harbottle*, which bars the plaintiffs' claims in these cases. The plaintiffs argued that they enjoyed a personal right to sue for their losses based upon Article 16 of the Directive (and reg. 43) and this could not be denied to them by the application of a national rule of law such as the rule in *Foss v. Harbottle*. Blayney J . rejected similar arguments advanced in O'Neill v. Ryan, at p. 570, based upon European competition law as follows:-

> *"[i]n my opinion these submissions are not well-founded. They assume that what is preventing the plaintiff from having a cause of action is the rule in Foss v. Harbottle, and they contend that the rule should not be permitted to be an obstacle to the enforcement of a right which is claimed to be derived from directly applicable provisions of community law. But it is not the rule in Foss v. Harbottle which is preventing the plaintiff from having a cause of action. As I pointed out earlier in this judgment, the plaintiff's claim being for damage to his shareholding, and not for damage to the company, is wholly outside the rule. What is preventing the plaintiff from having a cause of action is the fact that a shareholder may not sue in respect of alleged damage to his shareholding resulting from damage to the company. Is there a requirement of community law that this clear principle should be disregarded and a cause of action given? In my opinion there is not.*
>
> *The plaintiff's submissions relied heavily on his having rights under directly applicable provisions of the community law, namely, Articles 85 and 86 of the EEC Treaty. There is no doubt that these provisions are directly applicable, and rights under them must be enforced by our courts, but the plaintiff has to establish that he has such rights and in my opinion he has not. If there has been a breach of Articles 85 and 86, the party which has suffered damages as a result is Ryanair. Quite clearly that company could bring proceedings claiming damages. But the plaintiff's position is no different from what it would be if the damage sustained by Ryanair had been caused by a tort or breach of statutory duty occurring in this country. He has no direct remedy against the party alleged to be guilty of the tort or of the breach of statutory duty. And under community law there is no obligation on our courts to create such a remedy."[Emphasis added]*

94. It is clear therefore that the plaintiffs have no right to sue for damage done to Thema. In fact they are not purporting to sue for such damage: they are claiming that they are suing for damage directly caused to them. However, I have concluded that the plaintiffs in fact have no cause of action in their own right against HTIE. There is no requirement of European law that the plaintiffs be given such a cause of action.as Article 16 does not create any such cause of action. It follows therefore that insofar as the rule in *Foss v. Harbottle* applies to the plaintiffs' claims, it is not inapplicable by reason of the requirements of complying with the provisions of European law.

95. Whether or not there is a fifth exception to the rule in *Foss v. Harbottle* which would permit a shareholder to bring a derivative action on behalf of the company where to do so would be "*in the interests of justice",* is an as yet unsettled question. This is not the case where this issue should be decided and I expressly decline to make any decision on the issue. The plaintiffs were quite clear that their claims are not derivative actions brought on behalf of the company. The exceptions to the rule in *Foss v. Harbottle* can only apply to derivative actions; they have no relevance to genuinely personal claims of shareholders. Therefore, the fifth exception, to the rule, if it exists, cannot avail the plaintiffs.

96. Even assuming for the purposes of this application that the plaintiffs are unit-holders in Thema they may not maintain a derivative claim in these proceedings by reason of the application of the rule in *Foss v. Harbottle*. Insofar as the claims advanced are personal claims and not derivative claims they may not maintain those claims for the reasons set out in O'Neill v. Ryan, cited above.

The rule against reflective loss

97. If I am incorrect in relation to each of the matters previously decided, it is nonetheless possible that the plaintiffs' cases are barred by an application of the rule against reflective loss.

98. Where a company suffers loss as a result of a wrong by a third party, a shareholder in the company may also suffer loss personally as a result: for example the value of his shares may be reduced as a result of the losses suffered by the company. If the loss would be made be good if the company were to pursue and enforce its rights of recovery against the wrong doer, the loss is referred to as reflective loss. However, a wrongdoer may owe a duty not only to the company but also to the shareholder. In an action for breach of the duty owed to him, the shareholder can recovery damages for his personal losses but not for loss which is reflective of the company's losses. The rule applies when a duty is owed both to a company and a shareholder in the company and both suffer loss as a result of wrongdoing by a third party. The issue is whether the loss is that of the company and whether the shareholder's loss is merely reflective of the loss of the company. If the shareholder's loss is merely reflective of the company's loss, the rule applies and the company's cause of action bars the shareholder's cause of action. If not, then the shareholder is free to maintain his own cause of action.

99. The rule was discussed in an article by Aherne in "The Rule against Shareholders' Recovery of Reflective Loss" (2005) 12(6) C.L.P. 163. The rationale is explained as follows:-

> *"[t]he central rationale articulated by the courts as underlying the rule against reflective loss is that the shareholder's loss is merely a reflection of the loss suffered by the company and that the shareholder's shares, which represent his right of participation in the company, remain intact and unaffected. That the Rule is not simply based on a policy decision to avoid the prospect of double recovery is clear from judicial confirmation of the rule's applicability to situations where the company could have claimed but chooses not to and to cases where a company settles its action for less than it may be worth."*

100. The rule applies (but is not confined to situations) where both the company and shareholder have causes of action but the shareholder seeks to recovery damages which reflect the loss of value to the shareholding. The rule was applied by the Supreme Court in *Madden v. Anglo Irish Bank Corporation plc* [2005] 1 I.R.L.M. 294. At pp. 303-304, Denham J. followed the decision of Lord Bingham in *Johnson v. Gore Wood & Co.* [2001] 2 W.L.R. 72 as follows:-

> *"[s]econdly, the applicant submitted that in certain situations an individual could take a personal action and that he fell within this category. He referred to Johnson v Gore Wood & Co [2001] 2 W.L.R. 72. There is no doubt but that in certain circumstances where a company has suffered loss and damage and a shareholder suffers a separate distinct personal loss, from that suffered by the company, he may sue personally. In Johnson v Gore Wood, Lord Bingham reviewed relevant authorities and held that these authorities support the following proposition at pp. 94-95:-*
>
> *'(1) Where a company suffers loss caused by breach of duty owed to it, only the company may sue in respect of*

that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from Prudential Assurance Co. Ltd. v Newman Industries Ltd (No. 2) [1982] Ch. 204, particularly at pp. 222-3, Heron International , particularly at pp. 261-2, George Fischer , particularly at pp. 266 and 270-271, Gerber and Stein v Blake , particularly at pp. 726-729.

(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. This is supported by Lee v Sheard [1956] 1 Q.B. 192, at pp. 195-6, George Fischer and Gerber .

(3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect of Lee v Sheard , at pp. 195-6, Heron International , particularly at p. 262, R.P. Howard, particularly at p. 123, Gerber and Stein v Blake , particularly at p. 726. I do not think the observations of Leggatt L.J. in Barings at p.435B and of the Court of Appeal of New Zealand in Christensen v Scott at p. 280, lines 25-35, can be reconciled with this statement of principle.

These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company has enforced its full rights against the party responsible, and whether (to use the language of Prudential Assurance Co. Ltd v Newman Industries Ltd (No. 2) [1982] Ch 204, at p. 223) the loss claimed is "merely a reflection of the loss suffered by the company." In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant.'

I would adopt and apply this analysis of the law. Thus it is necessary to make a close scrutiny of the pleadings, which in this case is the statement of claim. Such a scrutiny is necessary to see whether the claim would be made good if the company had enforced its full rights, and whether the loss suffered by the appellant is merely a reflection of the loss suffered by the company."

101. It is important to note that the rule applies to all causes of action and to all companies. The principle is absolute in its application and it is not a matter of judicial discretion per Lord Millet in *Johnson v. Gore Wood* at p. 121. The rule does not require that the causes of action be the same: merely that recovery sought (or which could be sought) must be the same. The test for determining whether the loss is reflective in nature is whether a full recovery by the company of its loss in an action against the wrong doer would provide a full redress for the loss suffered by the shareholder.

102. In Joffe and Ors, *Minority Shareholders: Law, Practice and Procedure* (5th ed., Oxford University Press, Oxford, 2015) at para. 3.110, the authors state:-

> *"[t]he no reflective loss principle is not concerned with barring causes of action as such, but with barring recovery of certain types of loss. Whether the cause of action lies in common law or equity, and whether the remedy lies in damages or restitution, makes no difference to the applicability of the principle. Thus the principle will apply not only to claims in respect of breach of contract or tort (even where the tort is intentional) but also to claims based on breach of fiduciary duty, including an account of profits".*

103. At paras. 3.127-3.128 they point out:-

> *"[t]he no reflective loss of principle applies equally where a wrongdoer causes loss to a company whose shares are held by the trustese of a settlement. Neither the trustees in whose the name the shares are registered, nor a beneficiary whose entitlement arises under the trust, can recover reflective losses from the wrongdoer…*
>
> *…The position is the same where the wrongdoer is not a third party but the trustee itself. (Shaker v Al-Bedrawi [2003] Ch 350)"*

104. In *Gardner v. Parker* [2005] B.C.C. 46, Neuberger L.J. held at p. 71:-

> *"[t]hus it appears clearly to have been determined in Shaker that, even when the claim is bought by a beneficiary against a trustee for breach of fiduciary duty, it can be barred by rule against reflective loss."*

105. The basis for the rule was explained by Lord Millet in Johnson v. Gore Wood at p. 121:-

> *"[t]he position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, insofar as this is measured by the diminution in value of his shareholding or loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be*

permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is a company which is allowed to recover to the exclusion of the shareholder."

106. The defendants argue that the rule applies no matter what view the Court takes of reg. 43 and it applies to all causes of action. It certainly applies to claims in tort and contract and to alleged breaches of a fiduciary duty. It applies to all companies including investment company UCITS. Accordingly it applies to the plaintiffs' entire cases. If the rule applies, there is no element of discretion. While the rule is designed to guard against double recovery, a shareholder cannot overcome the rule by waiving so much of his claim as has already been paid to the company in satisfaction of its claim. They refer to *Humberclyde Finance Group Ltd. v. Hicks* [2001] EWCH 700 (Ch). In that case Neuberger J. (as he then was) rejected the proposition that an agreement or a court order limiting the damages a successful shareholder could recover would obviate the danger of double recovery and thus avoid the mischief designed to be avoided by the rule. He pointed out at para. 40 that the speeches of Lord Bingham and Lord Millet in Johnson v. Gore Wood indicate that:-

"the rule that a shareholder cannot recover reflective loss is one of principle, and its seems to me that Mr Hicks cannot get round it by the sort of device proposed by [his counsel], even though that device has inherent practical attraction."

107. The plaintiffs did not argue that the loss they suffered as a result of the loss of the assets in the Thema fund was different to the loss suffered by Thema or, that if Thema had recovered 100% of the net asset value as of November, 2008 they would not have received full value for their claims. They accept that the rule applies following Madden but they argue that there is no Irish authority which requires that the principle applies where the company has compromised an action with a defendant whom the shareholder also wishes to sue. They argue in those circumstances it is open to the shareholders to pursue a claim against the defendant and that a double recovery will be avoided by permitting a shareholder plaintiff only to recover such damages as it may be awarded over and above those recovered by the company in compromising its claim. In this regard they ask the Court to follow the decision of the Court of Appeal in New Zealand in *Christensen v. Scott* [1996] 1 N.Z.L.R. 273 rather than *Johnson v. Gore Wood.*

108. The Christensens were potato farmers and they formed a company of which they were the directors and sole shareholders. The company employed the defendants to organise a lease by the company of a block of land for the growing of potatoes and to prepare the lease and to attend to other incidental legal matters. The professional advisers failed to obtain the written consent of a mortgagee to the lease and they did not lodge a caveat against the land to protect the company's interest. In the event, access to the crop was denied to the company and the plaintiffs were unable to harvest it. The company sued the defendants, and, through its liquidator, compromised the proceedings. The Christensens opposed the settlement, claiming that the amounts being paid were inadequate. They instituted their own proceedings arguing that the claim was brought in respect of the duties owed by the professional advisors to them personally and not to the company. At p. 280 Thomas J. held at lines 25-35:-

"[w]e consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiffs. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors.

In circumstances of this kind the possibility that the company and the member may seek to hold the same party liable for the same loss may pose a difficulty. Double recovery, of course, cannot be permitted. The problem does not arise in this case, however, as the company has chosen to settle its claim. Peat Marwick and McCaw Lewis accepted a compromise in the knowledge that Mr and Mrs Christensen's claim was outstanding. It may well be, as was acknowledged by Mr Pidgeon in the course of argument, that an allowance will need to be made for the amount already paid to the liquidator in settlement of the company's claim.

109. *Christensen v. Scott* was rejected in *Johnson v. Gore Wood*. The House of Lords held that the rule applied even if the company compromised its claim or failed to pursue its claim. Lord Millet pointed out on p. 125 that:-

"if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the company settles for less than it might have done…

…But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy consideration. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands."

110. I prefer the reasoning of Lord Millet in *Johnson v. Gore Wood* to that of Thomas J. in *Christensen v. Scott*. It is also important to note that the passage from the speech of Lord Bingham quoted with approval by Denham J. in *Madden v. Anglo Irish Bank* states that the observations of the Court of Appeal of New Zealand in Christensen v. Scott upon which the plaintiffs rely cannot be reconciled with his third statement of principle which she accepted as a correct statement of law. While the case made by the plaintiffs on these applications may not have been argued in *Madden*, nonetheless it is a judgment of the Supreme Court which rejects the decision now sought to be relied upon and therefore it is a judgment which I am bound to follow unless it can be distinguished.

111. I agree with the submissions of the defendants that there are sound policy reasons for the rule against the recovery of a reflective loss. The rule is not simply designed to prevent double recovery and to ensure that the interests of creditors are protected. That being so, demonstrating that there will be no double recovery or prejudice to creditors is not an answer to the application of the rule, as was argued by the plaintiffs.

112. The rule recognises the fact that the losses are those of the company and so it is for the company to sue to recover the loss. It is important from the perspective of corporate autonomy. It is for the company through its directors, or, as in this case, the company in general meeting, and not individual shareholders, to make decisions in relation to the affairs of the company. This is the basis upon

which they have invested in the company and it involves individual shareholders accepting the decisional architecture of the company. The rule clearly prevents a multiplicity of actions. The possibility of the multiplicity of actions in the Thema litigation is a most eloquent illustration of this justification for the rule. It protects against double recovery as discussed above. It is desirable as preventing unfairness as between shareholders. It clearly could be detrimental to the creditors of a company. For example, if shareholders were to recover prior to the company obtaining a decree or a settlement, the wrongdoer might not be in a position to pay the award or to offer a more substantial sum in settlement of the company's claim. This could result in damage to the creditors of the company to the benefit of the individual litigant shareholders.

113. Thema sued HTIE in the Thema proceedings for the loss of the assets of the Thema fund being the entire net asset value. In these cases each of the plaintiffs sue for their share of the net asset value. Their claimed loss is identical to the loss claimed by Thema and formed part of Thema's claim in the Thema proceedings. That being so, the claims are undoubtedly a reflective loss within the meaning of the rule. Insofar as the loss claimed is other than the Net Asset Value – loss of opportunity –the claims are dependant upon the principal claims. If the principal claims are not maintainable on the basis that the loss of assets claims are disallowed as offending the rule as reflective loss, then the dependent claims likewise cannot be maintained.

114. If I accepted that the plaintiffs' submissions were correct it means that the company, the registered shareholder and then the beneficial shareholder could all sue in respect of the same claim: the total or the proportionate share of the Net Asset Value. Each and every individual unit-holder could sue. Not only would it make it virtually impossible as a matter of practicality to compromise any action brought by any of the numerous possible plaintiffs, even if the cases proceeded to judgment, if an award less than 100% recovery was made, it would still be open to other plaintiffs to pursue proceedings up and until there was full recovery. This clearly would be unjust for a myriad of reasons.

115. The plaintiffs accepted that if they obtained judgment in these proceedings they would retain any award of damages for themselves alone. They would not distribute it pro rata between the other unit-holders in the Thema fund. That being so, the continuance of the litigation clearly must have the effect of preferring the plaintiffs over other investors (whether unit-holders or otherwise) in the Thema fund. It also, of course, has the effect of preferring the plaintiffs over the creditors of Thema and in particular the SIPC Trustee.

116. I am satisfied that the rule applies in the circumstances of this case. The fact that Thema compromised the Thema proceedings does not mean that the rule is inapplicable. The rule is a matter of principle and it cannot be circumvented by limiting any issues of double recovery as suggested by the defendants. There are sound policy reasons for applying the rule with which I am happy to concur. In my judgment, the loss in respect of which the plaintiff sues is reflective of the loss suffered by Thema. That being so, the rule applies to all of the causes of action set out in the two statements of claim and I hold that the claims of each of the plaintiffs are barred by an application of the rule.

117. I will hear the parties in relation to the form of order which should be made on the notices of motion in the light of this judgment.