Neutral Citation Number: [2011] IEHC 344

**THE HIGH COURT**

**COMMERCIAL**

**2008 10983 P**

**BETWEEN**

**THEMA INTERNATIONAL FUND PLC**

**PLAINTIFF**

**AND**

**HSBC INSTITUTIONAL TRUST SERVICES (IRELAND)**

**DEFENDANT**

**AND**

**THEMA ASSET MANAGEMENT LIMITED AND 2020 MEDICI AG**

**THIRD PARTIES**

**JUDGMENT of Mr. Justice Clarke delivered the 4th day of August, 2011**

**1. Introduction**

1.1 Curiously, in this judgment, I am not asked to rule on any questions of law or fact but rather to decide when it would be appropriate to rule on issues which may arise in these proceedings.

1.2 These proceedings are part of the general Madoff litigation which is being case managed together for the reasons set out in *Kalix Fund v. HSBC International Services (Ireland) Limited* [2009] IEHC 457. In this judgment, the parties are described and terms are used in the same manner as in *Kalix*. To bring matters up to date, it should be recorded that the case management of the proceedings linked as a result of the judgment in Kalix has proceeded at a pace so that it is now anticipated that the discovery process (which had proved problematic and, not surprisingly, lengthy) is expected to be completed in September. Pre-trial directions concerning the exchange of witness statements, the furnishing of written submissions and decisions concerning the form of trial (particularly whether and, if so, to what extent it should be modular) are expected to be made soon thereafter.

1.3 Into that general matrix a possible issue concerning the interaction with these proceedings of a case taken in the United States Federal Courts (Southern District of New York) has arisen. In accordance with US federal law, those proceedings (*Davis v. Benhasset et al* 09 Civ. 2558 (RMB)) comprise a class action in respect of which a settlement is proposed. It will be necessary to refer briefly to the process by which the settlement of a class action may be approved in due course. There is at least a possibility that should a final settlement of those proceedings be approved, some practical consequences might lie for the proceedings with which I am concerned in this jurisdiction. It is in that context that Thema has brought a motion before the court seeking to have the potential consequences for these proceedings of the approval of a settlement in the US class action decided sooner rather than later. Before turning to Thema's application, I wish to record my views on a matter of concern which, while not confined to this case, does arise in the context of these proceedings.

**2. A Matter of Concern**

2.1 The probability that an application to the Irish courts in these proceedings might be necessary arising out of relevant US proceedings first came to my attention when a letter was written by the solicitors acting on behalf of HTIE to the Court Registrar, which letter was passed on to me. There followed further correspondence between the parties which can, I think, be reasonably characterised as highly argumentative on the issues, which correspondence was also copied to the courts. I eventually requested that that process stop.

2.2 It has become a growing practice for solicitors acting for parties in cases before the courts (and, I would venture to suggest, in particular, the Commercial Court) to copy correspondence to the court. Some lay litigants have adopted the same course. It is important that I here distinguish between two different types of such communications.

2.3 First, it is, of course, the case that the papers properly before the court for any application pending are frequently required to be lodged in advance so that the judge can have an opportunity to read them in accordance with modern case progression practices. There is nothing at all, therefore, inappropriate (indeed, it is often required) that there be relevant communications associated with ensuring that all of the documentation properly before the court for any particular application has been filed and is available for reading by the judge. Sometimes that involves late correspondence where relevant documentation (such as replying affidavits or submissions) only arrives after the main documentation has been filed. Again, in the ordinary way, there is nothing wrong with such communications. I would only add one rider. Difficulties can arise where there is a known dispute between the parties as to whether such late filed documentation is to be properly admissible (for example, where one party proposes to file documents after a time limit imposed by the court). In those circumstances, care should be exercised that documents which may not ultimately be admitted are not brought to the court's attention until such time as there has been a proper decision as to whether the relevant documentation is to be admitted. There is nothing at all wrong (indeed, it is to be commended) in ensuring that all relevant documents are filed in a timely fashion. Where there is no disagreement as to what the boundaries of the relevant documentation may be, then no problem arises. However, parties should exercise care to ensure that only documents which are properly before the court are included. It should not be assumed that a party has a right to bring documents to the court's attention where there is at least an argument as to whether the document is properly before the court. Simply sending documents to the Court Registrar for the attention of the judge, without reaching agreement with the other side, is, in those circumstances not, in my view, proper practice.

2.4 In addition, it is obviously useful for the court to receive early information as to developments which may affect the court's process. The fact that there may be an application for an adjournment, whether on consent or otherwise, or any other information that might be useful for the court in planning its diary, should, of course, be communicated. Against that background, it is not surprising that a much greater degree of correspondence between solicitors acting on behalf of parties and the court has arisen in recent times. Most of that correspondence is connected to the entirely legitimate purposes to which I have referred.

2.5 However, there has, in my view, in recent times, grown up alongside that practice a tendency for parties to copy argumentative correspondence, about issues which may be due to come before the court, to the Registrar. It needs to be recalled that justice is, under the Constitution, to be administered in public, save in very limited circumstances. The materials which the court is entitled to take into account are those materials which are properly before the court and thus open to public examination. Where there is, for example, a motion before the court, then any affidavits relevant to that motion, together with exhibits and the like are, of course, properly before the court. However, argumentative correspondence about applications that might be brought or positions that might be adopted or complaints that might be made to the court, are not, in my view, properly brought to the attention of the court, at least in the absence of an agreement by all sides. It is, of course, the case that, in the ordinary way, modern case management frequently involves applications being dealt with in an informal way (that is, without the need to issue a formal motion) when the case comes before the court in the ordinary course of case management. It is obviously useful that any applications that are going to be made in that context are notified in advance by correspondence and, indeed, that the position of the parties on any such applications is explored and narrowed in correspondence before they are actually dealt with in court. In those circumstances, the sending, by agreement between both parties, of a file of correspondence which defines the issues likely to arise in an application to be made in the context of case management, is entirely helpful.

2.6 What is not, however, in my view, appropriate, is for one side to simply communicate to the court general complaints, intimations of possible applications in the future, positions that might be adopted or a whole host of other information, in the form of letters passing between the parties being copied to the court outside the context of either a specific court application in respect of which the documents are properly before the court, or an agreed set of documents which both sides are happy to have placed before the court as a means of defining and refining issues which are to come before the court in the ordinary way of case management. Conveying information useful to the court is one thing; copying the court with argumentative correspondence outside the confines which I have identified is another. If necessary, solicitors might consider including any necessary information in one document which could be copied to the court but keeping argument to a separate document which would only be included in court papers if and when it became appropriate to do so.

2.7 I would have to say that some of the correspondence copied to the court in this case (and, indeed, in some other cases in recent times) has come close to, if not beyond the limits of the boundary to which I have referred. I hope that these comments may be of assistance in ensuring that the court does not simply become another "*c.c.*" on correspondence passing between the parties, and that the court, in the exercise of its public role, has only brought to its attention matters that are properly before the court. Having made those brief comments, I now turn to Thema's application.

**3. Thema's Application**

3.1 In material part Thema seeks the following orders:-

> "1. Directions as to whether in the event that the Order sought by the Defendant, and related HSBC entities, approving the proposed partial settlement of United States District Court proceedings entitled Davis v. *Benhasset et al.* Case no. 09 Civ 2558 (RMB) ('the Proposed Settlement') is granted, the same would be recognised or enforced in the State.
>
> 2. An order confirm (sic) that the Plaintiff is at liberty to communicate directly with its shareholders in respect of the Proposed Settlement and all other matters relevant to the Thema Fund."

3.2 Both Kalix and UBI Banca (whom it will be recalled are individual investors in Thema who have maintained their own proceedings) applied to be joined as notice parties so as to be able to address the issues raised in Thema's application. Both filed written submissions in that context. In addition, Mr. Neville Seymour Davis ("Mr. Davis"), the lead plaintiff in the US proceedings, was likewise given notice party status.

3.3 However, when the matter came before me on Monday the 15th July last, there was a refinement in Thema's position. In order to understand the position which Thema now adopts it is necessary to say something about the process whereby a class action can be compromised or settled in the US federal system.

**4. The Settlement of a US Federal Class Action**

4.1 It is only necessary to give a brief outline of the process sufficient to identify the potential interaction of that process with the question which I now have to decide. As I understand it, a proposed settlement of a class action before the US Federal Courts goes through two main stages.

4.2 At the preliminary stage, a judge rules on whether the settlement is of a type which might, in a broad sense, be capable of meeting with approval ("preliminary approval"). If the judge is so satisfied, then various further decisions need to be made about the definition of the class, the service of notice on members of the class to give them an opportunity to be heard and on the contents of such notice together with other matters of detail connected with the process.

4.3 Thereafter, there is an approval or "fairness" hearing at which the merits of the settlement can be debated. As there is an extent to which parties may end up having their proceedings settled against their will, such parties have, of course, to be given an opportunity to argue against the settlement terms should they so wish.

4.4 In the context of the current proceedings, a partial settlement has been proposed and a decision as to whether it meets the initial test or criteria is expected to be made in early course. In that context, Judge Berman, who is handling the matter, conducted a case conference on the 21st July, 2011, for the purposes of exploring with the interested parties the terms of settlement proposed so as to better understand the reasons why certain terms were intended to be included. It is my understanding from counsel who appeared in the application before me that there is a possibility that, as a result of what transpired at that case conference, some adjustments may be made to the proposed settlement.

4.5 While, therefore, Thema's original application was that I should now consider the question of the extent to which the courts in Ireland would recognise or endorse the settlement if ultimately approved; the position later adopted by counsel for Thema on the 25th

July was that it was accepted that any consideration by me of the recognition or enforceability in Ireland of the terms of the proposed settlement should be deferred until after the US Court had decided whether to give preliminary approval to the settlement. Counsel for Kalix and UBI Banca broadly supported that position although a somewhat different argument (to which it will be necessary to return) was adopted by counsel for UBI Banca. Counsel for HTIE was supported by counsel for Mr. Davis in suggesting that the proper time for the courts in this jurisdiction to decide on the enforceability or otherwise of a settlement of the US proceedings was after the final fairness hearing had been conducted.

4.6 Thus, in practise, the choice is between holding a hearing on recognition after preliminary approval but before the fairness hearing as now proposed by Thema or after the fairness hearing as proposed at all times by HTIE. Against that background it is next necessary to turn to the reason why the US proceedings could have a bearing on the proceedings with which I am concerned.

**5. The Effect of the US Proceedings**

5.1 It is, of course, trite to state that the courts of any jurisdiction will consider whatever cases are properly brought before them provided that, in accordance with the private international law rules of the jurisdiction concerned, those courts are considered to have jurisdiction to deal with the relevant case. It is also trite to state that, in many cases, having regard to the comity of courts, courts in one jurisdiction will recognise a decision made in another jurisdiction and give full force and effect to it. The extent to which such recognition will be afforded will depend on the private international law of the country of recognition and whether the ruling of the court of judgment is recognised in accordance with those private international law principles. In passing it is important to note that the private international law of Ireland is increasingly the subject of harmonisation measures adopted by the European Union which have an effect on questions of jurisdiction and the applicable law such as, for example, the Brussels Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (as amended)) and the Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations).

5.2 Against that background it is, of course, the case that the US Federal Courts must deal with whatever cases US federal law gives them jurisdiction over. What happens in the US Federal Courts (or, indeed, in the context of this application, what might happen) is only of relevance to me if it is possible that orders made within those US proceedings could have an effect, as a matter of Irish law (incorporating, where relevant, EU law) on these proceedings.

5.3 In order to understand how that might be so, it is necessary to turn briefly to a consideration of at least the broad structure of certain aspects of what is currently proposed as a settlement of the US proceedings. If the settlement is approved, a significant sum of money will be made available by HTIE and related companies to the class of investors in Thema (subject to those who exclude themselves), provided the investor concerned files a valid proof of claim. Some of that money will be kept as a fighting fund to allow further proceedings to be progressed. Investors in Thema will be given an opportunity to opt into or out of the settlement. As I understand the terms of settlement as currently proposed, those who opt in and those who express no view would be taken to have assigned to HTIE, and related companies, their interests in any recovery by or benefit accruing to Thema or similar payments including recovery on foot of these proceedings.

5.4 It is in that context that a possible effect on the proceeding with which I am concerned arises. I should say that I do not see any great difficulty in the case of individual investors in Thema who either opt into or out of whatever settlement might ultimately be approved as a result of a fairness hearing in the US. Those who opt in will do so voluntary and presumably, on the basis that they consider what is on offer is, in all the circumstances, to their advantage. In respect of those who opt out, it has been clarified by the solicitors acting on behalf of HTIE in these proceedings and confirmed by counsel at the hearing before me that any party opting out of the settlement will be free to continue with their proceedings in Ireland in the ordinary way. While counsel for Kalix made some reference to a comment which I made in *Flightlease (Ireland) Limited (In Voluntary Liquidation) v Companies Acts* [2006] IEHC 193 concerning the fact that a party who becomes engaged in foreign proceedings might, thereby, be taken to submit to the jurisdiction of the foreign court, I do not believe that there is any real problem under that heading on the facts of this case. It is true that the common law, as it applies in Ireland, will normally regard a person who becomes involved in foreign proceedings (save for the limited purpose of contesting jurisdiction) to have submitted to the jurisdiction of the foreign court concerned. Such a party will, therefore, ordinarily place themselves in a position where the Courts of Ireland will recognise the results of any such foreign proceedings by the rules of Irish private international law.

5.5 I find it difficult to see how simply filing an appropriate document rejecting a settlement could amount to the level of involvement such as would treat a party as having submitted to the jurisdiction of the court concerned. In any event, even if there were some doubt about the point, the position adopted by HTIE in this Court would now estop HTIE from adopting any other position in the future. A party who files the appropriate notice of rejection would have done so (and, therefore, changed their position) on the basis of an assurance that they would be entitled to continue with their Irish proceedings. I am sure that HTIE would not attempt to go back on the assurance already given but even if they were to try to do so, they would clearly be estopped. There does not, therefore, seem to me to be any problem for those who reject the settlement as they will be able to continue with their Irish proceedings as if nothing had happened in the US. Therefore, so far as those who either accept or reject the settlement, no real effect on the Irish proceedings exists except to the obvious extent that those who accept the settlement will have settled their claim against HTIE and to that extent their proceedings will, with their agreement, be compromised.

5.6 The potential problem arises in respect of those who express no view. It is important to recall that there has always been an issue in these cases as to the standing of the individual investors in Thema. It is clear that HTIE intends to argue that those individual investors do not have the standing to bring these proceedings because of the rule in *Foss v. Harbottle* (1843) 2 Hare 461. Whether the individual investors can get around the rule in *Foss v. Harbottle* (for example, by successfully arguing that the UCITS Regulation interpreted in the light of the UCITS Directive gives them a direct cause of action) is a matter to be decided. It is at least possible that the only proceedings which could properly be maintained in Ireland against HTIE are the Thema proceedings (in the event that HTIE succeeds in its argument about the individual investors). Thema is, of course, an Irish company but, because it is in substance a UCITS fund, it does not conform with some ordinary aspects of Irish company law. It is, in reality, a unitised investment vehicle. If Thema succeeds against HTIE in establishing liability, then the scale of Thema's recovery necessarily becomes an issue. That recovery may, if Thema succeeds on liability but HTIE wins on investor standing, be the only way in which investors may be compensated. There can be little doubt but that that issue has the potential to be complicated by a final settlement along the lines of that currently contemplated in the United States coming into place. Obviously, some investors in Thema may accept the settlement. In addition, others may express no view with the result that the deeming provisions of the settlement may come into play. The precise effect that either or both of those matters could have on the proper calculation of the damages to be payable to Thema by HTIE in the event that Thema should establish liability against HTIE, is a matter capable of some debate. That debate is only heightened by the possibility that there might then be an argument as to the extent to which it was appropriate for the Irish courts to recognise the settlement (most particularly in respect of those investors who did not indicate a view) so as to affect the

entitlement of those investors or recovery by Thema referable to the shareholding of such investors.

5.7 It is certainly possible that there are investors in Thema who have not commenced their own independent proceedings because they are either content that Thema will attempt to recover whatever can be recovered or have concerns about being involved (whether for reasons of cost or standing or both) in individual proceedings brought in their own names. It is at least possible to envisage circumstances, therefore, where it might be argued that an investor in Thema who did not participate one way or the other in the US process, could have their entitlement to recover in practise (that is through Thema) impaired if a settlement was recognised.

5.8 Obviously, the extent to which this may be a serious issue depends on a number of things. First, it depends on the form of the settlement itself. It was for that reason that it was accepted on all sides that it was better at least to await the outcome of the current preliminary process to see what terms (if any) are approved as a result of that process and which will, therefore, go out for consideration to the class.

5.9 However, two further matters seem to me to be essential pre-requisites to a US settlement having an effect on these proceedings. The first is that somebody (presumably HTIE) argues before the Irish courts that the settlement has some specific and identifiable effect on these proceedings. As things currently stand, these proceedings will progress in the ordinary way to trial (whether unitary or modular) and then to judgment. It is only if some party raises the question of the effect of a US settlement that that question will become an issue at all. It seems unlikely that any of the individual investors will raise the issue for if they have settled their proceedings then they can have no complaint and if they have not settled their proceedings it is, for the reasons which I have already set out, entirely open to them to continue with their Irish case unaffected by the US settlement.

5.10 As Thema seems strongly opposed to the US settlement and its recognition in Ireland, it seems highly unlikely that Thema will raise the question. As a matter of practicality it is, therefore, only HTIE that it likely to urge that a final US settlement has some effect on the Irish proceedings. That leads to the second prerequisite.

5.11 The problem is that HTIE has not said precisely what the effect of a settlement might be. My current understanding is that it is true to state that the proposed settlement involves HTIE having the ability, after, and assuming, approval at the fairness hearing, to make an application to the Irish courts. Indeed, it seems that what is proposed is that the ultimate settlement may be, in some way at HTIE's election, dependent on an appropriate level of recognition being given by the Irish courts. Counsel for HTIE indicated that that was an option that was available to HTIE under the proposed terms of settlement but not an option which HTIE necessarily had to avail of.

5.12 The problem with which I am faced at this stage is that I just do not know what it is that HTIE is likely to say is the precise effect of the settlement on the Irish proceedings. It is in that context that I return to the slightly different position adopted by counsel on behalf of UBI Banca. Counsel urged that HTIE should be required to now say what the consequences of an acceptance of the settlement would be for the Irish proceedings. It certainly would help if I now knew (or come to know soon) precisely what it is that HTIE will say is affected in the proceedings which I am managing in the event that the settlement is ultimately approved. From what I can see that there is merit in allowing HTIE to wait until the form of settlement that is ultimately to go out, after the preliminary approval process has been completed, has been finalised. However, it would certainly be of great assistance to me, once that point has been reached, to know precisely what it is that HTIE says would be the effect of an approval of the settlement on these proceedings.

**6. What to Do**

6.1 It seems to me that it would be very difficult to determine, in the abstract, and without knowing with some precision what effect HTIE is going to argue the US settlement should have on the Irish proceedings, as to whether recognition should be afforded. The recognition questions which arise are likely to be complex. In what way should the courts of a jurisdiction which does not have a class action system recognise the result of a class action in another jurisdiction which does? In particular, to what extent can parties who are members of a class as defined but who do not participate in any way in the process, be bound or have their interests affected? What other factors, if any, are properly to be taken into account? Those questions are complex enough without attempting to answer them in the absence of a specific question. It is, in truth, only HTIE who can ask the specific question for it is HTIE who are likely to argue that a final approved settlement in the US has some effect on the Irish proceedings. If HTIE are not going to argue that, then really the US proceedings are of no concern to me.

6.2 This leads to something of a chicken and egg question. HTIE argues that it would be premature to invite this Court to rule on recognition or enforceability until after a fairness hearing in the US because, it is said, the precise application which HTIE might wish to make in these proceedings is potentially dependent on the extent to which investors opt in, opt out, or are deemed, in practise, to have opted in by not taking part. Indeed, it is suggested in HTIE's written submissions that there are some scenarios in which HTIE might choose not to make any application to this Court. In other words, HTIE says that it will not really know the question that it wants to ask this Court (if it is to ask any question) until after the fairness hearing. On the other hand, it seems virtually impossible for me to fairly address the question of whether legitimate interests of Thema and/or investors in Thema might require that those parties know the answers to the question in advance of the fairness hearing without knowing with some precision what the question is.

6.3 However, the other problem with which I am faced is that it is difficult to see a jurisdiction under which I can require HTIE to make their application now. The problem with Thema's application is that it is necessarily, and through no fault of Thema, somewhat general because Thema does not know precisely what effect, if any, HTIE is going to argue for.

6.4 As it does seem to be envisaged in the settlement, at least in its current form, that there is likely to be an application by HTIE, after the fairness hearing, and assuming that there is an approved settlement with sufficient uptake after that fairness hearing, to the Irish courts for some form of order. It is worth noting that, in the ordinary way, the place at which issues such as the effect of the US proceedings on these proceedings would be decided is at the trial. To the extent that HTIE believed that a final approved settlement in the US had some effect on the Irish proceedings then same could be pleaded (presumably by an amendment after the settlement had been approved) and the question as to the effect of the US settlement (including any questions of recognition) would be just one of the issues to be heard at the trial. The default position is, therefore, that the US proceedings simply take their course, are settled or not, and if settled HTIE can have whatever issues they say flow from that settlement determined at the trial.

6.5 While I cannot force HTIE to indicate now what questions they would wish to have included in the trial in the event of the settlement being ultimately approved, I can indicate that, in the absence of HTIE giving an early indication of what those issues would be (obviously conditional on the settlement that is ultimately approved being materially in the same form as that which passes

the preliminary hearing and any other relevant conditions), I would not be minded to facilitate HTIE by giving an early hearing, at a time of their choosing, to any issues of recognition but would be inclined to leave those issues over to the trial. If, therefore, HTIE wish me to consider any questions of recognition of the US settlement (should it be ultimately approved) in advance of the trial then it will be necessary for HTIE to give an early indication of the manner in which it is said that the settlement might affect these proceedings.

6.6 As indicated earlier, those questions can obviously be asked in a way that is conditional on there being a settlement which HTIE wishes to enforce. In addition, the questions can be stated to be conditional on any other matters that might be relevant (such as take up or the like). However, it should not be beyond the competence of HTIE to formulate conditional questions in that way such as would allow me to know with some precision what bearing a final approval of the US proceedings might (if HTIE be correct) have on these proceedings.

6.7 If I am told, in that way, the questions that I am going to have to resolve then I can make a proper decision on whether the balance of justice requires that those questions be answered before or after the fairness hearing. There are points made on either side of that equation. HTIE suggests that to answer the questions at all when they might never, in fact, be put is a potential injustice. That may be so to some extent but in the overall context of these proceedings I am not sure that one further hearing is of particularly grave weight. HTIE suggests that the fact that a hearing on recognition was pending before this Court, was a matter which might have to be included in any relevant notification sent out to the class and that that might "complicate" matters. It is precisely because investors need to know where they stand, it is said, that Thema urges that the questions be answered sooner rather than later. It seems to me that it is, at the very least, possible, that the balance between those and the other points made on both sides of this application could be influenced by the precise questions which would have to be determined in the event that I rule in favour of a recognition hearing in advance of the fairness hearing in the US.

**7. Conclusion**

7.1 In those circumstances, I propose to request that HTIE should, as soon as practicable after the finalisation of the terms of settlement insofar as the preliminary approval is concerned, set out in a document to be filed in court, the effect which HTIE says such a settlement would have on the Irish proceedings in the event that a settlement in that form achieved approval after a fairness hearing. For the avoidance of doubt, it is unnecessary in such a document to set out matters of calculation and it is permissible for questions to be put in a conditional way. However, the effect which it is urged any settlement would have on matters of calculation should be explained.

7.2 In the event that HTIE decline to file such a document, then my current intention would be (in the absence of some intervening and compelling reason to the contrary) that any issues concerning the effect of the US proceedings on these proceedings would be left over to the trial, although it would, of course, remain possible that those issues might be dealt with as a specific module as part of a modular trial. Precisely where it would be appropriate for those issues to be dealt with in the sequence of modules would have to await pre-trial directions.

7.3 In the event that HTIE file such a document, and in the light of the specific issues which HTIE indicate in such a document I will need to ultimately determine, I will give further consideration on 9th September as to whether those issues are to be tried immediately or at a later stage. If they are to be decided immediately, then I would propose to give the parties a date in early October for hearing.

**8. Postscript**

8.1 The terms of this judgment were finalised on Monday last, the 2nd August. Thereafter, there came to my attention, yesterday, the 3rd, correspondence between the solicitors for HTIE and the solicitors for Thema, arising out of an order made by Judge Berman in the US proceedings which order was made on 29th July last. As I understand that order, the court sought information from the settling parties (Mr. Davis and those defendants associated with HTIE) as to whether they are "willing and able to revise (their settlement agreement) so that it is considerably less conditional than currently". The court has requested a written response from the parties by 10th August next. In that context, I understand that, contrary to their previous view, HTIE now wishes that there be a determination of the recognition and enforceability questions in this Court ahead of the possible fairness hearing in the United States. Therefore, both parties now wish the Court to do the same thing.

8.2 However, I see no reason to depart from what I had already determined prior to those latest developments. It seems to me that the process which I outlined earlier in this judgment still needs to be carried out. The only difference is that it will not be necessary to have an intermediate hearing so as to facilitate a final decision on whether the question of a hearing in this Court on recognition is to go ahead before or after the fairness hearing in the United States. Subject to that variation and subject to putting in place the necessary procedural directions to ensure that a hearing on the recognition and enforcement issues is ready for trial, I will endeavour to accommodate the parties in early October.

8.3 I should finally record two things. First, if the parties had agreed all along to the course of action which is now accepted, it would, in my view, have been possible to have had these issues heard in early course and as such a judgment might have been anticipated by mid-September at the latest. It is, unfortunately, no longer possible to accommodate the parties with a hearing in September. To the extent, therefore, that it may be the middle or end of October before a judgment is ultimately delivered, same stems from the fact that there was a dispute as to when the recognition question should be dealt with.

8.4 Second, it was, of course, quite proper for the parties to bring any changed situation to the attention of the court so that such changes could be factored in in an appropriate way. Those parts of the relevant correspondence which communicated a changed situation or position of the parties were entirely appropriate. Some parts of the correspondence did, however, in my view, potentially stray from the parameters of legitimate correspondence to be sent to the Court as set out in section 2 of this judgment.