Neutral Citation Number: [2011] IEHC 6

THE HIGH COURT

COMMERCIAL

2009 2938 S

BETWEEN

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

PLAINTIFFS

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

2009 3097 S

BETWEEN

PINET S.A.

PLAINTIFF

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

AND

THE HIGH COURT

COMMERICAL

2009 3098 S

BETWEEN

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

PLAINTIFFS

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANTS

AND RELATED CASES

JUDGMENT of Mr. Justice Clarke delivered the 10th day of January, 2011

1. Introduction

1.1 On 21st December last, I gave judgment on certain issues arising in the three proceedings set out above [2009] IEHC 565 ("the Aforge cases"). For the reasons set out in the earlier judgment ("the earlier judgment"), I directed that the issues between the parties to same should be determined at a full trial, but that that trial could be conducted on the basis of the motion then before the court with such further evidence as might be permitted. I also directed that the other parties to what has become known as the Madoff litigation should also be permitted to be heard at that hearing in that an aspect of the central issue that arises between the parties to the Aforge cases is also material to some of the issues which arise in the related proceedings. Parties are described and terms are used in this judgment in the same way as in the earlier judgment which should be read in conjunction with this judgment.

1.2 As pointed out at para. 5.1 of the earlier judgment, the issues which required to be tried related to the obligations of the defendant ("HTIE") to account to either a fund of which it was a depository under the UCITS Directive and the UCITS Regulation or investors in such a fund. In particular, the question of whether it was appropriate to characterise a party in the position of HTIE as a trustee under the law of equity in this jurisdiction, required to be tried. It was that question which had the potential to be common, not only to the Aforge cases, but also to the related proceedings in that part of the claim brought by the various plaintiffs in the related proceedings involves a contention that HTIE was a trustee owing fiduciary obligations to the relevant plaintiffs.

1.3 This is, therefore, the first judgment that relates to a substantive, rather than a procedural, issue in the Madoff litigation generally. Against that background, it is necessary to briefly note the procedural history of this litigation since the earlier judgment.

2. Procedural History
2.1 Subsequent to the delivery of the earlier judgment, case management was put in place at which all parties to the other proceedings within the Madoff litigation generally were invited to indicate whether they wished to participate. Kalix Fund Ltd. ("Kalix") (being the plaintiff in one of the relevant proceedings), Thema International Fund Plc. ("Thelma") (being a plaintiff in one set of proceedings and a defendant in others), and Unione Di Banche Italiane Società Cooperativa per Azioni (Trading as UBI Banca) and ABJ Vermoegensverwaltung MBH & Co. KG ("collectively UBI Banca"), (being a plaintiff in another of the relevant proceedings) each indicated a desire to participate, filed written submissions, and attended at the oral hearing for the purposes of making such submissions.

2.2 In addition, certain further affidavit evidence was filed on behalf of HTIE with replying affidavits on behalf of the plaintiffs in the Aforge cases ("Aforge"). It will be necessary to refer to some of that evidence in due course.

2.3 In the course of both the written and oral submissions, it is fair to say that the dispute between the parties came to be significantly more refined than might have appeared to have been the case in the course of the hearing which gave rise to the earlier judgment. In that context I, therefore, turn to the issues between the parties.

3. The Issues
3.1 As is clear from the earlier judgment, the underlying question which requires to be resolved is as to the obligation of HTIE to make information available either to the Fund (*i.e.* Thema) or to investors in the fund (*i.e.* Aforge, UBI Banca or Kalix). As pointed out in the earlier judgment, the fund is a UCITS fund and is, therefore, subject to the UCITS Directive and its Irish implementing measure, the UCITS Regulation. Those instruments impose certain obligations on a party such as HTIE to make information available to the fund and, through the fund, to investors in the fund. Those obligations are not, at least in general terms, in dispute.

3.2 In addition, there appeared to be the possibility, at the hearing leading to the earlier judgment, that it might be suggested that, on a proper construction, either the UCITS Directive or the UCITS Regulation imposed, in itself, additional as yet unmet obligations on HTIE. However, I did not understand the case as ultimately made, either by Aforge or any of the other relevant parties, to suggest (save in one respect to which I will turn in due course) that either the UCITS Directive or the UCITS Regulation imposed in express terms any such additional obligations to provide information.

3.3 Rather, it was suggested that a natural and necessary consequence of the set of legal relations which arises between a depository in the position of HTIE and a fund and its investors creates a fiduciary relationship between that party and both the fund concerned and investors in the fund, such as carries with it either generally, or in the particular circumstances of this case, an obligation to account for its activities as such a fiduciary by the provision of much more detailed information than has, heretofore, been forthcoming from HTIE.

3.4 In order to understand the way in which that case is made and disputed, it is important to say a little about uncontroversial aspects of the legal framework within which a so called UCITS fund operates. The UCITS Directive was designed to harmonise the provisions in respect of investment funds within the European Union. Historically, it would appear that in common law countries (and, in particular, the United Kingdom) a Unit Trust was the normal vehicle by which investment funds were managed. Investors gave money to trustees who purchased appropriate investments and held those investments on trust for the investors. Frequently, investment decisions were made by designated fund managers rather than the trustees. Subject to the terms of the Unit Trust, those investors could cash in their entitlement and receive back the value of their share of the trust fund.

3.5 On the other hand, it would appear that in other countries, corporate vehicles were used for such collective investment. Indeed, in the context of the issues which have arisen in this case, it is important to note that the sort of corporate vehicle used in Ireland (being in relation to this case, Thema) is a type of company which could not, in practice, have existed under traditional company law principles. The whole point of an investment fund is that persons wish to invest in same in a liquid way so that the investor has an entitlement to be repaid their investment at its current value on relatively short notice. It would have been extremely difficult, if not impossible, to have organised such an arrangement through a traditional Irish company. Each new investment by an investor would have required the issuing of new shares. Each redemption by an investor of their interest in the company would have required the cancellation of shares. This latter point is so because the investor is not selling its investment to a third party, but rather is getting its investment back from the investment vehicle. While the issuing of new shares for new investment and the paying back of an investment on foot of the cancellation of existing shares are both possible under traditional company law, carrying out such transactions in the speedy and liquid fashion contemplated by the Directive would have been impractical. It was for those reasons that it was necessary, in the implementing Irish UCITS Regulation, to modify Irish company law for the purposes of UCITS funds so as to allow companies operating as such funds to remain within the bounds of Irish company law.

3.6 However, one highly relevant feature of the UCITS regime is the requirement that there be a separation between the fund itself and what is described as a "depository for safe keeping" in the UCITS Directive. Thus, investors invest in the fund (which in the context of this case is a company being Thema), but the assets of the fund, *i.e.* the assets of Thema, are to be held by a depository. HTIE is that depository in this case.

3.7 The relationship between investor, fund, and depository, is governed both by substantive law in the form of the UCITS Directive and the UCITS Regulation and by contractual relations in the form of agreements between the fund and the depository.

3.8 It is argued by Aforge, and the other parties to the Madoff litigation generally who supported Aforge, that the set of obligations which can be derived both from the Directive and the Regulation and the contractual relations between relevant parties, is such as make it proper to characterise it as a fiduciary relationship carrying with it an obligation to account.

3.9 It is important at this stage to note a number of subsidiary issues which also arise. Kalix, Aforge and UBI Banca are all investors. In some cases, they are direct investors in Thema. In other cases, they are not the registered investor in Thema but rather claim to

be the beneficial owner of the relevant investment. Issues have arisen as to the extent to which any obligations of HTIE can extend either to investors generally or, in particular, investors who hold a beneficial rather than a direct interest in the investment.

3.10 Second, it is important to note a principal focus of the argument advanced on behalf of HTIE which placed reliance on the fact that the UCITS Directive is designed to harmonise the regime in the Member States in respect of investment vehicles. While accepting that the Directive permits (see Article 1.7) Member States to adopt additional measures, not inconsistent with the Directive, which are stricter and are designed to provide a greater degree of protection for investors, it is, nonetheless, suggested that courts should be slow to interpret the legal rights and obligations of parties in such investment funds in a manner which would bring about potentially significant and possibly imprecise differences between the obligations of such funds, as and between different Member States, at least where the additional requirements are not clearly specified in the relevant implementing measures. It is argued that the underlying objective of the Directive is to achieve a degree of uniformity so that investors in one country can invest in vehicles in another country in an easy and straightforward way. Whatever, it is said, about express provisions in national implementing measures, it is suggested that the court should lean against an interpretation of the overall legal structure in which such investment vehicles operate in this jurisdiction, which would impose a range of obligations (and, perhaps, imprecise obligations) that would not arise in other Member States.

3.11 It is in that context that the additional expert evidence tendered on behalf of HTIE was presented. That evidence demonstrates a very large volume of such fund activity in the Irish Financial Services Centre and draws attention to what would seem to be an undoubted fact that the relevant business requires those operating it to do so in an economic way. In turn, the indirect imposition of significant additional financial burdens as a result of the claimed accounting and reporting obligations would, it is said, place a much greater burden on entities operating in Ireland rather than other Member States. While it was accepted that such a matter could not, of itself, be a ground for altering what would otherwise be a proper determination of the legal position, it was said that such a state of affairs would be against the general intent of the Directive to ensure broad harmonisation between such investment funds across Member States.

3.12 Perhaps in partial answer to this latter point it was, as a fallback position, argued on behalf of Aforge that it did not necessarily follow that the court, in its discretion, had to require a full account in all circumstances and in all cases. In that context, particular reliance was placed on what are undoubtedly the extraordinary circumstances of this case. As is widely known almost all of the funds invested in Thema are currently lost, apparently as a result of the fall out from the collapse of the Madoff Empire. It is, of course, the case that the relevant assets in which the fund was to be invested were to be held by HTIE in its capacity as depository (or held by other entities properly authorised in accordance with the Directive and the Regulations). It is equally well known that the fund is, therefore, unable to make available any assets for return to the investors concerned. It is said that whatever might be the case in ordinary circumstances, there is a clear obligation on the courts to ensure that, in the extraordinary and unusual circumstances of this case, HTIE is required to account.

3.13 Various other issues of detail arose in the course of the arguments put forward by one or other of the parties to which, insofar as it may be necessary, I will make reference in the course of the judgment. Likewise, it should be noted that while there were differences of emphasis between each of the parties who argued against HTIE, the substance of the case made by each of those parties was the same. Finally, before going to consider the issues which arose I should record that when, after the original hearing, I commenced a consideration of the case, I came to the view that it would be helpful to have further submissions from the parties directed towards four specific questions which I then circulated to the parties. Each of the parties who were represented at the original hearing made both written and oral submissions directed to those issues.

3.14 The issues were as follows:-

> 1. Where the legal relationship between parties is either governed or regulated by statute (including in this context European legislation), in what circumstances can the relevant relationship can give rise to a fiduciary relationship imposing duties and obligations which go beyond those expressly or impliedly recognised by the relevant statute.
>
> 2. Where the relationship between parties is governed by contract in what circumstances can a fiduciary relationship arising out of that contract impose duties and obligations which go beyond those expressly or impliedly recognised by the contract itself.
>
> 3. Whether, having regard to considerations such as those mentioned at 1 and 2 above, or other considerations, the parameters of duties and obligations owed by a fiduciary to another party may vary from case to case and if so, the factors that are relevant to determining the duties and obligations arising out of a fiduciary relationship (if any) which might be said to arise on the facts of this case.
>
> 4. In the light of the jurisprudence which suggests that Irish implementing regulations of EU measures can only be put in place by ministerial regulation where the City View Press "policies and principles" test is met, does it follow that a fiduciary relationship which imposed duties and obligations materially beyond those mandated by the UCITS Directive could only be implemented by ministerial regulation if the transposition of the UCITS Directive into Irish law necessarily created a framework within which the relationship between a depository and a fund and/or an investor in a fund was fiduciary. If so, what are the implications? If not, on what basis can it be argued that obligations beyond the minimum specified in the UCITS Directive are to be found in Irish law in the absence of legislation?

3.15 I found the additional submissions directed to those questions most helpful. Against that background it is next necessary to consider the issues which arose.

4. The Issues

4.1 It is important, not least because of the potential effect of this decision on the Madoff litigation generally, to be especially precise about what was or was not before the court. At the end of the day, the only issue of substance was as to the extent to which HTIE is obliged to account to Aforge. The question of whether HTIE is a trustee owing fiduciary obligations either to Thema or to investors in Thema, is not, in itself, the substantive issue before the court. Rather, it is a basis on which the obligation to account is said to be founded. It follows that it is only necessary to determine questions concerning the trustee status of HTIE to the extent necessary to decide the question of its duty to account. The reason why the other parties to the Madoff litigation were given an opportunity to be heard was that one possible outcome of these proceedings was that the court would find that HTIE was not a fiduciary and that it did not owe any fiduciary duties, whether to Thema or to investors in Thema. Such a finding would have had an adverse effect on the case which various parties would wish to make in the Madoff litigation generally which is, of course, concerned with attempting to establish a liability on HTIE by virtue of what is said to be its capacity as a fiduciary. It should, of course, be recalled that that is but one limb of the argument made by those parties. However, if there were to be a finding that HTIE was not a fiduciary, then it would

appear that at least that limb of the various plaintiffs claims would be cut off. However, it was accepted at the hearing that it was not the intention to determine the question of the fiduciary relationship between HTIE and any other relevant parties save to the extent that it was necessary so to do for the purposes of resolving the issue in this case which is, as has been pointed out, solely concerned with HTIE's duty to account.

4.2 Against that background, it is also important to note that the parties generally appeared to accept that, at the level of principle, the circumstances in which a fiduciary duty might be said to arise could occur in a very wide variety of circumstances, but that also the extent of the fiduciary obligation that might be owed could vary extensively from case to case. The central issue in this case was not, therefore, strictly speaking, determinable solely by answering the question as to whether HTIE was a fiduciary. It was also necessary to consider the extent of any fiduciary obligation to account which might arise in the event that HTIE were considered to be a fiduciary. For example, if it were to be clear that any obligation which HTIE might have to account would not, in any event, go beyond the obligation specified in respect of accounting in the relevant legislation, then the question of any larger fiduciary obligations which might arguably lie on HTIE would not be relevant for the purposes of these proceedings.

4.3 In that context, it seems to me to be appropriate to turn first to an analysis of the reporting obligations which lie on a depository under the Directive and the Regulations.

5. The Reporting Obligations

5.1 In considering the reporting obligations under the Directive it is important to note that the recitals to the Directive refer to the desirability "that common basic rules be established for the authorisation, supervision, structure and activities of collective investment undertakings situated in the member states and the information they must publish". It is clear, therefore, that a principal feature of the Directive is an intent to establish common basic rules in respect of the information which collective investment undertakings must publish.

5.2 Section VI of the Directive provides for the obligation on funds to supply information to unit holders. Of particular relevance Article 27 requires that an investment company must publish both an annual report and a half yearly report within time limits specified in Article 27.2 being, in the case of an annual report, within four months of the end of the year in question and in the case of a half yearly report within two months of the end of the half year in question.

5.3 The detailed requirements for both the annual and half yearly reports are set out in Article 28.2 and Article 28.3 respectively in the following terms:-

> "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 judgment 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."

5.4 As will be seen the contents of those periodic reports are required to include the information specified in Schedule B to the Directive. Schedule B is in the following terms:-

> **"SCHEDULE B**
>
> Information to be included in the periodic reports
>
> I. *Statement of assets and liabilities*
>
> - transferable securities,
> - debt instruments of the type referred to in Article 19(2)(b),
> - bank balances,
> - other assets,
> - total assets,
> - liabilities,
> - net asset value.
>
> II. *Number of units in circulation*
>
> III. *Net asset value per unit*.
>
> IV. *Portfolio, distinguishing between*:
>
> (a) transferable securities admitted to official stock exchange listing;
>
> (b) transferable securities dealt in on another regulated market;
>
> (c) recently issued transferable securities of the type referred to in Article 19 (1) (d);
>
> (d) other transferable securities of the type referred to in Article 19 (2) (a);

(e) debt instruments treated as equivalent in accordance with Article 19 (2) (b);

and analyzed in accordance with the most appropriate criteria in the light of the investment policy of the UCITS (e.g. in accordance with economic, geographical or currency criteria) as a percentage of net assets; for each of the above investments the proportion it represents of the total assets of the UCITS should be stated.

Statement of changes in the composition of the portfolio during the reference period.

V. *Statement of the developments concerning the assets of the UCITS during the reference period including the following*:

- income from investments,

- other income,

- management charges,

- depositary's charges

- other charges and taxes,

- net income,

-distributions and income reinvested,

- changes in capital account,

-appreciation or depreciation of investments,

- any other changes affecting the assets and liabilities of the UCITS.

VI. *A comparative table covering the last three financial years and including, for each financial year, at the end of the financial year*:

- the total net asset value,

- the net asset value per unit.

VII. *Details, by category of transaction within the meaning of Article 21 carried out by the UCITS during the reference period, of the resulting amount of commitments*."

5.5 It will be seen, therefore, that the Directive specifies a detailed regime for the reporting by an investment company on a periodic basis.

5.6 It is clear, therefore, that an investment company (Thema in the context of this case) has extensive reporting obligations to its unit holders.

5.7 The Directive does not contain any express provision requiring a depository (HTIE in the context of this case) to report either to the investment company or to investors in the investment company. However, the Regulation (in Regulation 39(d)) does contain such an obligation. It is in the following terms:-

"(d) enquire into the conduct of the investment company in each annual accounting period and report thereon to the shareholders. The trustee's report shall be delivered to the investment company in good time to enable it to include a copy of the report in the Annual Report to the shareholders required under Regulation 77. The report shall state whether in the trustee's opinion the investment company has been managed in that period –

(i) in accordance with the limitation imposed on the investment and borrowing powers of the investment company and trustee by the memorandum and articles and these Regulations, and

(ii) otherwise in accordance with the provisions of the memorandum and articles and these Regulations

and, if it has not been so managed, in what respects it has not been so managed and the steps which the trustee has taken in respect thereof."

5.8 As is clear from Regulation 39(d), the timing of the obligation on the trustee (which for the purposes of the Regulation is how a "depository" in the terms used in the Directive is described) is such that it is to be "delivered to the investment company in good time to enable it to include a copy of the report in the annual report".

5.9 It follows that the express statutory regime is clear. An investment company has an obligation to produce half yearly and yearly reports to its investors. A depository or trustee has an obligation to report on the conduct of the investment company "to the shareholders". However, the method for so reporting is that the report of the depository or trustee is to be included in the annual report, but not it would appear in the half-yearly reports, of the investment company to its shareholders. There is, therefore, a reporting obligation under the Irish Implementing Regulation which obliges HTIE to report to the shareholders in Thema in relation to the matters specified in Regulation 39(d). Thema has the wider reporting obligation to its shareholders which are set out both in the Directive as already cited and in the Irish Implementing Regulation.

5.10 It is in that context that question 1 of the questions on which I asked the parties to make further submissions arises. In this case, at least certain aspects of the relationship between the parties are governed by the Regulation and, at a remove, the Directive. The question which arises is as to the circumstances in which such a relationship can give rise to a fiduciary relationship imposing duties and obligations which go beyond those expressly or impliedly recognised by the relevant statute.

5.11 I am satisfied that it is, at the level of principle, possible for a fiduciary relationship to arise under statute in circumstances where the relationship carries with it duties which do not derive from the statute itself. In *Brook v. Brook Bond* [1963] 2 W.L.R. 320, Cross J. had to consider the status of a so called "custodian trustee" under s. 4 of the Public Trustee Act, 1906. In analysing the obligations of such a trustee Cross J. said the following:-

> "It is apparent that the duties of a custodian trustee differ substantially from those of an ordinary trustee. If the trust instrument or the general law gives the trustees power to do this, that or the other, it is not for the custodian trustee to consider whether it should be done. The exercise of powers or discretions is a matter for the managing trustees with which the custodian trustee has no concern, and his bound to deal with the trust property so as to give effect to the decisions and actions taken by the managing trustees unless what he is requested to do by them would be a breach of trust or would involve him in personal liability. On the other hand, it is plain that he is a trustee holding the trust property and its income on trust for the beneficiaries according to the terms of the trust instrument and his is *prima facie* liable to the beneficiaries for any dealing with capital or income which is a breach of trust. In practice this liability may be considerably qualified as regard income by the provisions of subsection (2) (e) and as regards capital or income by the provisions of subsection (2) (h); but subject to the protection provided by those subsections the custodian trustee, as I understand the matter, is as liable as an ordinary trustee to be sued by a beneficiary for the misapplication of the trust property. His position is quite unlike that of a third party – a bailee of the trust property, for instance – who is in contractual relationship with the trustee but owes no duty to the beneficiaries."

5.12 It is clear, therefore, that, in the circumstances of that case, the ordinary obligations of a trustee were held to apply, even though not expressly mentioned in the statute, save to the extent that the statute expressly or impliedly excluded liability on the part of the trustee in certain circumstances.

5.13 It seems to me to be clear, therefore, that the obligation of a trustee where the relationship giving rise to the trustee beneficiary relationship is itself a creature of and governed by statute can, at the level of principle, go beyond the obligations which are specified in the statute. However, it is equally clear that the statute can expressly, or by necessary implication, limit those obligations.

5.14 In general terms, it seems to me that the same principles can, subject to one qualification to which I will shortly turn, apply equally where the statutory measure governing the relationship between the parties in this jurisdiction is an Irish measure designed to transpose Ireland's obligations under a Directive. In that context I should briefly touch on the decision of the Court of Appeal for England and Wales in the case of *CRC Credit Fund Ltd & Ors v. GLC Investments Plc Sub Fund: European Equity Fund & Anor* [2010] EWCA Civ. 917 which involved issues concerning the ownership of client funds held by Lehman Brothers International (Europe) when that fund went into administration. The issues with which the Court of Appeal was concerned in that case were very different from those with which I am concerned in this case. The European legislation in that case was very different to the European legislation relevant to this case. However, the judgment of the Court of Appeal does appear to acknowledge that it is possible, in appropriate circumstances, that an implementing measure in a common law country, of an EU Directive, may give rise to circumstances where a trustee/beneficiary relationship comes into existence, and where at least some of the rights and entitlements of parties may be determined on the basis of fiduciary obligations. It is equally true to say that *CRC Credit Fund Ltd* does not appear to be of any great assistance in deciding whether such a relationship should be said to exist under the UCITS Directive or in the circumstances of the cases which are currently before me. I should note that the solicitors on behalf of the parties agreed that that case could be brought to my attention even though it was not mentioned in argument before me. However, the solicitors for HTIE indicated that they did no consider it to be relevant because of the significant differences between the circumstances and legal framework involved in respectively that case and the cases which I now have to decide. There was a considerable amount of merit in that suggestion. However, it does seem to me that *CRC Credit Fund Ltd* is, at least, authority for the proposition that it is possible that an Irish implementing measure of an EU Directive can give rise to the creation of a fiduciary relationship between parties governed by such an implementing measure.

5.15 However, in the context of domestic implementing measures it is important to have regard to what was said by the European Court of Justice in *Commission v. Ireland* [Case – 427/07]:

> "It should be recalled that, according to settled caselaw, the transposition of a Directive into domestic law does not necessarily require the provisions of the Directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the Directive in a sufficiently clear and precise manner…
>
> . It follows from the equally consistent line of caselaw that the provisions of a Directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a Directive intended to confer rights on individuals, the person concerned must be enabled to ascertain the full extent of their rights."

It follows that 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.

5.16 It seems to me that, in those circumstances, a court in this jurisdiction should be slow to interpret the consequences of implementing measures in a way which leads to imprecision or lack of clarity. It seems to me that there is a difficulty under this heading with the argument put forward on behalf of Aforge and the other parties who oppose HTIE. In order to understand this difficulty it is necessary to briefly recount the way in which the argument at the hearing before me developed.

5.17 The basic argument put forward on behalf of Aforge is that a natural consequence of the Regulation is that the relationship created between an investor and HTIE as a result of the Regulation is a trustee/beneficiary relationship such as is recognised in the law of equity in this jurisdiction. While it is clear that the precise accounting obligations of a trustee may, in practice, vary from case to case, in general terms the starting point, at least in relation to an ordinary trustee/beneficiary case, is that the trustee has an absolute obligation to report on how the duties of the trustee have been carried out and all other matters material to the legitimate interests of the beneficiary. The court may, for reasons of practicality or other good reason, not enforce that full obligation in certain

cases.

5.18 Having regard to that argument counsel for HTIE suggested that an implementation of what one might loosely call "the full or ordinary accounting obligation of a trustee" in the circumstances of a trustee of an UCITS fund would create a range of anomalies. First, it was said that the whole underlying purpose of the UCITS regime is that potential investors in UCITS funds across the European Union should have access, whether through a prospectus or by consulting recent annual or half yearly reports, to detailed up to date information on an open and transparent basis as to how the investment company was situated in the market. On that basis it was said that to give an individual investor an entitlement to additional information above and beyond that which was required to be made publicly available either by virtue of the express provisions of the Directive or under the Implementing Irish Regulation, would be wholly inconsistent with the fundamental purpose of the Directive which was to ensure that persons could invest on an open and transparent basis in such funds. In my view, that argument was well founded. It would be entirely inconsistent with one of the significant overarching purposes of the Directive if an individual investor were enabled to get information, by reason of exercising an alleged obligation on the part of the depository/trustee to account, above and beyond that which was to be made publicly and readily available.

5.19 In response to that argument counsel for Aforge, in particular, suggested, correctly, so far as it goes, that it did not necessarily follow that the court would order, in every case, a full account such as might be directed in a simple case of trustee and beneficiary arising under a trust deed in this jurisdiction. It was also suggested that any information made available to an individual investor could be made available to all other investors. In particular, it was also argued that the undoubtedly exceptional circumstances which exist in this case, whereby most if not all of the fund appears to have disappeared, cried out for an account to be directed.

5.20 However, 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 Regulation 39(d) insofar as the obligations of the depository/trustee are concerned.

5.21 It is next necessary to consider the way in which that obligation can be said to apply as and between an investor in a fund and the depository/trustee. The obligation specified in Article 39(d) is an obligation to report to the "investors". The whole point of the report is that the trustee is required to report on the fund. It is true that the report contemplated by Regulation 39(d) is one which is expected to be incorporated by the fund into its annual report. However, that does not, in my view, take away from the fact that the report remains one which is, in the express terms of the Regulation, to be a report "to the investors". On a proper construction of Regulation 39(d) I am satisfied that the statutory reporting obligation is one from the depository/trustee to the investor. It may be contemplated that the way in which that obligation is met will normally be by the report being given to the investment company for inclusion in its annual report, but whether or not that be so, there remains an obligation on the trustee to report to the investor.

5.22 If a trustee/depository had given a report, within the time limits specified in Regulation 39(d), to the investment company and the investment company had not, for whatever reason, properly included that report in its annual report (either because there was no annual report or because, for some reason, the investment company omitted to properly include the report in its annual report), then it seems to me to be clear that any investor would be entitled to obtain that report directly from the depository/trustee.

5.23 In those circumstances, it does not seem to me to be necessary to determine whether, at the level of principle, the relationship between HTIE and the respective investors is one of trustee/beneficiary. Even if HTIE is a trustee it seems to me, for the reasons which I have sought to analyse, that it's reporting or accounting obligation to the investors would not go beyond the obligation which has been carefully set out in the Irish implementing measure in Regulation 39(d). As has been pointed out, it is permissible, in accordance with the terms of the UCITS Directive, for a member state to provide for a higher level of protection for investors. It is clear that the additional reporting obligation placed on a depository/trustee by Regulation 39(d) is such an additional protection which is, therefore, permitted by the terms of the UCITS Directive. However, the terms of Regulation 39(d) are clear and readily accessible to any potential investor. They comply with the principle of legal certainty. The imposition of other larger, vaguer and imprecise obligations contended for on behalf of Aforge would not, in my view, comply with the principle of legal certainty.

5.24 The UCITS Regulation, properly construed, seems to me to impose an obligation on the depository/trustee to report to the investors, which obligation can be met by the preparation of a report, by the report being furnished to the relevant investment company within the time limit specified in the Regulation, and further by that report being made available directly to investors in circumstances where, for whatever reason, the report has not been included in an annual report of the investment company produced within the time limits which the Directive and the Regulation impose.

5.25 It does not seem to me that such an obligation would impose any burden on a trustee beyond the burden which already exists. There is already a clear duty to produce such a report once a year. The only consequence of the interpretation which I have placed on the Regulation is that there may be an obligation to make that report available to all investors where there is a failure of the preferred method of the report being made available through the auspices of an annual report of the investment company itself. Likewise, the report will be readily and publicly available so that no distortion in the market place should take place. It seems to me that such an interpretation is harmonious with the objectives of the Directive.

5.26 There 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 Regulation 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 Regulation 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 Regulation 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 Regulation 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 Regulation 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 Regulation 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 Regulation 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.

6. Conclusions

6.1 In summary, it therefore seems to me that, irrespective of whether the relationship between HTIE on the one hand and Aforge and the other investors on the other hand amounts to a trustee/beneficiary relationship or not, there is an obligation on HTIE to produce a report for the benefit of Aforge and the other investors in accordance with its obligations and within the timeframe specified in Regulation 39(d) of the Regulations. Equally I am satisfied that, irrespective of whether the relationship between HTIE and Aforge and the other investors is one of trustee/beneficiary or not, any reporting or accounting obligation of HTIE to those parties would not go beyond the obligations specified in Regulation 39(d). In summary, therefore, HTIE is obliged to produce reports, in accordance with Regulation 39(d) and is obliged, in the event that there is any failure to have those reports transmitted to the investors in accordance with the Directive and the Regulations, to make such reports directly available to any investor. For these purposes an investor includes a party who reasonably appears, to the knowledge of HTIE, to be the beneficial owner of an investment in Thema.

6.2 In the light of that finding, I will hear counsel further as to what, if any, precise orders should now be made for in the light of the argument as it developed, I understood counsel for Aforge to assert that the information required by Regulation 39(d) had not been made available. However, as this issue was not fully explored, I do not propose making a finding in relation to the point until I have heard at least counsel for Aforge and counsel for HTIE. Hopefully some measure of agreement on the practical consequences of this judgment can be reached without a further hearing.