

Madoff Claims
Latest
Developments

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

MADOFF CLAIMS – LATEST DEVELOPMENTS

The Commercial Court in Dublin is currently dealing with around 50 cases arising from the role played by the convicted fraudster Bernard Madoff in respect of two Irish investment funds, Thema International Fund plc and AA (Alternative Advantage) plc. Dillon Eustace was the first Irish firm to initiate proceedings on behalf of an investor in one of these funds and currently represents the largest number of investors in litigation in the Commercial Court whose investments were affected by Mr. Madoff's activities.

HSBC (as custodian of each of the affected funds) brought a Motion to stay the proceedings brought by one of Dillon Eustace's clients last year, saying that investor claims should not be allowed to proceed until after the outcome of the cases being brought by the affected funds themselves. In his judgement dated 16 October, 2009 Mr. Justice Clarke ruled that HSBC were not entitled to succeed with their Motion, on the basis that the streamlined procedures and case management capabilities of the Commercial Court in Dublin were more than capable of dealing with the issues in the investor cases together with the actions initiated by the funds themselves and any other related proceedings. He said:

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

The pleadings have now virtually closed in all of these related proceedings; however, one particular issue is to be determined by the Commercial Court before any of these cases go to trial.

Mr. Justice Clarke has ruled that the following question will have to be determined in advance because of the particular nature of one investor's claim, in summary:

- a. Does a custodian have an obligation to account to a fund or its investors arising from the UCITS Directive / Regulations?
- b. Leaving aside the UCITS regime, is that relationship between HSBC and the Thema investors that of trustee and beneficiary in equity giving rise to a fiduciary relationship and, in turn, a duty to account?

The Court has recently announced that a hearing of this preliminary issue will take place on 18 May of this year and further updates will be published by Dillon Eustace as the matter develops. The determination of these questions is likely to be of note to those involved in similar litigation in other jurisdictions as well as those involved in the funds industry in Ireland and the decision of the court will be eagerly anticipated, both in Ireland and internationally.

Date: February, 2010
Author: Paul Kennedy

CONTACT US

Our Offices

Dublin

33 Sir John Rogerson's Quay,
Dublin 2,
Ireland.
Tel: +353 1 667 0022
Fax.: +353 1 667 0042

Cork

8 Webworks Cork,
Eglinton Street,
Cork, Ireland.
Tel: +353 21 425 0630
Fax: +353 21 425 0632

Boston

26th Floor,
225 Franklin Street,
Boston, MA 02110,
United States of America.
Tel: +1 617 217 2866
Fax: +1 617 217 2566

New York

415 Madison Avenue
14th Floor
New York, NY 10007
United States
Tel: +1 646.673.8523
Fax: + 1 646.683.8524

Tokyo

12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Kieran Cowhey

e-mail: kieran.cowhey@dilloneustace.ie
Tel: +353 1 6670022
Fax: +353 1 6670042

Paul Kennedy

e-mail: paul.kennedy@dilloneustace.ie
Tel : +353 1 6670022
Fax: + 353 1 6670042

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DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.
www.dilloneustace.ie

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