



Duties & Liabilities of Financial Planning Professionals

Garrett Cormican, Beale & Co, Solicitors

3 March 2016



Garrett Cormican

- **Solicitor with Beale & Co, Solicitors with offices in London, Bristol, Dublin & Dubai**
- **Specialises in defending professional negligence claims against construction, legal and financial professionals. He advises engineers, architects, quantity surveyors, solicitors, accountants, financial advisors and their insurers.**
- **Acted in a number of high value claims in the Commercial Court against solicitors and accountants.**
- **Member of the Dublin Solicitors and Bar Association and is regularly instructed by Irish and International insurers to advise on insurance policy and coverage issues. He is admitted as a solicitor in Ireland, England and Wales.**

Beale & Company

London | Bristol | Dublin | Dubai

Duties and Liabilities of Financial Planning Professionals

Garrett Cormican, Associate – Beale & Company

3 March 2016

Introduction

When dealing with any claim the Court will usually have to consider the following issues:

- + The duties owed by the Financial Planner and to whom they were owed;
- + Whether there was a breach of that duty;
- + Whether there was a loss suffered by the Plaintiff;
- + The cause of that loss and whether it is recoverable;
- + Has liability been validly excluded or limited; and
- + How any proven losses should be assessed or measured.

How do the duties arise?

- + Contract
- + Tort (e.g. negligence, fraudulent or negligent mis-representation)
- + Legislation
- + Regulation / Codes

Letter of Engagement and Terms of Business

- + What you are being retained to do
- + What services will be carried out by you and or any third parties assisting you
- + How your fees will be calculated and charged
- + Any exclusions, disclaimers or limitations on your liability
- + Your general terms of business.
- + The client's obligations e.g. in terms of any assistance you will require from it in order to properly perform your duties, or for the provision of accurate information.
- + If another party is providing related services this should also be addressed.

Common examples of clauses limiting liability would include the following:

- + Exclusions of liability for indirect or consequential loss and/or loss of profits
- + Monetary caps on liability – the monetary limit should be reasonable to the work being undertaken and best practice would be to negotiate and agree the figure with the client
- + Excluding liability arising from insufficient or deficient information being provided by the client – this requires careful consideration as the clause may not be reasonable if the information is subject to verification by you.
- + Excluding liability for claims by your clients, their employees or your client's clients which involve fraud or wilful misrepresentation.

Duty of Care /Know your client

- + The Common Law Duty of Care and the standard of care
- + Markets In Financial Instrument Directive Regulations 2007
- + The Consumer Protection Code

Consumer Protection Code

- + To ensure a consistent level of protection for **consumers** regardless of the type of financial services provider they choose. Applies to Investment Intermediaries, authorised under the Investment Intermediaries Act 1995;
- + Updated version introduced in 2014 and effective from 1 January 2015
- + Regulated entity must ensure that:
 - + Acts fairly and professionally [my emphasis] in the best interests of its **customers** and the integrity of the market;
 - + acts with due skill, care and diligence in the best interests of its **customers**;
 - + does not recklessly, negligently or deliberately mislead a **customer** as to the real or perceived advantages or disadvantages of any product or service;

- + has and employs effectively the resources, policies and procedures, systems and control checks, including compliance checks, and staff training that are necessary for compliance with this Code;
- + seeks from its **customers** information relevant to the product or service requested;
- + makes full disclosure of all relevant material information, including all **charges**, in a way that seeks to inform the **customer**;
- + seeks to avoid conflicts of interest;
- + corrects errors and handles **complaints** speedily, efficiently and fairly;
- + does not exert undue pressure or undue influence on a **customer**;
- + ensures that any **outsourced activity** complies with the requirements of this Code;
- + without prejudice to the pursuit of its legitimate commercial aims, does not, through its policies, procedures, or working practices, prevent access to basic financial services; and complies with the letter and spirit of this Code.

Consumer Protection Code (continued)

- + Obligations to provide information to Consumers, to know the consumer and to ensure suitability of any investments.
- + “A **regulated entity** must gather and record sufficient information from the **consumer** prior to offering, recommending, arranging or providing a product or service appropriate to that **consumer**. The level of information gathered should be appropriate to the nature and complexity of the product or service being sought by the **consumer**”
 - Needs and Financial Objectives
 - Personal circumstances
 - Financial Situation/Mean
 - Attitude to risk
- + Obligated not to provide the service if you do not have sufficient information to assess suitability.

Custom House Capital in Liquidation

According to the Final Report Submitted by the Central Bank to the High Court, CHC did not maintain adequate records in respect of client mandates. Sometimes there were none and certain client mandates were left blank and not signed.

“Regulation 100 of S.I No 60 of 2007, the European Communities (Markets in Financial Instruments) Regulations 2007, states that an investment firm shall establish and maintain a record that includes the document or documents agreed between the firm and its clients that set out the rights and obligations of the firm and the firm’s clients”

James Haughey - v- J&E Davy trading as Davy, Bank of Ireland Mortgage Bank and Bank of Ireland

- + Essentially a mis-selling Claim
- + Very vulnerable man.
- + 20 years old and an orphan when he started investing.
- + Had in excess of €5 million which he inherited from his deceased parents which he wished to invest. The Defendant was to provide investment advice to the Plaintiff which he could either accept or reject. The Plaintiff himself would ultimately retain the decision-making role
- + Haughey had limited investment experience

Standard pro forma account opening forms

Haughey was asked to provide details of the following:

- + His attitude to risk. This was to be ranked between 10 for speculative and 1 for conservative
- + His investment knowledge or experience. Again this was to be ranked between 1 for limited and 10 for extensive
- + His investment holdings
- + Sources of income and pension arrangements.
- + Financial Objectives e.g. growth, guaranteed growth, speculation, income growth etc.
- + The initial amount the client wishes to invest

- + The form also included a declaration that the detailed information in the forms was correct and required the Plaintiff to inform the Defendant if there was any change in it.
- + Haughey signed the declaration but the forms were otherwise left blank and contained none of the details required.
- + Classified by Davy as someone with extensive investment knowledge and an aggressive, high risk appetite.
- + Deliberate neglect and breach of duty.
- + Davys encouraged him to invest large amounts of his inheritance in CFDs.
- + Systems failure in Davys.
- + Plaintiff was not suitable for CFD trading.

James Haughey - v- J&E Davy trading as Davy, Bank of Ireland Mortgage Bank and Bank of Ireland

- + *“The Court has a fundamental view. This trading in contracts for difference would never have taken place if the stockbroking firm had gotten to know James Haughey. It would have been stopped, and replaced by conservative trading”*
- + *“There was a complete failure to get to know James Haughey for what he was. There was a complete failure in that fundamental obligation under the Rules of the Irish Stock Exchange. **That obligation is not one which arises at one point in time only and is then completed; it is a continuing obligation.** In this case, at no stage was that obligation met. While it may be met by a thorough introduction and analysis that maintains a profile over years or decades, failure to engage in that analysis means that there is an unfulfilled obligation throughout the entire of the relationship. That is why this case has nothing to do with the Statute of Limitations”*
- + The Court awarded €2,099,621 in damages to Haughey. Entitled to be put back in position had no trades occurred.

Limitation of Actions

Section 11 of Statute of Limitations Act 1957

“11.—(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued—

a) actions founded on simple contract;

(b) actions founded on quasi-contract;

2(a) Subject to paragraphs (b) and (c) of this subsection, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

- + In Contract time starts to run from the date of breach of contract
- + In tort, time will run from the date the person involved suffered actionable damage (i.e. a loss the Courts could compensate him/her for).

“Solid” World Bonds and Gallagher v ACC

- + • More than 400 people who invested in various “Solid World” bonds and investment products sued ACC Bank over alleged failure to secure any return on their investments.
- + • Mr Gallagher issued proceedings in the Commercial Court against ACC Bank on 10 June 2010, more than six years after he purchased the bond but within 6 years of the investments expected maturity date (in or around August 2009). He alleged that the investment was wholly unsuitable for him and that the bond would have had to far outperform the market if he was ever to get any return over the interest re-payments due on his loan from ACC Bank to purchase it.
- + ACC bank applied to the Commercial Court for a declaration that the proceedings were time barred. In Justice Charleton’s view the Plaintiff did not suffer an immediate loss on the purchase of the Solid World Bond but a contingent loss.
- + Appeal to the Supreme Court

Gallagher v ACC

- + The bank had advertised and marketed an investment bond and the plaintiff invested in the Bond, having borrowed money to do so.
- + His complaint was that he was induced by the bank to purchase a financial product that was unsuitable for him.
- + He conceded that his claim for breach of contract was statute barred as the proceedings issued more than 6 years after the purchase by the plaintiff of the bond.
- + The Supreme Court appeal was confined to considering whether the plaintiff's claim in tort for negligence was statute barred and in particular **on what date did the cause of action accrue**.

- + Fennelly J noted that under Section 11(2)(a) the date of accrual is not defined.
- + The tort of negligence is not actionable in the absence of proof of actual damage. Therefore, the key issue was whether damage had been suffered.
- + A number of common law authorities were examined on the question of when a cause of action in negligence for pure financial loss accrues.
- + NB: there was no complaint about mis-management of the fund; it was a pure mis-selling case.
- + Fennelly J held that it was inescapable that the plaintiff's claim as pleaded was that **he suffered damage by the very fact of entering the transaction and purchasing the Bond and held the cause of action then accrued.**
- + *“the marketing of the Solid World Bond product as a borrow to invest product made it wholly unsuitable for the Plaintiff”* given the fact that Mr Gallagher was borrowing from the bank to purchase the product and the associated cost of the interest re-payments

Komady Ltd v Ulster Bank Ireland Ltd (2014)

- + 14 August 2006, parties entered into two Swap Agreements. If interests rates rose above 3.9%, plaintiffs would be in the money. If fell below 3.9% liable to make a payment to the bank.
- + Proceedings issued 23 November 2014 i.e. more than six years later.
- + Plaintiffs argued that the misrepresentation to them as to the suitability of interest rate swaps –or mis-selling thereof –amounted to a “*concealment by fraud*” of the fact that they were unsuitable.
- + It was argued by the Bank that, based on the Plaintiff’s case, any person who received negligent advice could contend that the fact of the same served to defeat the Statute of Limitations Act 1957.
- + Peart J agreed with the Bank and found that **no right of action was concealed.**

Komady Ltd v Ulster Bank Ireland Ltd (2014).

*“In my view had [the plaintiffs] gone to a solicitor at any time after July 2006, and sought advice as to whether these Swaps met their conservative financial objectives, **they would have been in a position to provide all the necessary information in order to get such advice, and to decide if the Swaps had been mis-sold.** Instead they did nothing until they ran into financial difficulties in 2012 whereupon a financial review was undertaken and they received advice to the effect that these Swaps had not been suitable for their purposes in July 2006. The fiduciary relationship does not add anything to those facts. **It did not suddenly reveal to the plaintiffs some vital fact that was not available to them in July 2006 and which was essential to their knowledge that they had a cause of action.**”*

Regulation and Claims

Section 57BX 11) of the Central Bank and Financial Services Act 2004 provides provides as follows:-

“11) If the Regulatory Authority receives a complaint that appears to be within the jurisdiction of the Financial Services Ombudsman, it shall, without delay, refer the complaint to that Ombudsman for investigation. A complaint referred under this subsection is, for the purposes of this Part, taken to have been made under subsection (1) by the consumer concerned.”

In practice this will often mean that if a private individual complains about breaches of regulations to the Central Bank, it will simply refer the matter to the Financial Services Ombudsman. This can be useful from the point of view of a Defendant since, the Financial Services Ombudsman can only award up to €250,000 in damages currently and, unlike the Courts does not award costs.

Central Bank (Supervision and Enforcement) Act 2013

Applies to Regulated Financial Services Providers

Section 43.(1) provides as follows:

“Where the Bank is satisfied—

“(a) that there have been widespread or regular relevant defaults [my emphasis] by a regulated financial service provider, and

(b) that, in consequence of the relevant defaults, customers of the regulated financial service provider have suffered, are suffering or will suffer loss or damage,

the Bank may give the regulated financial service provider a direction requiring the making of appropriate redress to the customers.”

+

Regulation and Claims

- + Is the failure to comply with the Central Banks regulations actionable by an individual and whether the failure has actually made any difference or not? Is there a private remedy?
- + If no private remedy referred to in the legislation, at least arguable that there is not.
- + However for the purpose of a professional negligence action, Financial Planners will be judged by the standard of care expected of reasonably prudent professionals of their background and experience. Maintaining that standard will more than likely involve adherence to the applicable regulations and failure to do so is likely to give rise to a breach of your duty of care.

Gerard McCaughey v IBRC and Ors 2009/9042

- + McCaughey was a successful Irish businessman and professional investor. He accepted an invitation to participate in the New York Hotels Fund. He agreed to invest the sum of US\$1m and agreed to borrow US\$620,000 from the Bank. He had been a customer of the Bank and of its “*Private Banking*” arm.
- + Noted by the Judge that **Code of Conduct for Investment Business** states:
- + “*A failure by a Credit Institution to comply with a general principal of this code shall not of itself [my emphasis] give rise to any right of action by persons affected thereby, nor shall such a breach affect the validity of any transaction*”
- + “*Insofar as the Plaintiff has formulated a claim in tort, it must be recognised that this is a case where the parties have ordered their relationship on the basis of detailed, precise, elaborate contractual provisions. The effect of this is that the defendant’s obligations in tort cannot be more extensive than what the parties have by contract determined should be the position*”.

Regulation and the Standard of Care

- + Notwithstanding the Judgment in McCaughey it should be noted that in the earlier case of ***Komady Limited & Anor v Ulster Bank***, the judge made the following comments on the Code of Conduct for Investment business:
- + *“the Code while not actionable per se, nevertheless informs the standard of care expected of the bank in relation to the Plaintiffs”*
- + The same would almost certainly apply to the Consumer Protection Code but is adherence to it enough??? As was noted by the Supreme Court in ***Roche v Peilow*** [1986]:
- + *“the duty imposed by the law rests on the standard expected from a reasonably careful member of the profession, and a person cannot be said to be acting reasonably if he automatically and mindlessly follows the practice of others when by taking thought he would have realised that the practice in question was fraught with peril for his client”*

Assessing Quantum

- + Was the damage foreseeable?
- + To what extent was the Plaintiff made aware of the risks he was taking?
- + Was the Plaintiff in any way responsible for any of the losses? Did he she contribute to the loss suffered and/or fail to mitigate it
- + Was the damage caused by the alleged breach of duty or unforeseeable market forces?
- + Were there any other parties responsible for the alleged damage?
- + What would the Plaintiff have done differently had the alleged breach of duty not occurred? Would it have still suffered a loss and if so how much?
- + Restitutio ad integrum / Restitution

Dealing with a claim and insurance issues

- + Maintaining a paper trail
- + Data Protection Access Requests
- + Importance of the Insurance Policy Wording
- + What services are you covered for
- + Limit of Indemnity
- + Disclosure and Notification Requirements



Questions?