Ireland - Far reaching changes to limitation periods applicable to financial products

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Enacted in July of this year, the Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017 contains significant and far reaching changes to the limitation period for complaints to the Financial Services Ombudsman of Ireland.

The Act will extend the usual limitation period for complaints relating to long-term financial advice and, as a consequence, accountants and financial advisers could now find themselves caught up in Ombudsman complaints relating to financial advice which they gave many years earlier.

Amendment to the Limitation Period

For complaints relating to *"long-term financial services"*, the Act extends the limitation period for the hearing of complaints beyond the traditional 6 year limitation period.

The Act defines *"long-term financial services"* as services where:

1. The actual or intended duration of the service is five years and one month or more;
2. Life Assurance to which the EC (Life Assurance) Framework Regulations 1994 apply.

The limitation period for such products is either: 6 years from the date of the act or conduct giving rise to the complaint; or 3 years from the date the complainant did, or ought to have become aware of that act or conduct.

The Ombudsman may also extend the limitation period if, "there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period."

Effectively therefore, the limitation period where the complaint relates to long-term financial services is a matter for the Ombudsman.

Reaction to Gallagher v ACC

This amendment appears to be a response to the Irish Supreme Court decision of *Gallagher -v- ACC Bank Plc t/a ACC Bank [2012] IESC 35*, wherein the Court noted that complaints relating to closed investments had the potential for injustice as, by the time the consumer became aware of the act or conduct complained of, the limitation period was often expired.

In that case, the Plaintiff, Mr Gallagher, invested in a bond which had been advertised and marketed by the Defendant Bank as a *"borrow to invest"* product. The Plaintiff invested €500,000 in the bond in 2003. Proceedings were thereafter commenced in 2010, more than six years after the investment had been made. The Plaintiff's case was that the Defendant, *"wrongfully and in breach of the various duties and contractual terms…caused the Plaintiff to enter into transactions that were unsuitable for the Plaintiff and caused the Plaintiff loss and damage and the Defendant made representations referred to above negligently."* The Plaintiff alleged that the product sold to him was in fact, *"wholly unsuitable for the Plaintiff or indeed any investor."* Essentially, the Plaintiffs case was that due to misrepresentations on the part of the Defendant he had entered into an investment which he otherwise would not have entered into.

The issue as to whether the claim was statute barred was taken as a preliminary point. The Supreme Court came to a unanimous decision that the Plaintiffs case was statute barred. Mr Justice Fennelly stated that, *"it is to my mind inescapable that the Plaintiff's claim as pleaded is that he suffered damage by the very fact of entering the transaction and purchasing the Bond. The cause of action then accrued. That was also the date when he entered into a contractual relationship with the Bank. On the pleaded effects the present case as set out in paragraph 10 of this Schedule, the damage accrued on entry into the Bond when the Plaintiff was sold the Bond which was 'wholly unsuitable" for him'."*

The Court were cognisant of the potential for injustice as a result of the limitation period however, and expressly stated, *"if there is a case that the limitation period here operates too harshly then that argument should also apply in relation to the contractual claim, and public policy decision should be taken by the Oireachtas on that issue taking into account all the competing interests."*

Retrospective Effect

Aside from the sweeping powers in relation to limitation that the Bill provides, it is of note also that the Bill is to have retrospective effect.

Any complaints where the conduct occurred during or after 2002, and the service to which the complaint relates has not expired/been terminated more than six years ago can avail of this new limitation period.

Therefore, parties who entered into closed investments from 2002 on may find themselves with the right to take a complaint that was previously considered to be statute barred. Given the wide scope of powers the Ombudsman has to restore parties to their previous positions, which had not been changed by the Act, it is expected that this will lead to a flurry of new complaints being made which had previously been considered statute barred.

What are the implications of these changes for accountants and financial advisers?

The Ombudsman will now have a far wider discretion to extend the limitation period when hearing complaints relating to long-term financial investments in Ireland.

Previously statute barred complaints may now be permitted if the Ombudsman considers that it *"just and equitable"* to do so. Accountants and financial advisers should consider this fact when destroying closed client files, as it may no longer be adequate to simply hold these for the standard period of six years, and of course, this consideration will have to be weighed up against their obligations as Data Controllers under the Data Protections Acts.

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