

**THE HIGH COURT****Record No. 2010/2001 P****MICHAEL MADDEN****PLAINTIFF****AND****BARCLAYS BANK IRELAND PLC TRADING AS BARCLAYS WEALTH****DEFENDANT****Judgment of Ms. Justice Iseult O'Malley delivered the 27th July. 2012**

In this action the plaintiff claims damages for negligence, breach of duty including statutory duty, misrepresentation and negligent misstatement in relation to losses incurred by him arising out of certain investments. The issue before the court in this application is, by Order of Gilligan J made on the 11th July, 2011 "the identity of the proper Defendant to the proceedings". The parties are agreed that this depends on whether or not the plaintiff had a contract with this defendant to provide the relevant investment service to him. In brief, the plaintiff pleads that he had a contract with the defendant for wealth management services and that all aspects of the said management, including any investments, were to be made with and through the defendant.

This hearing was conducted on affidavit.

The defendant is a company incorporated in Ireland in 2005 and is a subsidiary of Barclays Bank plc (also referred to as Barclays UK). It pleads that, while it had a contract with the plaintiff, that contract did not include investment management. It says that that is a specialist service which at all material times was provided to the plaintiff by its parent company, with Barclays Bank Ireland acting simply as agent.

Both companies use "Barclays Wealth" as a trading name. Barclays Wealth documentation says that it operates through Barclays Bank plc and its subsidiaries.

Before the events giving rise to this litigation the plaintiff had had dealings with other companies in the Barclays group. In late 2007 he was a customer of Barclays in the Isle of Man. Having disposed of a business interest for a significant sum he sought advice relating to wealth management from the Senior Relationship Manager there. As a result he was put in touch with a Mr. Dominic Godman, Associate Manager of Barclays UK.

Mr. Godman in turn decided that the plaintiff, as an Irish national and resident, should be referred to Mr. Patrick McCormack. Mr. McCormack was the Barclays Bank plc private banker with responsibility for Irish customers. The plaintiff says that he was given to understand that from then on he would be dealing with Barclays Ireland - this is denied by Mr. Godman. At that time Mr. McCormack was an employee of Barclays UK with the title "Director, Ireland, Barclays Wealth". However, as it transpires, Barclays Ireland was in the process of obtaining approval from the Financial Regulator to engage in wealth management services in Ireland and Mr. McCormack was soon to become an employee of Barclays Ireland with the title "Head of Wealth".

It is agreed that at some stage the plaintiff was given a document headed "Barclays Wealth Terms and Conditions". For present purposes the important point is that when a customer signs an "Application Form and Additional Terms" for particular services, that form is to be read in conjunction with the "Barclays Wealth Terms and Conditions" as forming a legal agreement defining the relationship between the parties. The document contains a Law, Jurisdiction and Language clause providing that the agreement is governed by English law and that the courts of England have exclusive jurisdiction to settle any dispute arising in connection with it.

On the 24th January, 2008 the plaintiff attended a meeting in Dublin with Mr. McCormack and Ms. Shashi Watson, investment specialist with Barclays UK. There is some dispute as to whether the plaintiff had met Ms. Watson previously. At that meeting investment options were discussed with the plaintiff. Mr. McCormack says that he and Ms. Watson gave the plaintiff their business cards, which identified them as working for Barclays UK.

Some days after this meeting, on the 30th January, the plaintiff signed two documents. One is entitled "Barclays Wealth Core Services Application Form and Additional Terms". It refers back to the Barclays Wealth Terms and Conditions and stipulates that the two together (and any other terms agreed in writing) form a written legal agreement. All relevant references are to Barclays UK and there is none to Barclays Ireland.

The second document signed on that day is entitled "Barclays Wealth Investment Management Services Application Form and Additional Terms". Again, it refers back to the Wealth Terms and Conditions and says that the two in conjunction form a written legal agreement. Again, all relevant references are to Barclays UK and there is none to Barclays Ireland. The agreement is to apply only to the service selected on the form by the customer. The option exercised by the plaintiff in this form was for a Discretionary Investment Management Service.

There were further discussions involving the plaintiff, Mr. McCormack and Ms. Watson in the following period and in early April the plaintiff signed a further document entitled "Private Banking Private Bank Investment Management Services Application Form and Additional Terms". There is some dispute as to the circumstances in which it was signed, with the plaintiff asserting that he did not fill it in and did not sign it on the date recorded on it (the 4th April) but he does not deny the signature. Again, it refers back to the Wealth Terms and Conditions and states that the two documents together form a written legal agreement. The form provides for a choice to be made by the customer between different types of management investment services and states that the agreement applies only to the service selected. This time the option is for a Non discretionary Investment Management Service.

On the 23rd April 2008 Mr. McCormack wrote to the plaintiff informing him that "all relevant approvals" had now been obtained from the Financial Regulator and that Barclays Wealth was now officially established in Dublin. The letter stated that "this will have no impact on your relationship with Barclays Wealth in terms of the products and services available to you or the way in which you engage with us ... In effect, the only change will be that in order for me to continue to act as your private banker, providing advice locally in Ireland, you are required to sign up as a client of Barclays Wealth Ireland." Enclosed with the letter were a number of documents to be signed, namely a Client Agreement, Internet Indemnity and Risk Disclosure. Also enclosed were "our terms and conditions, terms of business and complaints leaflet".

The Client Agreement provides that it and any additional terms and conditions agreed at the time and any additional information as to charges, commissions and interest rates are to form a written legal agreement. The Agreement is to come into effect in relation to any service the customer selects upon the commencement of provision of that service. In the agreement, the terms "we, us and our" refer to Barclays Bank Ireland plc and "Group" means "us, our parent companies and any companies we or our parent companies totally or partly own at any time".

The section headed "Our Services" provides at clause 4.5 as follows:

This Agreement does not relate to any assets that are the subject of any other agreement you enter into with a Group company from time to time for the provision of our services, including our Discretionary Portfolio Management Service and our Non-discretionary Portfolio Management Service.

This agreement is stated to be governed by Irish law and the Irish courts have exclusive jurisdiction in relation to disputes. The plaintiff signed it, the Risk Disclosure and the Internet Indemnity on the 28th April, 2008.

As of the 28th April, 2008 no investments had actually been made by or on behalf of the plaintiff.

The document headed "Private Banking (Ireland) Terms of Business" is also important, as setting out the basis on which Barclays Bank Ireland PLC provides its wealth management services. The third paragraph, headed "Investment business services" states as follows:

We provide investment advice on a range of wealth management products and services which are provided by or through members of the Barclays Bank PLC Group. We provide investment advice and Barclays Bank Ireland PLC does not provide any products directly itself. These products include, inter alia, discretionary management services, security transactions, structured deposits and notes, mutual funds and other products provided by both Barclays Bank PLC Group companies and third parties. Detailed terms and conditions for each product and service will be provided for every product or service offer.

In summary, the plaintiff's case is that he had a contract with the defendant for investment advice and was given bad advice. He says that he dealt with Barclays Ireland at the insistence of Mr. Godman and was never told that he was contracting with a UK entity. He was dealing in Ireland with an employee of Barclays Ireland. The defendant says that the particular service giving rise to his complaints was investment management. It says that it does not and did not provide this service but rather that it acted as the agent of Barclays UK in signing the plaintiff up to the service provided by the latter.

Both sides lay some emphasis on the terms of an Agency Agreement between Barclays UK and Barclays Ireland, but since this document was never a feature in either bank's dealings with the plaintiff I do not think it can be determinative of the relationship with him.

There is no disagreement between the parties as to the applicable legal principles. The question as to the identity of parties to a contract is a factual one and all relevant evidence is admissible, even, possibly, where it contradicts the express terms of a written agreement - see the analysis by the Supreme Court in *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274.

By agreement this application is being dealt with on affidavit and therefore there is no way to resolve any contested factual issues. However, there are relatively few such issues. One must start with the fact that the plaintiffs original dealings were with the UK bank. The first document of a legal nature that he was given was the Barclays Wealth Terms and Conditions. The terms of that document were incorporated into each application form for services that he signed thereafter, including the applications for investment management services signed in Ireland, up until the Client Agreement with Barclays Ireland. That Agreement in terms excludes any assets covered by a contract with another Group company.

It is true that Barclays Ireland offered "investment advice" and it is true that Mr. McCormack, the plaintiff's private banker in Barclays Ireland, was involved in the meetings at which the plaintiffs proposed investments were discussed. However, any ambiguity as to the meaning of "investment advice" as opposed to "investment management", or any confusion as to Mr. McCormack's role could not, it seems to me, have survived a reading of the contractual documents signed by the plaintiff. The letter from Mr. McCormack of the 23rd April stressed that the only change to be brought about in the plaintiff's position was that, if he wanted Mr. McCormack to continue as his private banker "providing advice locally" he would have to sign up as a client of Barclays Ireland. The Terms Of Business document puts it beyond doubt that Barclays Ireland will not be providing investment management products itself. There is nothing, therefore, to suggest that the contractual relationship established in the previous agreements has been altered, still less that it has been taken over by Barclays Ireland.

I am therefore of the view that the Plaintiff had a contract with Barclays UK for an investment management service and did not have such a contract with the defendant in these proceedings.