THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 278
Appeal Number: 2017/589

Costello J.
Faherty J.
Power J.

BETWEEN/

ANTHONY ELLIOTT AND ANNE ELLIOTT

PLAINTIFFS/
APPELLANTS

- AND -

ACC BANK PLC, PATRICK CONDON AND JAMES HALLEY

DEFENDANTS/RESPONDENTS

Judgment of Ms Justice Faherty delivered on the 13th day of October 2020

1. This is the plaintiffs' appeal of the Order of the High Court (Ní Raifeartaigh J.) dated 30 November 2017 (perfected 8th December 2017) dismissing their case against the second and third named defendants and awarding the second and third defendants their costs.

2. The background is as follows.

3. In or about June 2002, the plaintiffs purchased from third party vendors a residential mini supermarket known as 59 Griffith Place, Waterford City. The purchase was funded by €222,335 borrowed from the first defendant and secured by way of a mortgage and charge on that property and "an assignment of a suitable Endowment Mortgage Policy which provided for a death benefit and an estimated Maturity Value in the amount of €222,000 on

the lives of the Borrowers", as set out in the "Letter of Loan Sanction & Agreement" dated 13 May 2002.

4. On or about 16 May 2002, Friends First issued Policy No. 50157489 to the plaintiffs entitled "Friends First Home Savings Plan". The sum assured was €222,000 payable on the death of one of the "Lives assured" (the plaintiffs). The premium was €753.74 per month payable by direct debit throughout the mortgage term of 20 years. As provided for in the Policy, the Friends First Home Savings Plan was to be invested in 50% managed funds and 50% "With Profit Gross Series 3".

5. On 17 December 2002, the first defendant made a further loan facility available to the plaintiffs in the amount of €120,000 to finance the renovation and refurbishment of 59 Griffith Place. The term of this loan was again 20 years. The required security was a first legal mortgage on the premises. Repayment was to be by monthly instalments of interest with full repayment of the principal sum upon expiration of the mortgage term "or earlier on maturity of the Endowment Mortgage Policy…". This advance was accepted by the plaintiffs on 18 December 2002.

6. On 13 September 2004 the facilities offered by the first defendant to the plaintiffs were rearranged by the advance of a sum of €388,000 for the purposes of repaying the two existing loans and to finance improvements to the mini market at 59 Griffith Place. The term of this loan facility was 20 years. The security provided to the first defendant was: -

> "1. An extension of the Bank's existing First Fixed Legal Mortgage Charge over supermarket at 59 Griffith Place, Waterford.
>
> 2. Assignment of suitable Endowments Policies for Anthony and Anne Elliott.
>
> 3. An Assignment of Life Cover on the Lives of Anthony and Anne Elliot to the value of €388,000 for the full term of the Loan Facility."

The facility letter provided that the loan facility was to be repayable on demand. Until demand was made or the loan facility repaid, repayments were to be by monthly instalments of interest repayments in the sum of €1,336.40. It was further provided that until demand was made or the loan facility repaid in full, repayment of the principal sum "shall be immediately upon the expiration of the term of the Loan Facility or earlier on maturity of the Endowment Mortgage Policy…" It was provided that the proceeds of the Endowment Policy –

> "shall first be used to repay sums secured on foot of the Loan Facility and any surplus shall be paid to the person entitled to any surplus under the Policy. Any deficit in the Policy shall be the responsibility of the Borrower who shall make good any such deficiency to the Bank."

7. It is common case that the plaintiffs retained the second defendant (an accountant by profession and who was their accountant) to assist them in arranging the mortgages, life assurance and endowment policies. The third defendant (a solicitor) was retained by the plaintiffs in his capacity as a solicitor in the years 2002-2004 in the context of the purchase of 59 Griffith Place, Waterford.

8. Unfortunately for the plaintiffs, they ran into difficulties and were unable to pay the endowment and other annuity mortgages and, ultimately, the mini-market at 59 Griffith Place was repossessed.

9. The within proceedings were commenced by way of plenary summons on 24 July 2013 by the plaintiffs in person. Two statements of claim were delivered on 11 November 2014 and 12 November 2014, directed against firstly the first and second named defendants and secondly the third named defendant. These statements of claim were largely identical. In the statement of claim dated 11 November 2014, it is pleaded that on or about 14 June 2002, "on the trusted professional advice" of the defendants the plaintiff

"did enter into a financial agreement to purchase a retail business, trading as 'Lynn's Shop'…The Plaintiff was subject to the professional negligence, breach of duty and breach of fiduciary duty as he was erroneously advised to enter into a financial situation that did not meet his requirements and the terms of which were misrepresented to him". It is pleaded that the plaintiff contacted the second defendant for advice regarding the purchase of the retail business and that the second defendant originally advised the plaintiff to take a mortgage with Bank of Scotland "but then revised his financial advice and advised to enter into an endowment agreement with Friends First with the aligned bank being the first named Defendant."

10. It is asserted that in or about March 2008 the plaintiff received a letter from Friends First "regarding what he thought was his endowment policy" and that when he contacted the second defendant he was told to disregard the letter. It is further pleaded that "the plaintiff then discovered that it was not in fact an endowment policy he had obtained but that of a home savings plan that was not a suitable vehicle through which to purchase a business" and that the policy "was not geared to pay off the cost of the business". The letter referred to in the pleadings comprised advice to the plaintiffs that a review as of 8 April 2008 of their Home Savings Plan showed an estimated value at the mortgage repayment date of €157, 930.81 and, therefore, "a potential shortfall" in achieving the targeted cash sum of €222,000.

11. Upon the direction of the High Court, the plaintiffs delivered a consolidated statement of claim on 8 May 2015. Therein it is again pleaded that the plaintiffs engaged the services of the second defendant to arrange finance for the purchase of the mini market and that upon the recommendation of the second defendant, the plaintiffs retained the third defendant to act on their behalf in the purchase of the business. It is further pleaded that the second defendant ultimately organised the finances for the purchase of the business

with the first named defendant. The plaintiffs go on to plead that "on the trusted professional advice of both their accountant, the second named Defendant and their Solicitor, the third named Defendant" the plaintiffs entered a financial agreement to purchase the mini market and that "due to the negligence, breach of duty, breach of fiduciary duty, the breach of contract of the Defendants and each of them the Plaintiffs were induced to enter into a financial agreement that was wholly unfit for their requirements the terms of which were misrepresented to them." The plea that the second defendant originally advised taking out a mortgage with Bank of Scotland but then revised his advice in favour of an endowment policy is repeated.

12. The plaintiffs also repeat the plea that in or about March 2008 they received a letter from the first named defendant and that they were told by the second defendant to disregard the letter.

13. At para. 5 of the particulars in the statement of claim, the plaintiffs plead:

> "The Plaintiffs then discovered that they had been induced by the second named Defendant to enter into a home savings plan rather than an endowment policy which plan was wholly unsuitable for the purchase of a retail business. At all material times the third named Defendant was fully aware of the true nature of the agreement entered into between the Plaintiffs and the first named Defendant. The third named Defendant failed in his professional obligations to the Plaintiffs to professionally advise them as to the true nature of the agreement in circumstances where he knew or ought to have known the instructions and requirements of the Plaintiffs. Indeed subsequent to the agreement being entered into and subsequent to the plaintiffs becoming aware of the true nature of the agreement, the third named Defendant advised the plaintiffs they had been sold a pup."

14. At para. 6 it is pleaded:

> "As a direct result of the entirely unsuitable nature of the agreement entered into between the Plaintiffs and the first named Defendant the Plaintiffs were unable to meet their obligations as a result of which 'Lynn's Shop', 59 Griffith Place… was repossessed by the first named Defendant causing untold hardship, financial loss, damage to include personal injury to the Plaintiffs."

15. In essence, the plaintiffs' pleaded case is that they had obtained a "home savings plan" rather than an "endowment policy" and that the home savings plan was not a suitable vehicle for the purchase of their business.

16. The plaintiffs' claim against the first named defendant was struck out on 1 February 2016.

17. On 1 July 2016, the third defendant applied to have the plaintiffs' claim struck out. This application was refused by Order of Murphy J. on 1 July 2016.

18. The second and third defendants filed their defences on 5 March 2016 and 21 July 2016 respectively. Both plead that the plaintiffs' claims against them are barred by operation of the Statute of Limitations 1957, as amended (hereinafter "the Statute"). The respective defences deny any liability towards the plaintiffs. No reply to the defence of either defendant was delivered on behalf of the plaintiffs.

19. The proceedings were set down for trial by the plaintiffs on 5 July 2016. On 30 November 2016, the third defendant served a Notice of Trial. The proceedings were duly listed for hearing on 12 October 2017 and the plaintiffs were notified of this date by the third defendant's solicitors on 27 February 2017.

20. Until shortly before the trial date the plaintiffs were litigants in person. By the time of the call over of the case in the week prior to the hearing, the plaintiffs had retained legal representation. However, at the call over it was the first plaintiff in person who informed the High Court that he had instructed a legal team and that he was seeking discovery and

wished to adjourn the trial to facilitate the discovery process and the procurement of expert evidence. The High Court (Noonan J.) refused to vacate the hearing date but gave the plaintiffs liberty to bring a discovery application returnable for the hearing date of 12 October 2017.

21. On 10 October 2017, the plaintiffs' solicitor wrote to the second defendant's solicitors seeking discovery.

22. Under Category A, they sought all documentation relating to the employee status of the second defendant. Under Category B, they sought discovery of documents relating to the duties and obligations owed by the second defendant to the plaintiffs between March 2002 and March 2008. Under Category C, they sought documents relating to the purchase of the mini-market, including:

> "a. Any advice provided in respect of the same;
>
> b. The organisation of the finance for the purchase of the business;
>
> c. The arrangement of mortgages, life assurance and endowment policies in respect of same; and
>
> d. The recommendation of solicitors in connection with the purchase of the business."

Pursuant to Category D, they sought:

> "All documentation relating to the 'sourcing' of financial and insurance instruments from Bank of Ireland, Bank of Scotland and the First Named Defendant including but not limited to any formal or informal letters of offer in respect of financial instruments to be offered to the plaintiffs."

Their Category E discovery sought –

> "All documentation relating to the Home Savings Plan, including but not limited to a copy of the original plan and all advice provided to the Plaintiffs regarding the Home Savings Plan and the suitability thereof."

Under Category F they sought:

> "All documentation relating to any inducements to enter into the Home Savings Plan, including but not limited to any payments received by the Second Named Plaintiff (sic) from Friends First and/or any third party in relation to the Home Savings Plan."

Their Category G discovery sought:

> "All documentation relating to the documentation received by the Plaintiffs in or around March 2008 relating to the Home Savings Plan and/or any discussions between the Plaintiffs and the Second Named Defendant relating to the same."

Under Category H, they sought documentation relating to the turnover of their retail business between March 2008 and the commencement of the proceedings.

23. On the same date, the plaintiff's solicitors also wrote to the solicitors for the third defendant seeking discovery, under Category A, of "[a]ll documentation relating to the introduction of the Plaintiffs to the Third Named Defendant including but not limited to any documentation relating to any introduction made by the Second Named Defendant."

Under Category B they sought:

> "All documentation relating to the duties and obligations owed by the Third Named Defendant to the Plaintiffs between March 2002 – March 2008… including but not limited to any contractual documentation and/or retainers between the Plaintiffs and the Third Named Defendant."

Category C sought documentation pertaining to any advices provided in respect of the purchase of the mini-market, the organisation of the finance for the purchase of the

business and the arrangement of mortgages, life assurance and endowment policies in respect of same.

Under Category D, they sought documentation relating to the Home Savings Plan and "all advice provided to the Plaintiff's regarding the Home Savings Plan and the suitability thereof."

Category E discovery sought "[a]ll documentation relating to any inducements to enter into the Home Savings Plan…" It appears that the Category E discovery was sought in error from the third defendant.

Pursuant to Category F, the plaintiffs sought all documentation relating to the documentation received by them in or around March 2008 relating to the Home Savings Plan "and/or any discussions between the Plaintiffs and the Third Named Defendant relating to the same." Under Category G, they sought documentation relating to "the 'failure and default' of the Plaintiffs to maintain repayment of monies to the First Named Defendant"

24. The plaintiffs' Motion for Discovery issued on 11 October 2017.

25. On 12 October 2017 (the date of the hearing of the action), counsel renewed the plaintiffs' application for an adjournment of the trial in tandem with moving his discovery application.

26. In aid of his renewed adjournment application, counsel alerted the trial judge to what was described as confusion on the plaintiffs' part in the manner in which they had pleaded their case. Their pleadings referred to having been given a "Home Savings Plan" in 2002 when what they wanted was an endowment mortgage. Counsel emphasised, however, that that was not the case which the plaintiffs sought to advance. It was said that their case was more aptly encompassed in the first plaintiffs' supplemental affidavit sworn on 25 February 2016 in response to the third defendant's application to have the claim struck out.

Therein, it is averred by the first plaintiff that the loans the plaintiffs took out "contained an endowment policy of which [they] were completely unaware of and which no advice was provided …of what an endowment policy was or what it contained." Counsel further asserted that the plaintiffs' true case was also set out in the *ex tempore* judgment of Murphy J. of 1 July 2016 refusing the third defendant's application to dismiss the plaintiffs' case. Murphy J. stated as follows:

> "4. In March, 2002 the first named plaintiff, who was a commercial haulier, and his wife, who was a house wife, were interested in buying a retail premises known as '*Lynn's*' at 59 Griffith Place, Waterford City. Their plan was to run the business for fifteen years and then sell it upon their retirement.
>
> 5. The plaintiffs sought advice from the second defendant, who apparently is an accountant, in relation to funding of the project. The Court is then told that initially funding was offered by the Bank of Scotland on a straightforward mortgage repayment basis.
>
> 6. The second defendant, according to the plaintiffs, advised them to use a different repayment structure available from the first defendant, ACC. This involved paying interest on the sum borrowed, monthly to the first defendant, and investing in a Friends First endowment-type policy, the benefit of which was to be assigned to the first defendant.
>
> 7. Being an investment type policy, its value was liable to fall as well as rise and carried no assurance or guarantee that on maturity it would be sufficient to discharge the capital sum due to the first defendants. The plaintiffs say that they were not aware of this, nor told of this by either the second or third defendant."

27. It was in the context of the above that the trial judge was advised on 12 October 2017 that an adjournment was required to procure expert reports and to facilitate any discovery

that might be granted, thereby leaving the plaintiffs in a position to flesh out their pleadings and amend their statement of claim by the addition of a plea of fraudulent misrepresentation on the part of the second defendant. The trial judge was advised that any claim for fraudulent misrepresentation that might be advanced would depend on the discovery obtained. Counsel emphasised to the trial judge that a lengthy adjournment was not being sought and that the plaintiffs were amenable to a timetable of directions from the trial judge with a view to the trial proceeding in December 2017.

28. Both the second and third defendants objected to the plaintiffs' application for an adjournment and to the discovery sought. Both contended that the plaintiffs' discovery application was a delay tactic and further emphasised to the trial judge that the plaintiffs had brought their proceedings for professional negligence in the absence of any expert reports.

29. It was also pointed out that fraud had not been pleaded by the plaintiffs and that the issue was being raised some seventeen years after the transaction in issue had been completed. It was submitted that discovery could not be granted to support an allegation of fraud which had not been pleaded in the first place. Counsel for the third defendant also highlighted the fact that the allegation now sought to be made by the plaintiffs, namely that the provision of an endowment policy was unsuitable to their needs, was an entirely different case to the one they had pleaded in three different statements of claim.
Both defendants urged the trial judge to strike out the proceedings as an abuse of process or, in the event of that application not being successful, that the Statute issue be tried as a preliminary point albeit that no motion for a trial on a preliminary issue was before the court.

30. The issue of a preliminary trial was advanced in circumstances where it was made known to the trial judge that the second defendant was not amenable to agreeing the facts

as pleaded by the plaintiffs and that the court would have to hear oral evidence on the issue of the Statute. It is the case that the third defendant was amenable to agreeing the facts as pleaded for the purposes of the preliminary trial.

31. In his reply to the second and third defendants' request to have the Statute tried as a preliminary issue, counsel for the plaintiffs asked the trial judge to "exercise caution when the facts are not agreed" and asserted that he would need time to make a proper submission on the issue of the Statute.

32. After considering the matter overnight, on 13 October 2017 the trial judge duly gave her ruling on the plaintiffs' adjournment and discovery applications and the second and third defendants' application to have the proceedings struck out or alternatively the Statute decided as a preliminary issue.

33. Firstly, she noted Noonan J.'s refusal of the adjournment and stated that she would refuse it "in any event". The trial judge was also not satisfied to accede to the plaintiffs' application to adjourn the proceedings for the purpose of the procurement of expert reports finding that such reports would not in any event be relevant to the issue of the Statute.

34. The trial judge addressed the discovery application in the following terms:

> "There is an application for discovery and I have examined the correspondence in that regard and I have carefully looked at the pleadings and have read all the affidavits in relation to it. And I am refusing the application for discovery for a number of reasons. One is because of its lateness. The other is that it seems to me that there is a considerable element of fishing in relation to the issue of whether the second defendant had some arrangement with ACC Bank by way of whether its commission or some, some kind of financial arrangement, which would then be used to mount an allegation or support an allegation that he induced the Plaintiff to enter into the contract because there was some financial incentive for him. But

perhaps more importantly at this point in time it seems to me that the categories sought, and I have looked at them carefully, they are irrelevant to the preliminary issue, the Statute of Limitations issue, and it does not seem to me necessary for the determination of that issue that this discovery be obtained.

And I, I say that including category E, as its been referred to, the category seeks information or documents relating to whether the second defendant had some kind of a retainer or an arrangement with ACC in relation to this type of financial product. Because it seems to me that that could not be said, in any event, to fall within the Section 71 fraud exception to the statute of limitations."

35. The trial judge then went on to refuse the defendants' application to dismiss the proceedings as an abuse of process. She opined that any such application should have been properly before the court by way of a motion and that, in any event, the third defendant's application to have the matter struck out as an abuse of process had already been ruled on by Murphy J.

36. The trial judge was however minded to proceed with the preliminary issue of the Statute. She acknowledged that there were no agreed facts and went on to state:

"Again, it might have been helpful if there had been a motion before the Court seeking to have it tried as a preliminary issue and then there might have been, perhaps, minds addressed to the agreed evidence and so forth. But we are late in the day and it seems to me that it's not a case where the facts would be readily agreed because, while the defendants are satisfied to agree the facts in the limited sense of agreeing them for the purpose of the preliminary issue of statute of limitations without prejudice to their right to contest it [if] the matter were to go to full hearing, it seems to me [that] the Plaintiff would not be in a position of readiness to necessarily agree the facts."

37. She stated that it would be very difficult to have a very simple set of agreed facts and that "the issue of limitation is not necessarily a very simple one." She opined that the plaintiffs' case was "a case of economic loss based on the entry into an arrangement with a lender for a financial product" not unlike the situation in *Gallagher v. ACC Bank* [2012] 2 I.R. 620 although she noted the *dictum* of Fennelly J. that there may be cases where the accrual of the cause of action is later in relation to economic loss cases. She noted however that from the pleadings the first plaintiff's assertion that he did not know he had entered into a bad arrangement until 2008 was more akin to a discoverability argument in circumstances where there was no discoverability rule in torts save for personal injury actions. She went on to state:

> "In short, this is a case of economic loss based on the entry into an arrangement with a lender for a financial product. And the case law on that is not entirely straightforward. And the facts of this case may be relevant to the application of those cases."

38. Ultimately. she decided:

> "[T]he best way of dealing with the facts on the preliminary issue is that the Plaintiff needs to give evidence, oral evidence. So it seems to me that there should be a trial of the preliminary issue on the Statute of limitations but that the Plaintiff should give evidence. If the Defendants want to give evidence they may – I doubt that they would, perhaps I am wrong about that. But it seems that the plaintiff can give evidence and be cross examined and then submissions can be had on the application of the authorities to the facts which I'll have to make findings in due course."

39. Recognising that counsel for the plaintiffs had only recently been brought into the case, the trial judge adjourned the matter to 18 October 2017. She stated:

"As I say, it's for the trial of the preliminary issue on the statute of limitations only, since the facts don't appear to me to be easily admitted of agreement. If they can be, so much the better. In the meantime, if the parties want to talk to each other. But if they can't be it seems to me that the Plaintiff would give evidence and be cross examined. Everyone can give such evidence as they want, provided – I do want to make this clear, very clear to the Plaintiff – the evidence should be tailored as far as possible to the preliminary issue.

Now, we know that there is inevitably going to be some overlap with the liability issues but insofar as it is possible to keep it within boundaries, it should really be tailored to the preliminary issue."

40. The hearing of the preliminary issue commenced before the trial judge on 18 October 2017 and concluded on 19 October 2017.

The evidence tendered by the first plaintiff

41. In his oral evidence the first plaintiff described his and his wife's intention to purchase 59 Griffith Place with a view to running it as a local corner shop until the first plaintiff's retirement some fifteen years later. He testified to having apprised the second defendant (his accountant) of the intention to buy the shop and his request that the second defendant would look into the financing aspect. The second defendant duly arranged a meeting with Bank of Scotland following which the plaintiffs were offered a fifteen-year loan and were not required to put their home forward for security. The first plaintiff testified that some days thereafter, the second defendant returned stating that he had secured a better deal for the plaintiffs which had better tax breaks and that the plaintiffs would receive €15,000 at the end of the term. He stated that the second defendant never spoke about risks associated with the deal. The first plaintiff's expectation was that at the end of the loan policy he would own the shop and the loan would have been repaid. He

testified that he did not expect a €15,000 bonus. His evidence was that he had asked for a "loan" and not an "investment" and "didn't ask to be put in the New York Stock Exchange". What he had sought was a simple loan.

42. The first plaintiff explained the discrepancy between the pleaded case, i.e., that he was induced into taking out a home savings policy rather than an endowment mortgage, and the case made by him in evidence, namely that he never wanted an endowment policy at all but rather a simple loan, on the basis that his pleadings were badly written and that he had made a mistake. With regard to the loan offer made to the plaintiffs on 13 May 2002 by the first defendant (which referred, *inter alia*, to an endowment policy), he testified that the plaintiffs were never shown the front of any documents; rather they just signed where they were told to sign. He testified that he had never been in the third defendant's office and that the only time the plaintiffs spoke to the third defendant was on the day they got keys to the shop. His evidence was that the paperwork relating to the 2004 facilities was brought to the plaintiffs by the third defendant for them to sign.

43. The first plaintiff described that after receiving the letter of 8 April 2008 from Friends First (which had advised him to contact his financial advisor) he had duly telephoned the second defendant who told him to throw the letter in the bin and that the second defendant would "look after it".

44. The first plaintiff further testified that at some point in 2008 he telephoned Friends First who told him that he did not have an endowment policy but rather a home savings plan. It was around that time that the plaintiffs stopped making payments to the first defendant. He testified that at a meeting with the first defendant in 2010 he was advised that his money "was gone on the New York Stock Exchange".

45. Under cross-examination the first plaintiff accepted that the documents he had signed had clearly shown that what he had taken out was an endowment mortgage and that

the term was twenty years and not fifteen years. He stated however that he had no understanding in 2002 as to what an endowment policy was, that he had not realised the nature of the financial arrangement he had made and that he did not know where the €15,000 end of term potential payment, which had been mentioned by the second defendant, would come from.

46. It was put to him that he had previously taken out an endowment mortgage in 1997 in order to purchase a house for his mother-in-law and that, therefore, he must have known what an endowment mortgage was. The first plaintiff stated that he did not know at that time that his house had been used as security for that loan. He testified that he did not know whether he had made a profit on that transaction.

47. The first plaintiff accepted in cross-examination that he had purchased other properties for rental in order to make a profit but maintained that he would never have chosen to involve himself in risky transactions.

48. He also accepted that he had received letters from the first defendant at least from 2007 in connection with the endowment policy showing that it was on a downward trend and that the letter of 2008 which had been put before the court by his counsel was not the first such letter. He stated that he had not understood what those letters meant and had not understood from them that he had an endowment mortgage. He accepted however that he knew he was paying €750 per month into the policy but stated that this did not alert him to the possibility that this could not amount to repayments in respect of the loan obtained from the first defendant.

The trial judge's decision on the Statute issue

49. The trial judge commenced her legal analysis of the Statute issue by noting the plaintiffs' acceptance that the limitation period in respect of the cause of action in contract had expired and that they would be time barred unless the court held that the cause of

action in tort did not accrue until a date within a period of six years from the date of the commencement of the proceedings (s.11 of the Statute) and/or that s.71 of the Statute applied.

50. Addressing the claim in tort, the trial judge noted that the question of when the cause of action in tort relating to financial loss accrues had been discussed in a number of Irish authorities and in this regard cited *Gallagher v. ACC Bank Plc* [2012] 2 I.R. 620, the decision of the High Court in *Cantrell & Ors. v. AIB Plc* [2017] IEHC 254 and *Murphy v. O'Toole & Sons Ltd* [2014] IEHC 486.

51. After considering those cases in detail, the trial judge went on to state:

> "41. Having regard to the above authorities, the question therefore arises as to where on the spectrum of cases involving an alleged tort causing financial loss the plaintiff's case falls. I am conscious of the warning of O'Donnell J., that cases are best approached on 'an incremental basis closely related to the fact of the individual case'. I am also conscious that the second and third defendants were an accountant and solicitor respectively, unlike the situation in *Gallagher* and *Cantrell*, where the defendants were banks who provided the product in question. It seems to me that (even if one assumes the plaintiff might have had a substantive case regarding advices given or not given) the relevant date for accrual of the cause of action must be when advice was either given by the second and third defendants, and/or when such advice was not given and could reasonably have been expected to have been given by them. This seems to me to be necessarily either 2002, when the endowment mortgage was first entered into, or, at the latest, 2004, when a refinancing was entered into. This logic appears to me to apply whether one considers the case from the point of view of the case as pleaded or the case as sworn to in the plaintiff's evidence. The case made in the sworn evidence of the

plaintiff was that he wanted a simple loan to purchase a shop for a fifteen-year term and that he should have been warned of the risks of entering into an endowment policy. On this version of the plaintiff's case, the time for such advice would have been 2002 or 2004, at the latest. Alternatively, if one takes the case as pleaded, namely that the plaintiff thought he had received an endowment mortgage but was given a home savings plan, the risks of which he was not warned, again the time for such advice, if required, would have been 2002, or 2004, at the latest. Even leaving aside the question of whether advice would have been required to advise him of the differences between an endowment policy and a home savings policy, or whether, objectively, there is indeed any material difference between the two types of policy it seems to me to be clear that if any advice was required, it would have to have been given in 2002 or, at the latest, 2004. On either view of the case, whether as pleaded or as sworn to, in my view the cause of action accrued at the latest in 2004 and therefore the commencement of proceedings in 2013 was outside the six-year time limit."

52. She next addressed the first plaintiff's emphasis on 2008 as being the date upon which he first realised that he had an endowment policy and not a simple loan. In respect of this evidence she opined:

"42. I must say that I am rather sceptical about the credibility of this claim for a number of reasons (set out below), the date of discoverability is of no relevance in tort cases other than those for which a special exception has been made by statute, of which this is not one. This is a matter of policy for the Oireachtas and even if the Court were persuaded, which I am not, that the plaintiff did not know he had an endowment mortgage until 2008, this would not advance his case on the Statute of Limitations.

43. Counsel on behalf of the plaintiff did not seek to advance the case on this basis but rather on the basis that the loss could not be ascertained until the policy was cashed out, at which point the loss was identifiable, which was in 2011. It seems to me that the *Cantrell* rationale cannot apply in a case such as this, where the core of the plaintiff's claim is fundamentally that he had asked for a 'simple loan' not involving any risk or involving the use of his family home as security, and his accountant and lawyer had 'induced' (Mr. Condon) or 'allowed' (Mr. Halley) the plaintiff to enter into something *other* than a simple loan, namely to enter into an arrangement carrying an investment feature carrying risk and involving the use of his family home as security. His case was that he wanted no risk at all and was placed in a situation in 2002, and again in 2004 at the time of the refinancing, where there was risk due to their failure to advise him properly. In those particular circumstances, it seems to me that 2002, or 2004 at the latest, are the relevant dates for the accrual of the cause of action in tort."

53. The trial judge then addressed the question as to whether s. 71(1)(b) of the Statute would assist the plaintiffs but concluded that it could not. She stated:

"48. The plaintiff received documents from Friends First in 2008 and 2007 concerning his policy, and he accepted in evidence that he may have received similar documents earlier than that. It seems highly probable that he was receiving a written update at least annually from Friends First. His claim that s.71 applies, even taken at its height, is, in reality, based not on a suggestion that he learned of new facts in 2008 which had been concealed by the second and third defendants, but rather that he for the first time began to suspect from the document received in 2008 that he had not received the product he had asked for, notwithstanding that the documents with the relevant information had been sent to him all along. The

acceptance of such an approach would reduce s.71 to an entirely subjective test dependent upon a plaintiff's claimed ability to understand the significance of facts manifestly available to him before the expiry of the six-year limitation period. It could not possibly be said that, using the words of Peart J. in *Komady*, that 'the facts necessary to found a cause of action have been concealed from a plaintiff by the defendant so that it would be unfair for that plaintiff to be held to have had knowledge of them, or to be expected to have made inquiry in that regard', in circumstances where he personally received documents during the limitation period clearly stating the relevant information about how the policy was performing."

54. It is also the case that the trial judge was not persuaded on the balance of probabilities that the first plaintiff did not know until 2008 that he had entered into an endowment mortgage as distinct from a simple loan/mortgage. She based her conclusion in this regard on a number of factors, articulated as follows:

"49. (1) the discrepancy between the factual case as pleaded in at least three different documents when compared with the sworn evidence given to the Court; in this regard, I am not persuaded that the absence of legal expertise would have led him to misstate the fundamental facts of the case (as distinct from its legal characterisation) in the pleadings;

(2) the fact that he previously had an endowment policy relating to the purchase of his mother-in-law's house; in this regard, I am not persuaded that:

(a) he did not know his own home was being used as security for that mortgage; or

(b) that he did not know that he made any profit and simply left 'paperwork' to his accountant; I find such a claimed level of naivety regarding fundamental

matters such as the security of his house and whether he made a substantial profit from that other endowment policy not credible;

(3) the fact that he was fully aware of the level of monthly payments he was making in order to service the policy he had entered into in 2002;

(4) the fact that he was receiving written annual updates on the policy;

(5) the fact that he accepted in evidence he was told that he might make a profit of €15,000 at the conclusion of the term, which is entirely inconsistent with the concept of a 'simple loan', together with his evidence concerning the exchange (described above) between his wife and Mr. Condon about the two banks being involved;

(6) the fact that the documents he signed clearly showed that he had received an endowment mortgage and other details such as the fact that his home was security and that the term was 20 years; and

(7) the unlikelihood that any bank would give a loan of this order of magnitude for the purchase of a shop and for a term of 20 years in the absence of any property as security, and that he must have known this. The cumulative effect of these matters is, in my view, indicative that he did in fact know that he had an endowment mortgage long before the six-year time limit expired and, most probably, at the time of entry into the contract. I have seen the plaintiff give evidence and he did not appear to me to be a foolish, naive person but rather an intelligent, articulate man. If I am correct in my conclusion that he knew he had an endowment policy within the six-year limitation period, s.71(1)(b) has no application to the facts of the case."

The trial judge's ruling on whether the plaintiffs had made out a *prima facie* case against the third defendant

55. The trial judge considered whether a *prima facie* case had been made out against the third defendant. This analysis arose because following the first plaintiff's evidence in chief, counsel for the third defendant had applied for a non-suit/dismissal of the case in circumstances where it had not been alleged that the third defendant had given any advice to the plaintiffs on the merits of the transaction in issue.

56. The trial judge noted that it had not been made entirely clear whether the third defendant's application was to non-suit the plaintiffs, or to dismiss upon the conclusion of the first plaintiff's evidence. This blurring she attributed to the discrepancy between the plaintiff's case as pleaded and to the case presented in his sworn testimony. In any event, she went on to rule on the third defendant's application in the following terms:

> "56. If I take the case as sworn, namely that the plaintiff wanted a simple loan (a 'no-risk' product), but instead received an endowment mortgage (a 'high risk product'); it seems to me that the Court would not [sic] in a position to decide the scope of the duty of care in this case in the absence of precise evidence from the plaintiff as to the circumstances in which the third defendant was retained and for what exact purpose. Further, it might have been necessary to grant discovery of any documents relevant to the scope of the third defendant's instructions from the plaintiff. On the other hand, if I were to take the case as pleaded, it seems to me that the pleadings do not make out a stateable case against the third defendant in negligence. The case as pleaded is essentially that he got a home savings plan instead of an endowment mortgage; if that were the case being made, I simply cannot see how the failure of the third defendant to give advice in those circumstances could amount to negligence, as both are a type of investment product

and the difference between them could not, even on the principles set out in the authorities cited to the Court, amount to such an obvious "pitfall" that the third defendant was required to advise the plaintiff of this in the absence of a specific instruction to do so. Certainly, the difference between the two products said to create the need for advice was not pleaded.

57. Given my conclusion on the Statute of Limitations point, I propose to dismiss the case against the third defendant in any event, and the question as to whether the plaintiff's case should have been dismissed before he was cross-examined on behalf of the third defendant will only develop significance if it were to be held, in the event of an appeal, that my conclusion on the Statute of Limitations is erroneous. It is for that reason that I have chosen to deal with the 'limitations' issue in this judgment first, although the chronological or logical sequential order would normally dictate that the application to dismiss should be dealt with first in this judgment. For completeness, I simply say that my view on this issue is that, in the absence of any application to amend the pleadings, the plaintiff must be held to the case as pleaded, which is that the defendant failed to advise him as to the different risks as between a 'home savings policy' and an endowment policy. It seems to me that no prima facie case of negligence is made out in this regard, whether on the pleadings or the evidence, and in my view, the case against the third defendant should be dismissed on this basis also."

The issues in the appeal

57. Arising from the Notice of Appeal and the parties' submissions, the following issues arise for consideration in the within appeal:

(1) Whether the learned trial judge erred in directing a preliminary hearing on the Statute.

(2) Whether the trial judge erred in concluding that the plaintiffs' claim was statute barred as against the second and third defendants.

(3) Whether the trial judge erred in determining that no *prima facie* case in negligence was made out against the third defendant.

Issue 1: The alleged error on the part of the trial judge in setting down a trial of a preliminary issue on the Statute

58. The first thing to be noted is that on 12 October 2017 myriad applications were made to the trial judge. There was however only one formal motion before her–the plaintiffs' discovery motion. The other applications comprised the plaintiffs' application to adjourn the proceedings to consider any discovery the Court might grant and to allow them to procure expert reports, the second defendant's application to strike out the plaintiffs' case as an abuse of process and the second and third defendants' application for preliminary hearing on the Statute issue. All of these applications were the subject of a detailed ruling given by the trial judge, having considered matters overnight.

59. The trial judge refused the adjournment application. Before this Court, it is contended that the trial judge wrongly refused the application in circumstances where the plaintiffs had been litigants in person up to shortly before the trial date and where they had not procured expert reports, put in a reply to the defences or sought discovery.

60. In my view, it was well within the trial judge's discretion to refuse to adjourn the case. It is important to recall in the first instance that the plaintiffs' application for an adjournment had been refused by Noonan J. prior to the case commencing. All of this was in circumstances where the plaintiffs themselves had set the case down for hearing. That being said, to my mind, it is axiomatic that an adjournment would have been granted, and the Statute issue not proceeded with, had the trial judge considered that discovery was necessary before the issue of the Statute could be considered. But she did not so find.

61. Counsel for the plaintiffs submits that the trial judge erred in not acceding to the discovery application. He states that the case that had been made was that discovery was necessary for the plaintiffs to pursue their claim of fraud against the second defendant. The issue of fraudulent concealment had been flagged on Day 1 of the trial. It is argued discovery was required and was relevant to the issue of whether the plaintiffs were statute barred. Counsel submits to this Court that in the court below he had adopted a cautious approach to the issue of fraud in circumstances where the Rules of the Superior Courts require precise pleading in this regard. He also points to the fact that he had proposed to the trial judge that once discovery was granted the plaintiffs could have been required to move with expedition in amending their statement of claim. It is submitted that the trial judge's refusal to grant discovery left the plaintiffs unable to advance their claim regarding fraudulent concealment, and that had the trial judge granted the discovery application her understanding, in due course, of the plaintiffs' claim would have been entirely different.

62. Counsel contends that the High Court's refusal to grant discovery went to the unfairness of the preliminary hearing. It is submitted that had discovery been granted, the plaintiffs would have been in a position to amend their pleadings by a plea of fraudulent misrepresentation which would in turn defeat any argument that they were statute barred as against the second defendant as they would have been in a position to rely on s.71 of the Statute. It is thus argued that in circumstances where the plaintiffs had raised the issue of fraudulent concealment (albeit not pleaded) such as would, if established, allow them to rely on s.71 of the Statue, a preliminary hearing was not appropriate.

63. The question for the Court is whether the refusal of the discovery rendered the decision to hold a preliminary trial on the Statute unfair. Firstly, while it is argued by the plaintiffs that the within appeal includes an appeal against the refusal of each of the categories of discovery sought I am not persuaded that the notice of appeal encompassed

the trial judge's refusal of the categories of discovery sought by the plaintiffs. Even if I am in error in this regard, overall, I am satisfied that the trial judge was correct in her assessment that consideration of the preliminary issue did not depend on discovery being granted. In my view, she correctly determined that many of the categories sought were not relevant to the Statute issue. This was also in circumstances where, as acknowledged by counsel for the plaintiffs, the discovery sought was, in part, to ascertain whether fraud could be pleaded against the second defendant. It is a fundamental principle that discovery is ordered in aid of a pleaded case by reference to the pleadings: it is not permissible to order discovery to enable a plaintiff to make a case not (yet) pleaded.

64. The gravamen of the plaintiffs' counsel's submissions to the trial judge was that if discovery was granted he would "either be able to put certain advices in place or be able to plead a case of fraudulent misrepresentation." The difficulty is however that fraud was not pleaded in the first instance. On that basis alone, there is some force in the defendants' contention that the discovery application, in so far as it was directed to the non-pleaded allegation of fraud, could have been rejected in *liminie.* However, as clear from her judgment, the trial judge went through each of the categories of discovery and found none relevant to the issue of s.11 of the 1991 Act which was the Statute issue that arose from the pleadings in the case.

65. I am of the view that the plaintiffs' discovery application, in large part, was not consistent with the stated purpose of discovery in litigation: the application was pursued in order to ascertain whether their case could be expanded to include a plea of fraudulent concealment and thus avail themselves of s.71 of the Statute, under which the time limit will not begin to run until a plaintiff has discovered the fraud. However, the discovery application was made in circumstances where fraud had not been pleaded by the plaintiffs. Discovery must arise from the pleadings. It is an express requirement of the rules that fraud

be pleaded with particularity so the absence of any plea of fraud was doubly offensive to the Rules of Court. It is also the case that fraud was being alleged very late in the day. Moreover, as conceded by counsel for the plaintiffs before this Court, there was no application made to the trial judge to amend the pleadings.

66. In aid of his submissions, counsel for the plaintiffs referred the Court to *O'Sullivan v. Rogan & Moran* [2009] IEHC 456. In that case the plaintiffs had commenced an action against a firm of solicitors alleging negligence, misrepresentation, breach of contract, breach of duty, and fraudulent concealment in relation to a transaction which took place in 1999. The defendants pleaded that the claim was statute-barred and a preliminary hearing on that issue had been directed. Ultimately, however, Hedigan J. (having heard the preliminary issue) remitted the matter for plenary hearing, stating as follows:

> *"13. What exactly was the conduct of the defendants in this case at the time? It is not clear and I believe cannot become clear until the full facts of the case are teased out. If it turns out that what occurred amounts to the kind of conduct referred to in Kitchen, Applegate and Keane, then it may well be that s. 71 will apply and save the plaintiff from the statute. If, on the other hand, it is found to be conduct which whilst negligent was unattended by fraudulent or deceitful behaviour then, as pointed out by Denning M.R. at p. 34 of Victor Parsons, the defendant may avail himself of the statute.*
>
> *Decision*
>
> *14. Owing to the centrality of the defendants' conduct in relation to the events at the time and owing to the inevitable conflicts in relation thereto which can only be resolved by plenary hearing, I cannot come at a preliminary stage to any conclusion as to whether s. 71 applies. I will therefore remit the issue to plenary hearing. It seems to me that it is only when the facts of this case are fully teased out that it will*

be clear whether s. 71 applies or not. For the sake of clarity I hold the plea of fraudulent concealment has been properly particularised by letter of 7th May, 2009 and now remains to be proved at plenary hearing.

67. I am not persuaded that the *dictum* of Hedigan J. in *O'Sullivan v. Rogan* bolsters the plaintiffs' arguments in the present case. It is clear that fraud was pleaded and particularised in *O'Sullivan v. Rogan*, unlike the position in this case. In those circumstances, I perceive no error on the part of the trial judge in proceeding with the trial on the Statute in the aftermath of a refusal of a discovery application that was largely irrelevant to the Statute issue as pleaded, and insofar as it was related to the allegation of fraudulent concealment, was properly rejected by the trial judge as a fishing exercise.

68. Part of the arguments advanced by the plaintiffs in this Court was that discovery would have also established when exactly their cause of action accrued for the purposes of s.11 of this Statute. It is argued that discovery of the documentation sought by the plaintiffs, including documentation pertaining to the Bank of Scotland mortgage first offered to them, would assist in determining when loss first occurred for the purpose of s.11 of the Statute, said by the plaintiffs to be 2011 when the endowment policy was encashed. Counsel also asserts that such documentation would assist the plaintiffs in establishing that damage for the purposes of s.11 occurred in 2008 -the time when they were advised that their Home Loan policy monthly premium would have to be increased to meet the mortgage repayment target figure set out in the policy. However, for reasons which will become apparent later in this judgment, I am not persuaded that the trial judge erred in refusing discovery in the face of the foregoing arguments.

69. I now turn to the decision to conduct a preliminary trial on the Statute issue.

The legal principles governing a trial on a preliminary issue

70. The general principle in litigation is that the conduct of a case ought to be by way of a unitary trial. The courts have adopted a cautious approach in exercising jurisdiction to direct a preliminary trial on a legal issue. The reason for that was noted by Kenny J. in *Tara Exploration and Development Co. Ltd. v. Minister for Industry and Commerce* [1975] IR 242:

> *"[w]hen this procedure is adopted, the answers to the questions of law usually have to be qualified in so many ways that they do not lead to expedition or, indeed to clarity.*

71. The principles to be applied when departing from a unitary trial are helpfully set out by Clarke J. (as he then was) in *Weavering v. Macro Fixed Income Fund Ltd (In Liquidation) v PNC* [2012] 4 IR 681:

> *"…the trial of a preliminary issue under the rules is concerned with circumstances where it is possible to separate out a legal issue which can be determined on the basis of facts agreed either generally or for the purposes of the preliminary issue. It is also possible, under O.35 to have an issue of fact tried where the case will almost completely depend on a resolution of that factual question. What is, however, clear from all of the authorities is that the trial of an issue, formally separated out as a preliminary issue in the sense in which that term is used in the rules, is a practice which is to be adopted with great care by virtue of the experience of the courts that 'the longest round is often the shortest way home'. Where issues such as the question of liability and/or causation, are tried first in a modular trial then the court is simply hearing all matters relevant to those issues, be it fact or law, and coming to a conclusion on those issues. It is, of course, the case that if, while hearing such a module, the court comes to the view that it cannot safely reach a*

final conclusion on some or all of the issues to be determined in that module without also entering into evidence and legal argument relevant to some issue originally intended to be tried at a later stage, then the court can act in an appropriate way to ensure that no injustice is caused." (at p. 699)

72. More recently, in *O'Sullivan v. Ireland* [2019] IESC 33 (a case concerned with s.3 of the Statute of Limitations (Amendment) Act 1991 ("the 1991 Act")), Charleton J. revisited the issue of when it is appropriate to conduct a trial on a preliminary issue and approved the judgment of Clarke J. in *Weavering*. At para. 42, Charleton J. stated:

"The proper application of the principles as to when the severing of the unitary trial principle is appropriate and the benefits in terms of facilitating a decision within a reasonable time should be seriously considered where it is proposed to isolate facts and to leave parties without a decision on liability. Whether litigation is taken into case management on a formal basis or not, it remains the responsibility of trial judges in every case to ensure that steps proposed to the court actually facilitate the necessity to move the case towards a final decision. That can include the steps detailed in Talbot, but must include the overriding obligation to use the resources of the courts to efficient purpose. In that respect, counsel for a plaintiff should be in a position to tell any court at any stage as to what their case broadly is and a defendant should be able to elucidate the nature of the contest joined."

In the same case, Finlay Geoghegan J. opined:

"88. I agree with the observations made by Charleton J. in relation to the dangers of departing from the unitary trial principle in a claim such as this. I also recognise that it may be appropriate sometimes to determine a limitation issue as a preliminary issue. The Statute of Limitations inter alia protects a defendant against

being required to defend a stale claim. In many instances, however, the limitation period is a period from the date of accrual of the cause of action and capable of being established with limited evidence."

73. However, as made clear by O'Donnell J. in *L.M. v. Commissioner of An Garda Síochána* [2015] 2 I.R. 45, a court "*retains power to refuse to determine a preliminary issue if, after careful analysis, it becomes apparent that some aspect of the issue was heavily fact dependent, or that a possible outcome would be so contingent or qualified as to require almost a form of advisory opinion."* (at para. 36)

74. In *Campion v. South Tipperary County Council* [2015] IESC 79, McKechnie J., at para. 35 of his judgment, elaborated on the principles which should govern a decision to direct a trial of preliminary issue as follows: -

"• there cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application;

• there must exist a question of law which is discrete and which can be distilled from the factual matrix as presented;

• there must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be will not be sufficient;

• the greater the impact which a decision on the preliminary issue(s) is likely to have on the entire case, the stronger will be the argument for making the requested order;

• conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order;

• exceptionally however, even if the follow-on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense;

• as an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate;

• it must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful to retain the traditional separation of such matters;

•'convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation;

• the making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties;

• the court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally

• subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."

75. In their submissions to this Court, the plaintiffs, in the first instance, point to the fact that there was no motion by the second and third defendants before the High Court for a trial on a preliminary issue. This is in circumstances where the defendants had had ample opportunity to bring such a motion. It is argued that in the absence of a motion, the trial judge had no jurisdiction to embark on a preliminary hearing. It is further submitted that even if the trial judge had jurisdiction, and while there is no rule

against the holding of a trial on a preliminary issue, agreed facts were required, as *per McCabe v. Ireland* [1999] 4 I.R. 151, where Lynch J. stated, at p.157:

> *"A preliminary issue of law obviously cannot be tried in vacuo: it must be tried in the context of established or agreed facts. The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue. The facts must be agreed or the moving party must accept, for the purposes of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party."*

76. This is echoed by McKechnie J. in *Campion v. South Tipperary County Council*:

> *"There must exist a question of law which is discrete and which can be distilled from the factual matrix as presented."* (at para. 35)

77. Another of the plaintiffs' core arguments under Issue I is that the trial judge erred in requiring the first plaintiff to give oral evidence in circumstances where there were no agreed facts. It is contended that requiring the first plaintiff to give evidence was completely inappropriate where complex issues of law pertaining to the Statue were at issue.

78. I think it can fairly be said that the general import of the caselaw referred to above is that a trial of a preliminary issue will be ordered in limited circumstances, i.e. where a discrete issue or issues arise in proceedings that can be conveniently tried by reference to agreed facts (or the assumption that the matters pleaded by a plaintiff will be proven) and the determination of which may dispose or substantially dispose of the entire action or otherwise be likely to lead to a substantial saving in time and costs. Undoubtedly, a classic

example of where it may be appropriate to direct a preliminary trial is where a defendant pleads that the proceedings are statue barred.

79. In the present case, both the second and third defendants pleaded that the plaintiffs' proceedings were statute barred. It is the case, however, and as acknowledged by the trial judge, that there were no agreed facts (albeit that it was made clear to the trial judge on 12 October 2017 that the third defendant was prepared to agree to the facts as alleged by the plaintiffs for the limited purpose of any trial of a preliminary issue on the statute).

80. The question to be determined is whether the trial judge erred in deciding to embark on a preliminary trial on the Statute in the absence of agreed facts. Clearly, she was alert (from para. 14 of her judgment) to the *dictum* of Kenny J. in *McCabe*. She determined, however, that it would be difficult to have a set of agreed facts in the present case and thus decided to have a hearing in relation to the Statute issue by way of oral testimony.

81. In my view, while the optimum position to determine the Statute issue as a preliminary matter would have been by way of a motion on agreed facts, in the within case the decision of the trial judge to hear oral evidence on the Statute issue was in all the circumstances not unfair and met the requisite threshold of being in the interests of justice. I so find for the following reasons.

82. Without in any sense departing from the requirement set out in *McCabe*, I note that there are occasions on which a trial of a preliminary issue has proceeded by way of oral evidence. In *O'Sullivan* v. *Ireland*, the High Court heard oral evidence in a preliminary trial on the interpretation and application of s. 3 of the 1991 Act in a medical negligence suit. I do not believe that the Supreme Court found such a mechanism prejudicial to the plaintiff. In her judgment in the Supreme Court, Finlay Geoghegan J. noted, at para. 88, that *"in many instances…the limitation period is…capable of being established with limited evidence".* It is, however, also the case that a preliminary trial on the Statute may

not be appropriate. This may arise, as noted by Finlay Geoghegan J. for example "*where reliance is placed on the later date of knowledge in s.3(1) of the 1991 Act the limitation issue may not be capable of being determined on limited evidence."* (at para. 89) Finlay Geoghegan J. further opined that *"[a]ny decision to try such a limitation issue in advance of a full hearing requires very careful consideration to decide if it is in the interests of justice."* (at para. 89)

83. As I have said, however, I am satisfied that the trial judge's decision in the present case met the interests of justice threshold. As is clear from the ruling given on 13 October 2017 (given after a careful consideration of the defendants' request for a preliminary hearing and the parties' submissions), the parameters of the plaintiffs' claim as pleaded (and as testified to by first plaintiff on affidavit) were known to the trial judge when she delivered her ruling, thus allowing her to determine the appropriateness or otherwise of a preliminary trial on the Statute issue (See the extract from the trial judge's ruling as quoted at paras. 36-39 above). In my view, the trial judge's approach was in accordance with the *dictum* of McKechnie J. in *Campion*, to wit, *"the court will always be obliged to have regard to the issues involved, to the contextual setting in which these issues are pleaded and so the overall evidential footprint in which they are, at that point in the case, then positioned"* (at para. 27). Furthermore, I note that in *Campion,* McKechnie J. was alert to the fact that *"[i]n the absence of admissions, appropriate evidence will usually be necessary",* which, to my mind, supports the proposition that a trial on a preliminary issue in an *appropriate* case may proceed by way of oral evidence.

84. Moreover, as stated by Hedigan J. in *Fortune v. McLoughlin* [2004] 1 IR 526 (a case referred to by Charleton J. in *O' Sullivan v. Ireland*), the plaintiff's knowledge for the purposes of the Statute is largely a question of fact. It follows that the factual matrix can therefore be distilled from oral testimony.

85. An important factor in this case is that the trial judge's decision was made in the course of the management of a full unitary trial. As the case was listed for hearing as a unitary trial, the trial judge had the power to manage the conduct of the trial. There is a high threshold to be met before this Court should interfere with the discretion of a trial judge to manage the conduct of litigation. As was held by Hardiman J. in *Phibbs v. Hogan* [2008] 3 I.R. 221:

> *"I have no doubt that any trial judge, sitting with or without a jury, is entitled to exercise a wide, inherent and discretionary jurisdiction to control the proceedings in his court."*

86. In *Phibbs v. Hogan,* Hardiman J. referred to the persuasive authority of *Ashmore Corporation of Lloyds* [1992] 1 W.L. R. 446 where Roskill L.J. held that it was the duty of a trial judge to identify crucial issues and to see that same were tried as expeditiously and inexpensively as possible. *Ashmore* was also referred to by this Court in *Thomas v. Commissioner of An Garda Síochána* [2016] IECA 203. In that case, Mahon J. dismissed the appeal of a High Court order directing a preliminary trial of certain issues, holding that an appellate court should accord due deference to the decision of a trial judge made in the exercise of his or her discretion in the ordinary course of the management of litigation. He stated:

> *"A direction to try a particular matter by way of the preliminary issue procedure is an order a made in the ordinary course of the management of litigation. While an appellate court retains the jurisdiction to review such directions and orders, it is, in general terms, slow to do so, and will only do so in the face of compelling reasons."* (at para. 31)

87. In all the circumstances of this case, I find no basis to interfere with the decision of the trial judge to direct a preliminary hearing on the Statute issue. While I accept that the

second defendant did not agree the facts and submitted to the trial judge that oral evidence was necessary, I do not accept that the decision to deal with the Statute was either one-sided or unfair to the plaintiffs. Absent any unfairness, due deference has to be given to the trial judge's decision. The trial judge was entitled to marshal the resources of the Court appropriately, particularly so when her decision was made against the backdrop of a full unitary trial.

88. Accordingly, she did not err in allowing the preliminary issue to proceed by way of oral evidence. She ordained the hearing of the preliminary issue in a manner which was fair to the plaintiffs. She recognised that they had been litigants in person until shortly before the trial date. She considered the defendants' application for a trial of a preliminary issue overnight and delivered a ruling that was balanced and nuanced having regard to the case as pleaded and the affidavit evidence before her. Moreover, she paused the hearing on the preliminary hearing for a week to allow the plaintiffs' counsel time to prepare.

89. It is also of note that on 12 October 2017 counsel for the plaintiffs agreed that a preliminary hearing was the appropriate manner to determine the Statute issue. Save the entreaty to the trial judge on 12 October 2017 to adopt a cautious approach to the issue of a preliminary trial in the absence of agreed facts, no further objection was made by counsel for the plaintiffs on that date, or on the 13 October 2017 when the trial judge gave her ruling directing a preliminary trial on the Statute.

90. In the above circumstances, I am satisfied that the trial judge had the jurisdiction to and was not in error in directing a preliminary hearing on the Statute and that the plaintiffs were not prejudiced by that ruling. Nor was the decision to conduct a preliminary trial flawed by the absence of a motion in that regard.

91. It is also of note that for the purposes of her determination on the Statute issue the trial judge (as is clear from her judgment) took both the plaintiffs' pleaded claim at its

height, and indeed, applied the same approach to the evidence given by the first plaintiff in the trial of the preliminary issue.

Issue 2: Alleged error by the trial judge in finding the plaintiffs' claim statute barred

92. The plaintiffs submit that the trial judge erred in law and in fact in determining that their cause of action accrued more than six years prior to the commencing of the proceedings.

93. The core of the plaintiffs' argument is that it could not have been predicted at the outset whether the endowment policy taken out by the plaintiffs in 2002 would have gone up or down in value or that it might fail in its entirety. It is contended that in this regard the plaintiffs' claim is entirely different to the factual matrix which was the subject of Fennelly J.'s judgment in *Gallagher v. ACC Bank* [2012] 2 I.R. 620.

94. In order to put the plaintiffs' argument in context it is necessary to firstly consider in some detail what was at issue in *Gallagher*, and indeed other relevant authorities.

95. In *Gallagher*, the plaintiff invested €500,000 in a bond sold by the defendant bank and said by the bank to be a high performing investment. The funding for the purchase of the bond was provided by the defendant bank. The bond was never likely to make the returns necessary for the plaintiff to meet his loan interest repayments. The plaintiff commenced proceedings in June 2010, more than six years after he had made his investment. The issue in the case was whether his claim in tort for alleged "mis-selling" was statute barred. The High Court (Charleton J.) held that the claim was not statute barred, the trial judge having determined that the plaintiff, assuming his claim to be a valid one, did not suffer any immediate loss when he purchased the bond, but faced only a contingent loss.

96. In his judgment in the Supreme Court, Fennelly J. considered that the principle regarding the running of time must be the same whether the damage takes the form of

personal injury, property damage or financial loss although he noted that the claim for financial loss *"presents special difficulties"* (at para. 107). He further acknowledged that it may not be possible to lay down a rule capable of easy application in every case and that *"some account had to be taken of probability"*. He went on to state:

> *"110. The possible situations vary infinitely. Where a person has been led by what he alleges to be negligent advice or other negligent action, such as, for example, negligent valuation of an asset, to enter into a transaction, I do not think the cause of action accrues when there is a mere possibility of loss. To hold otherwise would be doubly unfair to the plaintiff. If he sues early, he may be unable to quantify his loss. The defendant may be able to point to imponderables and uncertainties and argue reasonably that the plaintiff is unable to prove on the balance of probabilities that he has suffered any actual damage. If, on the other hand, the plaintiff waits until his loss materialises, his claim will be held to be statute-barred, if mere possibility of loss is the test."*

97. In the context of the date of accrual of action in *Gallagher*, Fennelly J. opined: -

> *"[117] There are three possible approaches to the accrual of the cause of action: firstly, it could accrue when the plaintiff entered the transaction by borrowing the money and purchasing the bond; secondly, it might accrue at some intermediate date when the plaintiff could prove that he was at a loss in terms of a calculation of his liability for interest against movements in the value of the shares; thirdly, it could accrue at the end of the period of the investment.*
>
> *[118] 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 defendant."*

98. In *Komady v. Ulster Bank (Ireland) Limited* [2014] IEHC 325, Peart J. adopted the approach of Fennelly J. in *Gallagher*. Peart J. concluded that the necessary ingredients required to find a cause of action were in existence when the plaintiff executed certain swaps. Damage was found to have arisen upon entry into the swaps although no one could estimate the damage likely to arise. Peart J. found that the fact that the plaintiff did not realise that damage had arisen was irrelevant. The cause of action had already accrued. Peart J. stated that to have concluded otherwise would have been to import the discoverability test - known to personal injuries litigation – into other types of tort.

99. The Court of Appeal has recently considered the issue of when a cause of action accrues in the context of alleged mis-selling: *Cantrell v. Allied Irish Banks plc* [2019] IECA 217. In *Cantrell*, the issue for determination was whether plaintiff investors' claims of misrepresentation and negligent mis-statement were statute barred. The investors invested in a number of Belfry funds. The invested monies were lost. The claims related to the existence and pleaded non-disclosure of Loan To Value (LTV) covenants in borrowings negotiated on behalf of the Belfry Vehicles by the Director defendants. The borrowings negotiated by the Belfry Directors were subject to LTV covenants. Consequently, if the value of any property purchased fell below the borrowings by 80% of the value, there would be a deemed automatic default and crystallisation of the floating charge, thus entitling the lender to dispose of the charged assets. The plaintiffs claimed that they had not been made aware of the LTV covenants, nor was the possible negative impact on their investments explained to them. The cause of action was that sometime after the investments were made, the Belfry directors, in the exercise of power vested in them and referred to in the prospectus, negligently and without informing the investors, negotiated terms of lending which made the risk greater than that which existed at the date of the investments as the investors had fewer buffers against the market forces than they

had contracted for and the risk was greater than that which they understood had been assumed.

100. In the High Court, Haughton J. concluded that damage or loss was manifest or capable of being proved by the investors only when a loss actually occurred, i.e. when the Belfry accounts showed the loss, and when the investors were at a risk that the LTV covenants would be triggered. He found that it was at that time that the damage was capable of being discovered and capable of being proved, and that before that point in time there was no more than a possibility of loss which did not start time running.

101. He was of the view that it was only when the investments were written down to nil there was a *'provable actual loss'* in the context of the claims related to the LTV covenants. He concluded that the LTV covenants did no more than create the risk or possibility of loss and that no provable loss occurred until actual loss occurred.

102. In the within appeal, counsel for the plaintiffs places considerable reliance on the approach adopted by Haughton J.in *Cantrell.*

103. It is however the case that Haughton J.'s conclusions as to when loss arose were not upheld by the Court of Appeal. Moreover, in the present case, the trial judge was satisfied to distinguish the plaintiffs' circumstances from Haughton J.'s reasoning in *Cantrell*, finding that the core of the plaintiffs' claim was encompassed in their pleadings and first plaintiff's testimony that he had asked for a simple mortgage loan which he did not receive and that the damage to the plaintiffs was caused by the alleged acts of omission or commission on the part of the second and third defendants in this regard. The approach of the trial judge (who incidentally did not have the benefit of the Court of Appeal's decision in *Cantrell* as same had not been delivered) echoes the reasoning of Baker J. in *Cantrell.* I turn now to that decision.

104. In the course of her judgment, Baker J. noted the pleadings in the case, which claimed, *inter alia*, that *"the simple existence of a LTV covenant held the potential to, and did, cause the plaintiff loss after the date of her investment…"* (at para. 31). Baker J. viewed that *"as a plea that it was not the triggering of the LTV covenant but its existence, and the failure to explain the effect the covenants might have in a downturn, which completed the tort"* (at para. 32) (emphasis added).

105. At para. 81 she found no basis to distinguish the case from *Gallagher* and she held that the question for consideration remained that identified by Fennelly J. at para. 111 of his judgment, which Baker J. found had been aptly summarised by Binchy J. in *Lyons v. Delaney* [2015] IEHC 685 when he stated that the core of the claim of the plaintiff in *Gallagher "was that the product was not a suitable product to borrow money to invest in and it was most unlikely it would deliver any returns sufficient to offset the cost of the loan transaction."*

Baker J. went on to state:

> *"104. The more difficult proposition is that explained by Fennelly J. in Gallagher v. ACC Bank and by the judgment of Brennan J. for the High Court for Australia in Wardley Australia Limited v. Western Australia that 'mere possibility' of loss will not be sufficient and some level of probability will be necessary. That proposition is central to the reasoning of Haughton J. in the decision under appeal.*

This is also central to the plaintiffs' submissions in the within appeal, a matter to which I will return.

106. In *Cantrell*, Baker J. found that "*[t]he risk is not contingent but actual, albeit there is a risk that certain contingencies may or may not happen"*. (at para.119) She found that *"the plaintiffs in the present case allegedly suffered damage by reason of the existence of the LTV covenants which may or may not have resulted in loss to them, or more properly,*

may have resulted in more or less loss to them, the quantum of which might depend on the market and other factors. Lord Hoffman described the matter in simple terms as follows:

> *'but I would prefer to put my decision on the simple basis that the possibility of an obligation to pay money in the future is not in itself damage'" (at para. 120)*

107. She went on to opine, at para. 121:

> *"A contingent liability is something which may happen or may never happen. To speak of risk, on the other hand, is to speak of a present risk that something may or may not happen. The risk is a present risk. An investor in a financial product takes the present risk that he or she will not profit from the investment, and the measure of the risk is ascertainable, albeit sometimes with difficulty. I consider that the present cases fall into that category. The Directors, at some point after the Investors handed over their money, in the exercise of their power to negotiate the lending arrangements, entered into loan arrangements which added to the risk that property prices could depress the value of the investments to such a level that the secured lenders could call in the loans without giving the Investors the opportunity to await a possible upturn in value."*

108. Accordingly, Baker J. considered that Haughton J. had erred in concluding that damage or loss was manifest or capable of being proved by the investors only when a loss actually occurred. She articulated her findings as follows:

> *"133. However, it seems to me that Haughton J. was incorrect in his conclusion. If the cause of action is that the lending arrangements wrongly, or negligently, or in breach of representations, contained the LTV covenants, the Investors had a provable loss far earlier than the date at which Haughton J. considered the damage had accrued. If the causative connection between the alleged negligence and the damage is that between the existence of the LTV covenants and the ultimate loss of*

value of the investment, with the consequence that the lending institutions ultimately forced a sale, it is the inclusion of the LTV covenants in the borrowing arrangements that is the damage suffered by the Investors. It is true that the investments did well for a number of years, but when the borrowings were made and the LTV covenants agreed, there was a defect which was not latent but one capable of being discovered on enquiry. The loss claimed to have been caused by the actions of entering into the LTV covenants as part of the borrowings was manifest at that time.

134. The cause of action is one pleaded to the effect that there were failures, factors or frailties inherent in the investments which made the investments unsafe."

109. Baker J noted that *"the very fact identified by Haughton J. that there was an 'increase' in the risk from that bargained for or represented means that actual manifest damage could be shown to have been caused by that increased risk".*

110. She went on to state:

137. However, in my view, if the claims of the Investors are to be characterised as arising from the fact that they entered into a flawed transaction, the loss occurred at the time of the loan transactions when the LTV covenants were agreed. As Longmore L.J. said in Axa Insurance Ltd v. Akther & Darby [2009] EWCA Civ 1166, [2010] 1 WLR 1662, at para. 82:

> *'[I]t is true that the investors were not immediately worse off as a result of entering into the investments and it might well have been some time before the underlying assets failed but the question must be determined on the basis of what is claimed to be the causative connection between the flawed transaction and the damage or injuries suffered.'*

138. Insofar as there was an actual loss, it was the actual loss caused by the existence of misrepresentations or omissions or incomplete information regarding the LTV covenants, and had the Investors sued after the borrowings had been agreed they would have had a stateable and provable cause of action, the one they, in fact, plead in the present cases, that the investment they bought was different from the one represented to them, or that a material element was omitted from the pre-contract information on which they relied. The assessment or measurement of the loss might be difficult, but there was still loss which could be ascertained.

…

140. In my view, the essence of the claim made by the Investors is that the investments were more risky than they bargained for (to use the language of Haughton J.) and that they were, as a result of the alleged negligence, less valuable than was represented. The claims are, for that reason, ones that accrued when the LTV covenants were entered into…

…

142. As Fennelly J. said in Gallagher v. ACC Bank, the claim was predicated on a plea that the plaintiff would not have entered into the transaction had it not been for the misrepresentation and, in essence, the claim was capable of being characterised as one where the plaintiff did not get what he should have got or what he was told he was to get. The damage in that case occurs immediately upon entering into the contract."

111. Baker J. duly concluded that *"the damage became manifest once the LTV covenants were entered into by the directors and, at that stage, the Investors had less chance of surviving a catastrophic loss of property values."* (at para. 145)

112. In the within appeal the plaintiffs assert that their case can be factually distinguished from the factual matrix in both *Gallagher* and *Cantrell*. It is submitted that this is in circumstances where in 2002 it could not be said that it was most unlikely that the endowment mortgage would not deliver a return.

113. Counsel urges the Court to find that the plaintiffs' circumstances in 2002/2004 only admitted of *"a mere possibility of loss"* which Fennelly J., in *Gallagher*, opined would not equate to a cause of action. It is asserted that Baker J.'s reasoning at paras. 119-121 of her judgment completely disregards the reasoning of Fennelly J. in *Gallagher* in this regard. It is further asserted that Baker J. wrongly equated risk with loss. It is submitted that the factual matrix which presented in 2002/2004, and indeed in 2007 and 2008 when the plaintiff received correspondence from ACC, did not equate to measurable loss in the sense articulated in *Gallagher*. It is argued that in 2007 or 2008 there was no question of the first defendant having any issue with the endowment policy. Counsel submits that the loss, or adverse balance, for the purposes of the plaintiffs' claim only arose in 2011 when the endowment policy was cashed out, on the balance of probability.

114. It is further submitted that unlike the position in *Cantrell*, there was no factor that made it probable from the outset that there would be a loss for the plaintiffs.

115. To my mind, it cannot be gainsaid that the essence of the plaintiffs' claim is that in 2002 they were induced to enter into a transaction which was different to what they had requested. That is essentially the case pleaded by the plaintiffs in the statements of claim delivered on 11 and 12 November 2014. The same plea is set out in the consolidated statement of claim delivered on 8 May 2015. The particulars set out in that statement of claim assert that the plaintiffs *"had been induced by the second named Defendant to enter into home savings plan rather than an endowment policy which plan was wholly unsuitable for the purchase of a retail business."* When that pleading was put to the first plaintiff in

cross-examination he said that his case was that what he had asked for all along was for a simple loan and what he had received in 2002 put him into serious trouble. While the first plaintiff's replying affidavit to the third defendant's motion to dismiss (and indeed his oral testimony) refer to the loans taken out by the plaintiffs containing an endowment policy of which they were completely unaware and in respect of which no advice was provided to them as to what an endowment policy was or what it contained, in principle, the plaintiffs' complaint as testified to by the first plaintiff remains the same as their pleaded case, namely that in 2002 they received a product which was not suitable for their needs.

116. The import of the first plaintiff's testimony was that he had asked for a simple loan/mortgage and not an investment/endowment mortgage. As found by the trial judge, the first plaintiff's evidence was that he wanted a simple loan/mortgage for a fifteen-year term to purchase his corner shop and that he should have been warned of the risks of entering into an endowment policy. The trial judge found that on either the case as pleaded by the plaintiffs, or as testified to by the first plaintiff, the time for the advice of the risks attaching to an endowment policy would have been 2002, or at the latest in 2004 when the loans were restructured. I find no basis to depart from the trial judge's reasoning. As properly found by the trial judge, the plaintiffs' cause of action accrued in 2002 or latest in 2004. Leaving aside altogether the question of the first plaintiff's credibility as commented on by the trial judge, it is irrelevant that the plaintiff's sworn testimony was that he only discovered in 2008 that he had an endowment policy since the concept of discoverability is not germane to the alleged tort in issue here. It may well be that when the endowment policy was transacted in 2002 the plaintiffs were not immediately worse off, and it may have been some time before the policy started its downward course but to paraphrase Longmore L.J. in *Axa Insurance Ltd. v. Akther & Darby* [2009] EWCA Civ 1166, 1 WLR

1662, the alleged negligence in the present case is that the plaintiffs were advised to enter into an endowment policy that they had not asked for.

117. For all of the above reasons, to my mind, the plaintiffs' case falls squarely into the scenario enunciated by the Supreme Court in *Gallagher*, namely, where a plaintiff claims that he or she has suffered damage by the very fact of entering into a transaction which was wholly unsuitable (the causative connection), the cause of action accrues on the date of the entry into the transaction.

118. In *Gallagher*, Fennelly J. articulated the position as follows:

> *"the core of the plaintiff's complaint insofar as it is claimed to have caused loss to the plaintiff, is, however, that the product was not a suitable product to borrow money to invest in and that it was most unlikely that the bank would deliver any return and that the bank stood to profit hugely from the transaction."*

I am satisfied that the trial judge was entirely correct to reject the plaintiffs' argument that their loss could not be ascertained until the endowment policy was cashed out in circumstances where the core of their claim, whether as pleaded or as testified to by the first plaintiff, was that they had not received what they had asked for, in other words the product they received was unsuitable.

119. One of the arguments advanced by counsel for the plaintiffs is that at para. 41 of her judgment, the trial judge erred in law and in fact by erroneously conflating the issue of negligence/breach of duty on the part of the defendants with the separate issue of when damage and loss arose. I am not satisfied that is the case. I am satisfied that the findings of the trial judge concur with the approach of Baker J. in *Cantrell* and that the trial judge properly concluded that the nature of the product provided to the plaintiffs in 2002, or latest in 2004, meant that they had less chance of surviving adverse economic factors.

120. Counsel for the plaintiffs also asserts that Baker J. erred in the logic she applied in *Cantrell* insofar as she sought to apply the principles enunciated by McKechnie J. in *Brandley v. Deane* [2017] IESC 83 (a property damage action) to a claim of alleged mis-selling.

121. In *Brandley*, the core question for consideration was *"what constitutes actionable 'damage' for the purposes of the tort of negligence."* The case concerned alleged negligence in the construction of two houses. Cracks appeared in the houses some eighteen months after the foundations were completed. The question was whether time began to run when the foundation was installed, or as maintained by the plaintiff, when cracks were observed to appear in each of the houses. Writing for the Supreme Court, McKechnie J. considered that the wrongful act itself was not sufficient for time to start running, there had to be damage or loss, harm or injury, as negligence is not actionable *per se*. McKechnie J. discounted the date of discoverability. He concluded that that the date of the accrual of the action arose by reference to when damage was manifest, stating, *"it is not the defect which needs to be capable of discovery: it is the subsequent physical damage caused by that defect."* (at para. 89) He took manifest injury or manifest damage as meaning that it *"need only be* capable *of being discovered, meaning that it must be provable."* (at para. 89) From his pronouncements at para. 104 of his judgment it is clear that McKechnie J. did not consider that claims in respect of property damage warranted a separate or discrete test to that applied personal injuries for the purpose of establishing when time would begin for the purposes of the Statute.

122. At para. 99 of her judgment in *Cantrell*, Baker J. discussed this aspect of McKechnie J.'s judgment. She considered that McKechnie J.'s proposition *"must…equally apply to a mis-selling claim and no difference in nature between a mis-selling claim and a property damage claim has been argued that might suggest a basis to distinguish the classes of*

claim. She noted McKechnie J.'s statement, at para. 104 of his judgment in *Brandley*, that *"the 1957 Act should be construed accordingly."*

123. I am satisfied that the argument counsel for the plaintiffs seeks to make is not a sustainable one. As I have said, the plaintiffs' claim concerns the giving of or failure to give advice. Their alleged loss was not getting the financial product that they wanted in 2002 and/or 2004. They wanted a particular product in 2002 and did not receive it: thus, the manifestation of that loss occurred in 2002, or at the latest in 2004 when their loans were restructured. The *"adverse balance"* was struck in either 2002 or 2004 when the plaintiffs received a financial product they did not want. Contrary to the plaintiffs' submissions, this was not "*a mere possibility of loss*" in the sense articulated by Fennelly J. in *Gallagher*. Given that the plaintiffs' cause of action is linked to the existence of the endowment mortgage, the measure of their loss, in the words of Fennelly J. in *Gallagher*, *"will prima facie be the difference between the plaintiff's position as it is after entering into the transaction and what it would have been without it. In many cases, particularly the cases of professional negligence, the loss is measured by reference to what the situation would have been if the defendant had not been negligent as against the plaintiff's actual position.'* As said by Baker J. in *Cantrell*, *"it is not a matter of waiting to see 'how things work out' to borrow a phrase from Fennelly J."* (at para. 80).

Alleged errors of fact said to undermine the trial judge's findings

124. It is argued by the plaintiffs that the trial judge's conclusions that they are statute barred, and her conclusions as to the first plaintiff's credibility, should not stand on the basis of what are said to be errors of fact made by the trial judge. In this regard, counsel points to para. 43 of the judgment wherein the trial judge records the core of the first plaintiff claim as "fundamentally …he had asked for a 'simple loan' not involving any risk or involving the use of his family home as security" and that the second and third

defendants had " 'induced' (Mr. Condon) or 'allowed' (Mr. Halley) the plaintiff to enter into something *other* than a simple loan, namely to enter into an arrangement carrying an investment feature carrying risk and involving the use of his family home as security". It is contended that the trial judge was in error when she referred to the plaintiffs as wanting only a simple loan. Counsel points to the first plaintiff's evidence on Day 4 of the hearing that it was always his understanding that any loan obtained by him would be underpinned by security (in this case the plaintiffs' shop premises). It is also argued that, contrary to the trial judge's finding, it was never the case that the plaintiffs' family home was security for the loan from the first defendant and there is no reference to same in the loan documentation.

125. As far as the trial judge refers to "a simple loan", I am not persuaded that she erred in the manner suggested by counsel. I do not understand the trial judge to have understood that what the plaintiffs were seeking or indeed received was a "simple" loan. I am quite satisfied that the reference by the trial judge to a simple loan comprises no more than an articulation of the first plaintiff's testimony that he had never wanted an endowment mortgage (an investment feature carrying risk) and that what was seeking was a traditional mortgage. It should of course also be noted that the first plaintiff's sworn testimony is replete with references to his desire for "a simple loan". Thus, the phraseology employed by the trial judge is entirely understandable.

126. I do accept that the trial judge erred in fact in finding that the plaintiff's family home was security for the loan in question. That was not the case: the requisite security was their shop premises, not the family home. However, in my view, this factual error does not impugn the trial judge's conclusions on the Statute issue. To my mind, the erroneous reference by the trial judge to the plaintiffs' family home as the security for the loan obtained from the first defendant did not lead to "a fundament misapplication of the

relevant law in relation to the statute of limitations" as contended by the plaintiffs in their written submissions. The fact that the trial judge misdescribed part of the security underpinning the plaintiffs' borrowings is not germane to the Statute issue. For the reasons already set out above, I am satisfied that the trial judge properly applied the law in determining that the plaintiffs were statute barred pursuant to s.11 of the Statute.

127. I am also of the view that albeit that the trial judge was mistaken in finding that it was the plaintiffs' family home that was the security for the loan in question (as opposed to their shop premises), this does not undermine the findings of the trial judge with regard to the first plaintiff's credibility, an issue to which I now turn.

128. As is clear from her judgment, the trial judge rejected the first plaintiff's testimony that he did not know until 2008 that he had an endowment mortgage. She based her conclusion on a number of factors, listed at para. 49 of her judgment as recited in this judgment at para. 54. Save for pointing out the erroneous reference to the plaintiffs' family home as the security for the loan in issue, counsel for the plaintiff does not otherwise take issue with the trial judge's findings, all of which, in my view, arose from the evidence before her and from which she was entitled to make findings and draw appropriate inferences.

129. Taking their argument at its height, in my view, applying the principles set out in *Hay v. O'Grady* (1992] 1 I.R. 210, the plaintiffs have not established that the trial judge's overall conclusion as to when the first plaintiff knew he had an endowment mortgage is erroneous. The trial judge's the erroneous finding regarding the family home apart, there were myriad factors in the case upon which the trial judge was entitled to base her conclusions. Accordingly, I am satisfied that the trial judge had credible evidence to conclude that the first plaintiff knew before the expiry of the six-year limitation period that he had an endowment policy.

Alleged unfairness on the part of the trial judge in ruling on the non-applicability of s.71 of the Statute

130. The plaintiffs further complain that the trial judge erred in ruling on the non-applicability of s.71 of the Statute. It is said that this is so in circumstances where counsel had effectively been precluded from arguing the applicability of s.71 at the trial of the Statute issue by virtue of the trial judge's earlier refusal to allow the plaintiffs to make submissions on fraudulent concealment. Yet the trial judge had nevertheless proceeded to find that s.71 was not applicable to the plaintiffs' circumstances.

131. Whether as pleaded, or as testified to by the first plaintiff, the plaintiffs' claim fell to be considered under s.11(1) of the Statute. The action and proceedings set forth by the plaintiffs did not concern fraud or fraudulent concealment as understood by the Statute. Accordingly, in my view, there was no requirement by the trial judge to consider whether the provisions of s.71 (the effect of which is to postpone the limitation period in the case of fraud) of the Statute applied. In the instant case there was no allegation of fraud and same was not pleaded. Accordingly, insofar as the trial judge opined on the non-applicability of s.71, her conclusion in that regard was decidedly *obiter*. While I have some sympathy for the plaintiffs' complaint that the trial judge opining on the non-applicability of s.71 was unfair, this cannot assist the plaintiffs in the appeal given my earlier findings that fraud was not an issue in the case, and in light of my conclusion that the trial judge did not err in concluding that the plaintiffs' discovery application was, in large part, entirely inconsistent with the purpose of discovery in litigation. In the circumstances, I am not persuaded that the complained of frailty in the judgment is sufficient to undermine the trial judge's conclusions as to when loss occurred for the purposes of s. 11 of the Statute. Accordingly, there is no basis for a remittal of the matter to the High Court.

Issue 3: Alleged error by the trial judge in determining that no *prima facie* case was made out against the third defendant.

132. At para. 56 of her judgment, the trial judge stated that she would not be in a position to decide the scope of the duty of care owed by the third defendant to the plaintiffs *"in the absence of precise evidence from the plaintiff as to the circumstances in which the third defendant was retained and for what exact purpose"*. She went on however to find that since the case pleaded by the plaintiffs was that they got a home savings plan instead of an endowment mortgage (both types of investment products), the difference between such products could not "*amount to such an obvious 'pitfall' that the third defendant was required to advise the plaintiff of this in the absence of a specific instruction to do so"* and that the difference between those two investment products had not been pleaded. (at para. 56).

133. She further determined that *"[i]n the absence of any application to amend the pleadings, the plaintiff must be held to the case as pleaded, and that the defendant failed to advise him as to the different risks as between a "home savings policy" and an endowment policy. It seems to me that no prima facie case of negligence is made out in this regard, either on the pleadings or the evidence, and in my view, the case against the third defendant should be dismissed on this basis also."*

134. The third limb of the plaintiffs' appeal is that the trial judge erred in dismissing their case against the third defendant on the basis that no *prima facie* evidence of negligence was made out. It is submitted in the first instance that unfairness accrued to the plaintiffs by this finding since it had been made abundantly clear by the trial judge that the preliminary hearing was directed solely to the issue of the Statute, as is evidenced by para. 14 of the trial judge's judgment.

135. As to the merits of the trial judge's finding, citing *Credit Lyonnaise SA v. Russell, Jones and Walker* [2002] EWHC 1310 counsel for the plaintiffs submits that given the plaintiffs' inexperience, the third defendant should have been alive to the dangers inherent in an endowment policy and advised the plaintiffs accordingly.

136. I am of the view that the trial judge was wrong to determine the third defendant's application to non-suit/dismiss the plaintiffs' claim in circumstances where she herself had stated in her ruling on 13 October 2017 that the preliminary hearing would be directed solely to the issue of the Statue. Again, however, in my view, this frailty in the judgment is not a sufficient basis for a remittal of the matter to the High Court since the views expressed by the trial judge were *obiter* and where I have in any event upheld the trial judge's finding that the plaintiffs' claim against the third defendant is statute barred.

Summary

137. For the reasons set out in the within judgment, I would dismiss the appeal.

138. As the second and third defendants can provisionally at least be deemed to be '*entirely successful*' for the purposes of the 2015 Act, a costs award in their favour should follow. If the plaintiffs wish to submit that an alternative order should be made, they have liberty to deliver written submissions within 14 days of the date of delivery of this judgment. Thereafter, the second and third defendants will have 14 days to deliver replying submissions on costs. In default of receipt of submissions from the plaintiffs, an order in the proposed terms will be made.

139. Costello J. and Power J. have indicated their agreement with this judgment.