

*Approved*  
*No redactions required*



**THE COURT OF APPEAL**

**CIVIL**

**Neutral Citation [2021] IECA 269**

**RECORD NUMBER 2019/506**

**Donnelly J**

**Faherty J**

**Collins J**

**BETWEEN**

**MICHAEL NOBLE**

*Plaintiff/Appellant*

**AND**

**DEIRDRE-ANN BARR, JOSEPH BEASHEL, ANN-MARIE BOHAN, FERGUS BOLSTER, GEORGE E L BRADY, BRIAN D BUGGY, MICHAEL DAVID BYRNE, ALAN S CHISWICK, LIAM ANTHONY COLLINS, ALAN CONNELL, BONNIE A COSTELLOE, DUALTA A COUNIHAN, NIAMH COUNIHAN, SHARON C DALY, CHRISTIAN DONAGH, BRIAN P DORAN, TARA M DOYLE, JOSEPH DUFFY, NICOLA DUNLEAVY, BRYAN G DUNNE, DEIRDRE DUNNE, JOHN W DUNNE, PAT ENGLISH, AIDAN FAHY, TURLOUGH J GALVIN, LIBBY GARVEY, JOHN F GILL, THOMAS HAYES, ROBERT HERON, SHANE HOGAN, NIAL HORGAN, RUTH HUNTER, MICHAEL G JACKSON, HELEN G KELLY, DAMIEN KEOGH, CARINA MARY, C.R LAWLOR , SHAY LYDON, RONAN F MCLOUGHLIN, PARAIC T MADIGAN, DARREN MAHER, PATRICK G MOLLOY, BRID MUNNELLY, JULIE MURPHY-O'CONNOR, HELEN NOBLE, PETER O'BRIEN, JOHN C O'CONNOR, MICHAEL M O'CONNOR, PAULINE O'DONOVAN, ANTHONY G O'GRADY, CARA D O'HAGAN, ROBERT G O'SHEA, MARK O O'SULLIVAN, ALISTAIR PAYNE, CHRISTOPHER J QUINN, WILLIAM A QUIRKE, TIMOTHY SCANLON, PATRICK F.G SPICER, PATRICK SWEETMAN, GERARD MARK THORNTON, STANLEY G WATSON, (PRACTISING UNDER THE STYLE AND TITLE OF MATHESON SOLICITORS (A FIRM) FORMERLY KNOWN AS MATHESON ORMSBY PRENTICE SOLICITORS (A FIRM)**

*Defendants/Respondents*

**JUDGMENT of Mr Justice Maurice Collins delivered on 21 October 2021**

## BACKGROUND

1. This appeal raises once again the difficult issue of when a cause of action in tort for negligence accrues for the purposes of section 11(2)(a) of the Statute of Limitations Act 1957 (*“the 1957 Act”*). That issue arises in the context of a claim for the recovery of financial loss arising from alleged professional negligence.
2. The High Court (O’ Regan J) heard a preliminary issue as to whether the Plaintiff’s claim was statute-barred and, for the reasons set out in her reserved judgment ([2019] IEHC 590) the Judge held that it was. The Plaintiff now appeals from that decision. The Plaintiff accepts that any breach of contract claim he has is statute-barred and accordingly the appeal is concerned only with the claim for negligence and breach of duty.
3. The action has its origin in two option agreements entered into by the Plaintiff with Celtic Waste Limited (which later changed its name to Greenstar Holdings Limited) on 24 November 2000. These agreements appear to have been part of a larger transaction whereby Celtic Waste Limited acquired the waste business of Noble Waste Disposal Limited, a company connected to the Plaintiff.
4. By the first of those options (*“the First Option”*) the Plaintiff granted Celtic Waste Limited an option to acquire certain lands at Ballynagran, County Wicklow (*“the Ballynagran Lands”*), comprising some 102 acres in total, for the purposes of developing a waste landfill on a portion of the lands (ultimately comprising 48 acres).

The Plaintiff did not own the lands at the time but he held options to acquire them. The First Option provided that, on its exercise, Celtic Waste Limited would pay the Plaintiff the “*Agreed Consideration*” (€3.25 million) and thereafter would pay “*the Royalty Payments*” in the manner set out in the Schedule to the First Option. The Schedule provided for an annual payment, amounting to 10% of the “*Net Income*” arising from the operation of the landfill (to be calculated in the manner provided for in detail in the Schedule).<sup>1</sup> However, no Royalty Payments would be payable until the point when accrued payments exceeded the “*Initial Payment*” (€3 million) and then only in the amount of the excess.<sup>2</sup> In the absence of any time-limit on the payment of royalties, it appears that they were intended to continue throughout the working life of the landfill (subject of course to their being “*Net Income*” in any given accounting period).

5. The First Option provided that Celtic Waste Limited was entitled to assign its rights and obligations under it to any “*Related Company*” (defined by reference to section 140(5) of the Companies Act 1990). In contrast, the Plaintiff was not permitted to assign or transfer his rights under the First Option.
6. By the second option agreement (“*the Second Option*”) Celtic Waste Limited granted the Plaintiff an option to re-acquire the Ballynagran Lands, exercisable within a year of the “*Determination Date*”, that being the date on which Celtic Waste Limited received

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<sup>1</sup> In essence, “*Net Income*” was gross income from landfill operations less VAT, statutory charges and rates.

<sup>2</sup> It appears that, in effect, the first €3 million of royalty payments was regarded as included in the Agreed Consideration.

notice from the Environmental Protection Agency that the “*Aftercare Process*” (in essence the remediation of the landfill site at the end of its life) had been completed to its satisfaction. The Option Price was €1.

7. The Second Option permitted Celtic Waste Limited to assign its interest under the agreement to a Related Company. Again, the Plaintiff was not permitted to assign or transfer his rights under the Second Option.
8. On 20 January 2005, Arthur Cox solicitors wrote to the Plaintiff giving notice on behalf of Greenstar Holdings Limited (as Celtic Waste Limited was by then called) that it was exercising its option to acquire the Ballynagran Lands.
9. A draft contract for sale was appended to the First Option and on the exercise of the option it was that form of contract that the parties were to execute. It named Greenstar Holdings Limited as purchaser. However, when the contract for sale came to be executed on 23 February 2005, it identified the purchaser as Greenstar Properties Limited. The contract for sale made no reference to royalty payments. The precise circumstances in which Greenstar Properties Limited came to be substituted for Greenstar Holdings Limited are unclear - the issue is studiously avoided in the affidavit evidence put before the High Court by the Defendants (“*Matheson*”) - but it seems to have occurred late in the day and it appears that Matheson (who were at all material times acting for the Plaintiff) either failed to notice the change or failed to appreciate its potential significance.

10. In any event, the Ballynagran Lands were duly transferred to Greenstar Properties Limited and with effect from 29 September 2005 that company was registered as full owner in Folios WW21186F and WW16658F.<sup>3</sup> I shall refer to the transaction leading to this transfer as the 2005 transaction.
  
11. Royalty payments were made to the Plaintiff as they fell due in the period up to 31 December 2011. As already explained, it was only when accrued royalty payments exceeded the “*Initial Payment*” of €3 million that any further sum actually became payable. The first such payment - in the sum of €571,048 – was made in 2011 for the year ended 31 December 2010. A further payment of €524,549 was made in 2012 for the year ended 31 December 2011. According the Statement of Claim, those payments were made by Greenstar Holdings Limited “*or another company in the Greenstar group.*”
  
12. On 23 August 2012, David Carson of Deloitte was appointed receiver over the assets of Greenstar Holdings Limited and of another Greenstar company, Greenstar Limited. The appointment did not extend to Greenstar Properties Limited.
  
13. The Plaintiff says in his Statement of Claim that Greenstar Holdings Limited calculated that a royalty payment of €502,069 was due to him in respect of the period 1 January 2012 – 22 August 2012. However, he was informed by the solicitors acting for

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<sup>3</sup> In fact, it appears that, in error, a different entity was registered as owner in 2005 but that was rectified in September 2012.

Greenstar Holdings Limited that this sum would not be paid. The Plaintiff did receive a payment of €116,538 in respect of the period from 23 August 2012 to 31 December 2012. During that period the Ballynagran landfill was operated by another Greenstar company, Greenstar South East Limited, and that company appears to have made that payment.

14. It seems that Greenstar Holdings Limited operated the landfill in the period prior to the appointment of the receiver and that, certainly, is the position contemplated by the First Option.
15. According to the Statement of Claim, Greenstar Properties Limited has made it clear to the Plaintiff that *“it does not intend to be and is not bound by the terms of the First and Second Option and has claimed that it is under no contractual duty to pay the royalty payments or to transfer the lands pursuant to the Second Option”* (para 27).
16. In fact, it appears that Greenstar Properties Limited no longer owns the Ballynagran Lands. According to the Statement of Claim, Greenstar Properties Limited transferred those Lands to a company called Ballynagran Landfill Limited on 3 March 2014. Prior to that, the Plaintiff had brought proceedings against Greenstar Properties Limited and, following the transfer, Ballynagran Landfill Limited was joined as a defendant in those proceedings. A copy of the Amended Statement of Claim in those proceedings was provided to the Court. According to the Plaintiff, a full defence has been delivered by Greenstar Properties Limited denying any liability to him and asserting that it is under no contractual duty to make royalty payments or to transfer the Ballynagran Lands back

to the Plaintiff pursuant to the Second Option. It appears that the Plaintiff has also issued separate proceedings against Greenstar South East Limited and Mr Carson. The nature of those proceedings is unclear.

17. It is not apparent from the material provided to the Court whether Ballynagran Landfill Limited continues to own the Ballynagran Lands and/or to operate a landfill there.
18. In September 2013 the Plaintiff issued proceedings for negligence and breach of contract against Matheson. Matheson had acted as the Plaintiff's solicitors in relation to the negotiation of the two Options in 2000 and the sale of the Ballynagran Lands in 2005.
19. The Plaintiff's Statement of Claim (delivered on 11 February 2015) sets out in some detail the alleged negligence of Matheson. According to the Plaintiff, Matheson should have advised him not to sign the contract of sale with Greenstar Properties Limited. However, the Plaintiff's fundamental complaint is that Matheson failed to ensure that the obligations undertaken by Greenstar Holdings Limited under the First and Second Options were binding on Greenstar Properties Limited and failed to ensure that there was an adequate mechanism for enforcing those obligations against Greenstar Properties Limited. The Plaintiff says that provision should have been made for the registration of his right to a royalty payment and/or his option to re-acquire the Ballynagran Lands as a burden in the Land Registry.<sup>4</sup> Alternatively, a charge should

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<sup>4</sup> The Plaintiff had assented to the registration of the First Option as a burden on the "*relevant folios*" (though not

have been executed by Greenstar Holdings Limited and/or Greenstar Properties Limited and registered as a burden or inhibition on the folios at the time of the transfer from the Plaintiff. It is also said that Matheson failed to ensure that “*the contracts*” contained any adequate protection for the Plaintiff in the event that Greenstar Holdings Limited went into receivership or liquidation.

20. As a result of the Matheson’s negligence and breach of duty (so it is pleaded), the Plaintiff suffered loss, damage, inconvenience and expense. The Statement of Claim identifies value of royalty payment, loss of interest, value of lands (buy-back) and costs in the proceedings against Greenstar Properties Limited as items of loss and damage in this context, with the quantum of loss “*to be ascertained*” in every case.

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identified in the agreement, this appears to be a reference to Folios WW21186F and WW16658F): see clause 9.2 of the First Option. That appears to have been intended to allow Greenstar Holdings Limited to register its option to purchase the Ballynagran Lands as a burden in order to protect its position pending the possible exercise of the option. No such burden was ever registered on those folios. Otherwise the parties agreed to keep the existence and terms of the First Option confidential: clause 9.1. The Second Option contained similar provisions: by clause 6(2) the Grantor (Celtic Waste Limited as it then was) assented to the registration of the agreement as a burden “*on the relevant folio in the Land Registry after the date that the Grantee exercises its option to purchase the Subject Property*”. The benefit of this provision to the Plaintiff seems questionable given that it would become operative only *after* the Plaintiff exercised the buy-back option (and therefore would provide no protection to the Plaintiff in the period between the exercise of the First Option and the point in time – likely to be many years later - when the Second Option became exercisable). In any event, whatever the value of clause 6.2 to the Plaintiff, it appears to have been lost when the Ballynagran Lands were transferred to Greenstar Properties Limited in 2005.



21. Matheson's Defence traverses virtually every aspect of the Plaintiff's claim, including the fact of their retainer on his behalf. It also denies the fact of the Options. For present purposes, however, it is the plea in paragraph 1 to the effect that the Plaintiff's claim is statute-barred that is most significant.

## MOTION AND HIGH COURT DECISION

22. On 23 June 2017 Matheson issued a motion seeking an order pursuant to Order 25 RSC directing the trial of a preliminary issue as to whether the Plaintiff's claim is statute-barred. At that point the pleadings were closed and discovery had been made. The motion was grounded on an affidavit sworn by Paul Glenfield, described as Matheson's "*general counsel*". Mr Glenfield does not appear to have had any direct involvement in Matheson's dealings with the Plaintiff. In his affidavit, he sets out a version of the facts as already narrated (though, as the Plaintiff later observed, he remained "*notably silent*" on the issue of whether Matheson had picked up on the fact that the contract for sale involved a new company as purchaser). Notwithstanding the pleading in the Defence, Mr Glenfield does not dispute that Matheson had in fact been retained by the Plaintiff. He notes that the Plaintiff's claim relates to advices provided in 2000 and 2005. He says that any alleged cause of action in relation to the advice given in 2000 became statute barred on 23 November 2006. As regards the "*second engagement*" in relation to the exercise of the First Option, Mr Glenfield asserts that on the basis of the matters pleaded by the Plaintiff, his loss – "*if any*" – was "*complete*" as at 29 September 2005 when Greenstar Properties Limited became registered as full owner of the Ballynagran Lands. As and from that date, Greenstar Holdings Limited did "*not have the necessary interest in the Lands to perform the option if called upon by the Plaintiff to do so [and] The Plaintiff did not have an option which identified GPL as party obliged to re-convey the Lands*" (para 25). On that basis, according to Mr Glenfield, any claim arising from the 2005 advice became statute barred on 28 September 2011.

23. Mr Glenfield's analysis is disputed by the Plaintiff. In his replying affidavit, he expresses disappointment that Matheson had not "*set out in evidence to the Court what transpired and what resulted in GPL taking the transfer*" and states his belief that the change of purchaser was not picked up by Matheson, as he says it should have been. If it was picked up – so the Plaintiff says – Matheson ought to have drawn it to his attention and advised him of the legal consequences of it. As to the issue of whether the proceedings are statute-barred, the Plaintiff maintains that he first suffered loss and damage only in August 2012 "*when Greenstar refused to pay the royalty payment*": up to that point, he says, all royalty payments had been made and he had not suffered any loss or damage.
24. A further affidavit was sworn by the First Defendant on behalf of Matheson but it says nothing of substance.
25. The motion came on before the Judge in July 2019. Despite the fact that the only relief sought in the notice of motion was an order directing the trial of a preliminary issue on the statute, the hearing appears to have proceeded as though that issue was before the Court for determination. That may explain why there is no agreed statement of facts. The Judge was, however, content to proceed on the basis of the facts as pleaded in the Plaintiff's Statement of Claim.
26. For the reasons set out in her judgment, the Judge concluded that the Plaintiff's claim is statute-barred. In her view, the Plaintiff had suffered loss immediately on the

conclusion of the 2005 transaction and could at that point have proceeded with an action against Matheson in respect of (a) the loss of a right to enforce the payment of royalties and (b) the loss of a right to exercise the option to buy back the 102 acres property (the Ballynagran Lands). That loss or damage was, in the Judge's view, not the "*mere possibility of loss*" but rather amounted to actual, if unquantifiable, loss (para 30(2)).

27. The Judge was satisfied that the Supreme Court's decision in *Gallagher v ACC Bank plc* [2012] IESC 35, [2012] 2 IR 620 ("*Gallagher*") remained the relevant jurisprudence in cases of economic loss. While the Plaintiff had relied on the subsequent decision of that Court in *Brandley v Deane* [2017] IESC 83, [2018] 2 IR 741 ("*Brandley*"), it is evident that the Judge did not consider it to be relevant where the claim was one for financial loss rather than property damage. However, even if she was incorrect in that regard, the Judge considered that loss and damage was manifest in 2005, in that it was then capable of being discovered and being proved and the fact that the Plaintiff may not have any actual knowledge of any negligence at that point was "*immaterial*" to the accrual of the cause of action (para 30(5)).

28. The Judge noted that both parties had adopted the position that the First and Second Options were part of "*an integrated transaction*", observing that this was consistent with the fact that, when payment of the royalty payments ceased, the Plaintiff had issued proceedings not just in relation to the non-payment but also in relation to the non-availability of the buy-back option (para 30(1)). This issue assumed considerable importance in argument before this Court and it will be necessary to consider it further in the context of considering the so-called "*single action rule*."

29. A number of authorities from England and Wales were opened in submission and they were the subject of considerable debate but the Judge was satisfied that it was possible to resolve the issue without reference to them (para 19).

## THE APPEAL

30. The Plaintiff says that the Judge erred in holding as she did. As regards the royalty payments, the Judge was wrong to suggest that the Plaintiff had suffered the loss of the right to enforce the royalty payments in 2005. The contractual right to royalty payments remained and was being honoured, with substantial payments – in excess of €1 million in total – being made for 2010 and 2011. There was – so the Plaintiff says – “*an air of complete unreality and artificialness*” in the suggestion that he should have sued Matheson for loss of royalty payments prior the appointment of the receiver and the non-payment of royalties triggered by it. Any such claim would have been met with the argument that it was premature given that no loss had actually occurred at that point and any future loss was entirely contingent. To hold that the Plaintiff’s loss occurred in 2005 was to follow the logic of cases such as *DW Moore & Co v Ferrier* [1988] 1 WLR 267, *Bell v Peter Browne & Co* [1990] 2 QB 495 and *Shore v Sedgwick Financial Services Ltd* [2008] PNLR 37 from England and Wales which had been considered and rejected by the Supreme Court in *Gallagher v ACC Bank plc* [2012] IESC 35, [2012] 2 IR 620 (“*Gallagher*”). *Gallagher* made it clear that the approach taken in those cases was not the law in this jurisdiction: the mere risk of loss does not constitute actual damage such as is required to complete the tort of negligence.
31. Similarly, as regards the Second Option and the effect on that option of the transfer in 2005, only a potential for loss, rather than any actual loss, had arisen in 2005 when the Ballynagran Lands were transferred to Greenstar Properties Limited. According to the

Plaintiff, had the Determination Date occurred prior to August 2012 (when the Greenstar Group began to break up and a receiver was appointed to Greenstar Holdings Limited), Greenstar Holdings Limited would have been in a position to ensure the transfer of the Lands back to the Plaintiff and would have done so. Actual loss only occurred in 2012 when Greenstar Holdings Limited lost the ability to ensure that the buy-back option would be respected.

32. Matheson accepts that the mere possibility of loss does not equate to damage but says that the Plaintiff suffered actual loss and damage in 2005. While the Plaintiff retained the same contractual entitlement to be paid royalty payments after 2005, the fact that Greenstar Holdings Limited did not acquire the interest in the Ballynagran Lands had the result that *“the prospect of on-going royalty payments was undermined and the right to enforce in the absence of payment was lost”*. The Plaintiff was in a *“worse position”* as a result of the 2000 and 2005 transactions and that was – so it was said – the test to be derived from the decision of this Court in *Cantrell v Allied Irish Banks plc* [2019] IECA 217. That decision issued after the hearing in the High Court and was not considered by the Judge. Significant reliance was placed on it in Matheson’s written and oral submissions. However, subsequent to the hearing of this appeal, the decision of this Court in *Cantrell* was reversed by the Supreme Court: [2020] IESC 71, [2021] PNLR 9. As to the Plaintiff’s argument that any claim in relation to the royalty payments would have been met with a plea it was premature, Matheson says that a claim could and should have been made at that stage as to the failure to ensure that there was a right to enforce in respect of the royalty payments. As regards the Second Option, once the Ballynagran Lands were conveyed to an entity other than Greenstar Holdings

Limited in 2005, the Plaintiff no longer had any enforceable contractual entitlement to buy back the Lands and this had caused immediate loss to him.



## ANALYSIS

33. A multitude of authorities were cited by the parties in their submissions. Since the hearing of this appeal, the Supreme Court gave judgment in *Cantrell*. In his judgment in *Cantrell* (with which Clarke CJ and Dunne, Charleton and O' Malley JJ agreed) O' Donnell J undertook a comprehensive survey of the authorities, including a close analysis of the Supreme Court's earlier decisions in *Gallagher* and *Brandley*.
34. No useful purpose would be served by repeating the exercise undertaken by O' Donnell J in *Cantrell* (or the similar exercise previously undertaken by Fennelly J in *Gallagher*). In my recent judgment in *Smith v Cunningham* [2021] IECA 268 (with which Whelan and Ni Raifeartaigh JJ agreed), I identified what appeared to me to be the main points to be drawn from the Irish authorities, as follows:

*“(1) A “cause of action” means “every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court”:* *Read v Brown* (1888) 22 *QBD* 128. *This statement was described as “entirely uncontroversial” by McKechnie J in Brandley (at para 62).*

*(2) While certain torts are actionable per se (for instance, defamation), the tort of negligence is not. It is complete, and the cause of action accrues, only when damage occurs: “in negligence, some actual damage, beyond what can be regarded as negligible, must occur before the tort can be said to be complete. More accurately, without such damage a tortious cause of action does not exist. ... Damage, injury,*

*harm or loss, recognisable as such, is an essential requirement of the cause of action ..” [Brandley, at para 63]*

*(3) “Time begins to run from the date of the manifestation of damage, which means that it runs from the time that the damage was capable of being discovered and capable of being proved by the plaintiff” [Brandley, at para 111]. This does not, it should be emphasised, import a discoverability test, nor is the date referable to the date on which damage is actually discovered. It is, rather, the date on which provable damage is objectively capable of being discovered, “even if there was no reasonable or realistic prospect of that being so” [Brandley, at para 4(iii)]*

*(4) Occurrence of damage and its manifestation will often be simultaneous (as indeed was the position in Brandley itself: see the comments of McKechnie J at para 137). Furthermore, cases in which it will be possible to distinguish between the two are likely to be more readily encountered in cases of physical damage rather than cases of financial loss [Cantrell, at para 141]*

*(5) In the context of property damage claims (and, it appears, personal injury claims also) a distinction is to be drawn between “defect” and “damage”. In property damages claims, time will not begin to run unless and until a defect causes actual damage [Brandley, at para 112 and following]. Thus, in Brandley itself, time did not begin to run when the defective foundations were laid (defective because of the use of unsuitable building materials). Rather, it was only at the point when the defective foundations caused “actual physical damage” in the form of*

*visible cracks that there was “damage” such that the plaintiff’s cause of action accrued. ...*

*(6) Claims in negligence for economic loss present “particular difficulties” in terms of determining when the cause of action accrues [per Fennelly J in Gallagher, at para 104]. While the fundamental principle is the same whether the damage takes the form of personal injury, damage to physical property or financial loss, the “problem is that actual financial loss may take many forms” [Gallagher, at para 107]. The case law has not succeeded in producing any “entirely clear or satisfactory” principle or “a single bright-line rule providing clear and satisfactory conclusions.” [Cantrell, at para 103].*

*(7) Decisions from England and Wales in this area must be treated with caution given that, since the enactment of the Latent Damage Act 1986, the severity of the existing law had been mitigated by the introduction of a discoverability test. After this change in the law, it was possible to remedy any injustice and “courts may have been content to adopt a strict interpretation” [per Fennelly J in Gallagher, at para 60. A similar point is made by O’ Donnell J in Cantrell at para 110.]*

*(8) The distinction drawn in the authorities from England and Wales between “[flawed] transaction” cases on the one hand and “no transaction” cases on the other is of limited assistance. The distinction does not provide a basis for any general rule: in either case “there may be immediate damage or it may not be possible to say that there will be damage until a later date.” [per Fennelly J in*

*Gallagher, at para 105]. It can, however, be “helpful but not decisive” [Cantrell, at para 145] and it is “generally easier to argue that damage occurs in a flawed transaction at the date of the transaction, since the plaintiff acquires something different and worth less than they ought to” [Cantrell, at para 97]*

*(9) As a matter of pure logic, it may be possible to put a present value on any future contingent liability, thus allowing damages to be estimated and awarded. There is, therefore, logical force in the observation of Bingham LJ (as he then was) in DW Moore v Ferrier [1988] 1 WLR 267 that, if the law of contract could award more than nominal damages for a breach of contractual obligation to use reasonable skill and care, then it must follow that the plaintiff has suffered sufficient damage to complete the parallel negligence claim. However, such logic “collides with reality.” Such a definition of damage is far removed from reality. Most litigants are led to commence proceedings not by the identification of negligence or breach of contract but by suffering “actual damage” [Cantrell, at paras 108- 109]*

*(10) Gallagher decisively rejects the “remorseless logic” of decisions such as Shore v Sedgwick Financial Services Limited [2008] EWCA Civ 863 in favour of the “pragmatism” reflected in decisions such as Wardley Australia Limited v State of Western Australia (1992) 175 CLR 514 (“Wardley”) and Law Society v Sephton [2006] UKHL 22, [2006] 2 AC 543 (“Sephton”) [Cantrell, para 117]. Gallagher is “clear in its instruction to prefer sensible pragmatism to relentless logic” [Cantrell, para 139].*

*(11) The pragmatic approach mandated by Gallagher is one in which the identification of damage for accrual of a cause of action must proceed on an incremental basis and that damage “must bear a close relationship to the layperson’s understanding of the term”, that is “real actual damage, which a person would consider commencing proceedings for” [Cantrell, para 132].*

*(12) The mere possibility of loss and/or the exposure to a risk or increased risk of loss will not, in itself, constitute damage sufficient to complete the tort of negligence, absent a present adverse effect on value [Gallagher, at paras 109 – 110; Cantrell at paras 134-135]. As O’ Donnell J explains in Cantrell, in Gallagher the underperformance of the investment was probable and that probability had an immediate impact on the value of the investment. If the risk to the product had not rendered the investment less valuable, then no damage would have been suffered sufficient to complete the tort “even if the product could be said to be something other than that which the appellants sought, and to that extent defective, and perhaps giving rise to a claim in contract” (paras 134 & 135). Later in his judgment (para 139) O’ Donnell J re-iterated that “it is insufficient to identify increased risk alone as damage leading to the accrual of the cause of action.” It follows that decisions such as *Shore v Sedgwick Financial Services Limited* – where the claimant’s cause of action was held to have accrued at the point when he transferred out of his occupational pension scheme into a personal income withdrawal plan on the basis of the riskier profile of the latter, even though he received full market value for the rights transferred – are not good law in this jurisdiction [see also the discussion of *Shore* in *Cantrell*, para 136]*

*(13) Where loss is wholly prospective or contingent in character, it will not constitute damage in this context, even if such loss appears probable, in the absence of an immediate impact on value [this appears to follow from Wardley and its approval in Gallagher and Cantrell and is consistent with Cantrell's analysis of Gallagher]*

*(14) Where a transaction involves benefits and burdens, loss or damage arises only if the balance is adverse to the plaintiff. Where the balance is dependent on a contingency, it is only when that contingency occurs, and affects value, or where the possibility of it occurring in itself affects value, such as to give rise to immediate loss, that a cause of action will accrue [Gallagher, para 111 (citing Wardley); Cantrell, para 138].*

*(15) There are cases in which it can be said that actual damage is suffered on the occurrence of the transaction, even if there are difficulties of quantification and there are uncertainties and contingencies. Uncertainties do not in themselves prevent do not in themselves prevent the accrual of a cause of action, provided that the plaintiff has suffered actual loss at the time of entering into the transaction. [Gallagher, para 113; Cantrell, para 133]. Thus, in Forster v Outred, the execution of the mortgage had itself effected a diminution in value of the plaintiff's interest in the land. That had "an effect then and there on value", irrespective of whether the event in respect of which the security was created was more or less likely [Cantrell, para 133]*

*(16) It follows from the above that there may be “damage” sufficient for a cause of action in negligence to accrue, well before the point at which the plaintiff is in a position to quantify a claim for “damages”. Thus, in Gallagher, the plaintiff’s claim was held to have accrued at the time he entered into the investment even though his actual loss could be quantified only at the end of its term, almost 6 years later. Similarly, in Cantrell, the time(s) of accrual identified by the Supreme Court significantly predated the point at which the investors’ loss could have been quantified or, indeed, the point at which it could be said with certainty that they would suffer a loss.*

*(17) Ultimately, the “test is when provable injury capable of attracting compensation occurred, and that is when it is available to be proved and damage is, in the Brandley sense, manifest.” [Cantrell, para 140] “*

35. As I acknowledged in *Smith v Cunningham*, this analysis is of limited practical utility and it does not pretend to provide any form of bright-line rule or principle of general application capable of producing predictable and repeatable results. The uncertainty as to the operation of section 11(2)(a) of the 1957 Act in the respect of claims in negligence for financial loss – a hugely significant area of the law - is wholly unsatisfactory.
36. I would also refer to my comments in *Smith v Cunningham* on the issue of the burden of proof. That issue was not the subject of any significant discussion in this appeal.

*The Transaction(s) Here*

37. The First and Second Options are clearly connected. The Second Option had no purpose or effect in the absence of the First Option and to that extent was clearly dependent on it. However, the converse is not the case. The First Option was not dependent on the Second Option and could have been entered into independently of any agreement that the Plaintiff should have an option to re-acquire the Ballynagran Lands after they ceased to be used as a landfill and had been remediated satisfactorily.
38. As I understand the Plaintiff's case, the essence of his complaint in relation to the First Option is that neither the option itself nor the draft contract annexed to it made appropriate provision for Greenstar Holdings Limited's liability to make the royalty payments to be secured on the Ballynagran Lands in the event that the option was exercised. If the liability was secured as it ought to have been – so the Plaintiff says – he would have been protected when Greenstar Holdings Limited was put into receivership in 2012 and would not have suffered the loss he did arising from the non-payment of royalty payments in respect of the period from 1 January 2012 to 22 August 2012 and, presumably, subsequent periods also (in fact the Statement of Claim is far from clear as to the claim - if any – being made in respect of subsequent periods).
39. The Plaintiff does not appear to have any complaint regarding the Second Option. While it is said in the Statement of Claim that Matheson was negligent in advising the Plaintiff “*to enter into the Second Option with a company with no interest in the Lands and without the ability to transfer back the lands to the Plaintiff rendering the Opinion*



*ineffective*”, that does not accurately reflect the position as of November 2000 and the reference to the Second Option appears to be an error: the substantive complaint appears to be directed to the 2005 transaction rather than the Second Option.

40. Insofar as Matheson was negligent in advising the Plaintiff about the First Option – and, for the purposes of the preliminary issue, the Plaintiff’s claim must be taken at its height – that negligence occurred in the period leading up to the execution of the First Option in November 2000. There is no dispute as to that: the dispute is as to when any resulting damage was sustained by the Plaintiff.
  
41. Before addressing that question further, it is necessary to look at the 2005 transaction. A number of complaints are made by the Plaintiff but the essential complaint is that Matheson permitted the Ballynagran Lands to be conveyed to Greenstar Properties Limited either at all, or at least without first ensuring that Greenstar Properties Limited was bound by the obligations undertaken by Greenstar Holdings Limited under the First and Second Options. On the Plaintiff’s case, the Ballynagran Lands should either have been transferred to Greenstar Holdings Limited as provided for in the First Option or, in the alternative, in the event that the Lands were to be transferred to Greenstar Properties Limited, the necessary steps should have been taken (and Matheson should have advised the Plaintiff of the need for such steps to be taken) to ensure that Greenstar Properties Limited would stand fully in the shoes of Greenstar Holdings Limited as regards all of its obligations under the First and Second Options (including the obligation to make royalty payments) so that the First and Second Options could be enforced effectively against Greenstar Properties Limited.

42. Insofar as Matheson may have been negligent in advising the Plaintiff about the 2005 transaction – and, again, the Plaintiff’s claim here must be taken at its height – such negligence occurred in the period leading up to the transfer of the Ballynagran Lands to Greenstar Properties in 2005. Again, there is no dispute as to that: the material dispute is, once again, as to when any resulting damage was sustained by the Plaintiff.
43. Although there is a clear connection between the First and Second Options on the one hand and the 2005 transaction on the other, they were separate transactions and give rise to separate claims against Matheson. Even if no complaint was made as to the adequacy of the advice provided by Matheson in relation to the terms of the First Option, the complaint regarding the 2005 transaction would nonetheless arise. Conversely, even if the Ballynagran Lands had been transferred to Greenstar Holdings Limited in 2005, or if they had been transferred to Greenstar Properties Limited on terms which bound that company to the terms of the First and Second Options, the Plaintiff’s complaint regarding the adequacy of those terms, and in particular his complaint that the terms of the First Option (including the conditions of the contract appended to it) did not adequately secure or protect his entitlement to royalty payments, would remain.
44. Canny, *Limitation of Actions* (2<sup>nd</sup> ed; 2016) expresses the “single action rule” in the following terms: “[i]t is a long established rule at common law that if a plaintiff has suffered actionable damage as a result of a defendant’s breach of duty, in a case where damage is the gist of the action (such as in negligence), he can and must claim damages

*in a single action for all the damage which he has suffered or will suffer in consequence of that breach of duty*” (para 12-04); original emphasis). Once any actionable damage is suffered, time begins to run. Any further damage that may subsequently arise from the same breach of duty does not give rise to a further cause of action. All damage, including prospective or contingent damage, must be claimed in the first action: the “rule is that damages for loss resulting from a single cause of action will include compensation not only for damage accruing between the time the cause of action arose and the time that the action was commenced, but also for the future or prospective damage reasonably anticipated as the result of the defendant’s wrong, whether such future damage is certain or contingent.” (McGregor on Damages (20<sup>th</sup> ed; 2018) at para 11-024)

45. Where, however, there are separate and distinct breaches of duty, separate causes of action arise in respect of each and the issue of whether any such causes of action are statute-barred requires separate assessment. The position is aptly stated by Coulson LJ in *Sciortino v Beaumont* [2021] EWCA Civ 786, [2021] 3 WLR 343 (at para 62):

*“In short, in a case where are two (or more) allegedly negligent advices, and therefore two separate breaches of duty, there is no general principle of logic or common sense which requires any sort of ‘relation’ back, such as to say that the limitation period was triggered by the first occasion on which the negligent advice was given, regardless of any subsequent breaches of duty.”*

46. Such is the position here, in my view. On the Plaintiff’s case, a breach of duty occurred

in 2000 and a further and distinct breach of duty took place in 2005. According to the Plaintiff, each breach gave rise to actionable loss and damage. The crucial question is when such loss and damage occurred and, in addressing that question, the 2000 and 2005 transactions must be considered separately.

### ***The First Option***

47. According to the Plaintiff, Matheson was negligent in advising on the First Option and, as a result of that negligence, the obligation of Greenstar Holdings Limited to make the royalty payments was not secured as it ought and the entitlement of the Plaintiff to such payments was not protected to the extent that it could and should have been. On the Plaintiff's analysis, that gave rise to a risk (or, perhaps, an increased risk) that he would suffer loss and damage in the event that Greenstar Holdings Limited became insolvent or otherwise defaulted. However (so the Plaintiff says) any loss suffered by the Plaintiff at that point was at most a contingent loss. Greenstar Holdings Limited was contractually bound to make the payments in the event that the First Option was exercised (assuming of course that the operation of the landfill generated sufficient "*Net Income*") and substantial payments were duly made by it and/or on its behalf. It was only when Greenstar Holdings Limited went into receivership and as a result (and for the first time) it failed to make a royalty payment, that the Plaintiff suffered actionable damage and his cause of action in negligence accrued.
  
48. The Plaintiff claims support for this analysis from certain observations of Lord Nicholls in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR

1627. In *Nykredit*, an issue arose as to when the bank's claim in negligence against the defendant (a property valuer) in respect of the negligent over-valuation of proposed security for a loan had arisen. The context was a claim for interest, rather than any issue of limitation. In such cases, according to Lord Nicholls, "*the basic comparison*" was between (a) what the plaintiff's position would have been if the defendant had fulfilled his duty of care and (b) the plaintiff's actual positions. Where the plaintiff would not have entered into the transaction if properly advised – the "*no transaction*" case – the relevant comparison was between the plaintiff's position had he not entered into the transaction and their position under the transaction. In a negligent valuation case, the basic comparison called for was between (a) the amount of money lent by the plaintiff, which he would still have in the absence of the loan transaction, plus appropriate interest and (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued covenant (page 1631D-F).

49. The point at which that "*basic comparison*" first revealed a loss would, Lord Nicholls continued, depend on the facts. In his view, it ought not to be "*unduly troublesome*" to ascribe a value to the borrower's covenant, given that it was a "*routine matter*" to value a lessee's covenant when valuing property. He went on:

*"Sometimes the comparison will reveal a loss from the inception of the loan transaction. The borrower may be a company with no other assets, its sole business may comprise redeveloping and reselling the property, and for repayment the lender may be looking solely to his security. In such a case, if the property is worth less than the amount of the loan, relevant and measurable loss*

*will be sustained at once. In other cases the borrower's covenant may have value, and until there is default the lender may presently sustain no loss even though the security is worth less than the amount of the loan. Conversely, in some cases there may be no loss even when the borrower defaults. A borrower may default after a while but when he does so, despite the overvaluation, the security may still be adequate.”* (at page 1632 C-E; my emphasis)

Lord Nicholls went on to observe that, in the case before him, the borrower’s covenant was “worthless” and he had defaulted at once. Given that the amount lent at all times exceeded the true value of the property, it followed in his view that the cause of action had arisen at the time of the transaction in March 1990 “*or thereabouts*”. As interest was claimed by the Bank only from December 1990, it was not strictly necessary to determine precisely when the cause of action had arisen, provided that it arose before December 1990 rather than at the (much later) time that the property was sold and the bank’s loss was quantified, as the defendant valuer had contended (page 1635A-B),

50. In a separate speech, Lord Hoffman observed that:

*“Proof of loss attributable to a breach of the relevant duty of care is an essential element in a cause of action for the tort of negligence. Given that there has been negligence, the cause of action will therefore arise when the plaintiff has suffered loss in respect of which the duty was owed. It follows that in the present case such loss will be suffered when the lender can show that he is worse off than he would have been if the security had been worth the sum advised by the*

*valuer. The comparison is between the lender's actual position and what it would have been if the valuation had been correct.*

*There may be cases in which it is possible to demonstrate that such loss is suffered immediately upon the loan being made. The lender may be able to show that the rights which he has acquired as lender are worth less in the open market than they would have been if the security had not been overvalued. But I think that this would be difficult to prove in a case in which the lender's personal covenant still appears good and interest payments are being duly made. On the other hand, loss will easily be demonstrable if the borrower has defaulted, so that*

*The lender's recovery has become dependent upon the realisation of his security and that security is inadequate. On the other hand, I do not accept Mr Berry's submission that no loss can be shown until the security has actually been realised. Relevant loss is suffered when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been. This is, I think, in accordance with the decisions of the Court of Appeal in *UBAF Ltd v European American Banking Corp* [1984] 2 All ER 226, [1984] QB 713 and *First National Commercial Bank plc v Humberts (a firm)* [1995] 2 All ER 673.”*

Lord Hoffman also emphasised that the borrower had defaulted almost at once, well before the date in December 1990 from which the bank claimed interest and thought

that there was “*ample evidence of relevant loss having been suffered before that date*” (1639E).

51. *Nykredit* was considered by the Supreme Court in *Gallagher* and in *Cantrell*. In *Gallagher*, Fennelly J observed that the decision “*clearly gives rise to great uncertainty*” (para 77). He noted that Lord Nicholls had left room for the possibility that, in some cases, the borrower’s covenant might have value and no loss might be sustained until there was default but also noted that he had also stressed that difficulties of assessment at the earlier stage did not lead to the conclusion that it was only when the assessment became more straightforward or final that loss first arises and with it the cause of action. (para 77). Later in his judgment, he cited *Nykredit* as showing how difficult it was to devise anything like a straightforward rule based on the distinction between *transaction* and *no transaction* cases: “*In either case*”, in his view, “*there may be immediate damage or it may not be possible to say that there will be damage until a later date*” (para 105).

52. In *Cantrell*, O’ Donnell J cited, with apparent approval, the passages from the speeches of Lord Nicholls and Lord Hoffman set out above, observing that it appeared “*that the House of Lords in Nykredit rejected the stark propositions that loss only occurred when it was crystallised, on the one hand, or that it inevitably occurred on the entry into the transaction, on the other.*” It followed that “*in some cases, damage will occur and a cause of action accrue at an intermediate point*” (para 73). O Donnell J also referred to the speech of Lord Hoffman in *Sephton* in which he revisited *Nykredit*, explaining that *Nykredit* had not involved any question of mere contingent liability and could be



analysed as deciding that in a bilateral transaction where there were benefits and burdens, and the measure of damages is the extent to which the lender was worse than it would have been if they had not entered into the transaction, the lender suffers loss and damage only when it is possible to say that they are on balance worse off.

53. This is not a lender claim and the Plaintiff's claim here is not advanced as a "*no transaction*" case. The Plaintiff does not make the case that he would not have entered into the First Option if properly advised by Matheson. Rather, his case is that, if he had been properly advised, his (contingent) right to receive royalty payments in the event of the exercise of the option would have been secured on the Ballynagran Lands, thus protecting his position in the event that Greenstar Holdings Limited became insolvent or otherwise defaulted on payment. This is, therefore, a "*flawed transaction*" in terms of the classification or categorisation found in the authorities from England and Wales. But, however the case may be classified, the essential question is the same, namely when actionable loss occurred and in that context the analysis in *Nykredit* appears to me to be of some assistance.

54. As *Nykredit* recognises, where a bank lends money on foot of security that turns out to be inadequate (or non-existent), loss is not necessarily inevitable or even probable. The absence of adequate security may not, in fact, impact the lender at all: if the borrower repays the loan in accordance with its terms, the lender will suffer no loss. The absence of security may increase the risk of loss on the loan – because in the event of default the bank will not have recourse to security adequate to recoup the sum advanced – but, *prima facie*, loss will be contingent upon borrower default. However, as *Nykredit* also

suggests, there will be cases where borrower's covenant is of such questionable value that, in the absence of adequate security, there is a probability of default such as to have an immediate impact on the value of the loan, thus giving rise to immediate damage. Loans are tradeable commodities and the likelihood of future loss can and is priced into present value, both in the market and by way of write-down in a bank's accounts.

55. Here, the Plaintiff had a contractual right to payment of royalty payments. However, that right was contingent in a number of significant respects. In the first place, and fundamentally, it was contingent on the exercise by Greenstar Holdings Limited of its option to purchase the Ballynagran Lands. In practice –if not formally – the exercise of that option was in turn contingent on compliance with the “*Pre-Conditions*” set out in the First Option, namely receipt by Greenstar Holdings Limited of all “*Consents*” required for the operation of the Landfill. On the exercise of the option, the Plaintiff's right to receive royalty payments was contingent on the operation of the landfill generating sufficient “*Net Income*” over its lifetime to trigger a liability on the part of Greenstar Holdings Limited over and above the “*Initial Payment*” provided for by the First Option.

56. On the hypothesis that the Plaintiff sought independent legal advice about the terms of the First Option in the period prior to the exercise of the option in 2005, what advice should he then have received? Assuming that he would have been advised that the terms of the First Option (including the draft contract annexed to it) did not adequately protect him against the risk of Greenstar Holdings Limited becoming insolvent or otherwise defaulting on payment (as the Plaintiff contends), is it plausible to suggest that he could

properly have been advised that he had already suffered damage such as to warrant a claim in negligence against Matheson? I do not believe so. A prudent legal advisor would, I believe, have advised the Plaintiff that, while he had been exposed to a risk (or increased risk) of loss, any loss was highly contingent and might never eventuate. The option might not be exercised. In that scenario, there would be no loss. If the option was exercised, it might be possible to negotiate the inclusion in the contract for sale of further special conditions that would provide additional protection for the Plaintiff. In any event, no royalty payments might become payable above and beyond the “*Initial Payment*” (and it is important to recall that, quite apart from any future royalty payments, the First Option provided for the immediate payment of a very substantial amount to the Plaintiff upon the exercise of the option and the transfer of the Ballynagran Lands). Again, in that scenario, there would be no loss. Finally – and critically - the Plaintiff would have a contractual right to payment, enforceable against Greenstar Holdings Limited. If Greenstar Holdings Limited performed its contractual obligations, again there would be no loss.

57. There is no reason to suppose – and certainly there is no evidence to suggest – that Greenstar Holdings Limited’s covenant to pay royalty payments would have been discounted or dismissed as “*worthless*” in the period prior to the 2005 transaction.
58. If the Plaintiff had sued in negligence at that point (i.e. prior to the 2005 transaction) I do not believe that he would have been able to establish “*real actual damage*.” All that he could have pointed to was a *possibility* of future loss (the non-payment in the future of Royalty Payments payable by Greenstar Holdings Limited) and/or the exposure to a

*risk or increased risk* of such loss. In argument, counsel for Matheson maintained that this was sufficient to constitute actionable loss, citing the observations of Baker J in this Court in *Cantrell* at para 123, where she suggested that it was an error to apply the *Wardley* approach to contingent liability (which, she noted, had found favour with the Supreme Court in *Gallagher and Brandley*) to a claim for financial loss based on increased risk. Such risk, in her opinion, was not contingent but actual. The risk that Baker J was referring to in *Cantrell* was the risk of foreclosure to which the Belfry investment vehicles were exposed when their directors negotiated loans which were subject to loan to value (LTV) covenants and for the reasons set out in her judgment, she concluded that the risk constituted actual damage such that the investors' cause of action in negligence accrued at that point.

59. The transactions here differ from the transactions in *Cantrell*. In any event, the Supreme Court adopted a materially different analysis of loss on appeal in *Cantrell*. In his judgment, O' Donnell J acknowledged the logic of this Court's decision but considered that *Gallagher* was "*clear in its instruction to prefer sensible pragmatism to relentless logic*" and, on that basis, "*it is insufficient to identify increased risk alone as damage leading to the accrual of the cause of action at that point* (para 139). In his view, the LTV claims accrued only at the point when the LTV covenants had a negative impact on valuation (para 144).
60. Counsel for Matheson acknowledged in debate that difficulties of quantification would have arisen in the event that negligence proceedings had been brought at this point. In my opinion, however, such difficulties would have gone well beyond mere difficulties

of quantification. The Plaintiff would not have been able to establish real actual loss at that point in my view. Even if it would have possible for an actuary by some complex calculation to put a present value on the increased risk – and given the contingent nature of the royalty payments, both as to whether and when any payments would be made and as to their amount if payable, that may not have been possible – it is clear from *Cantrell* that such would not suffice to establish actual damage (paras 108-109).

61. It remains to be considered whether the position changed in 2005 on the transfer of the Ballynagran Lands to Greenstar Properties Limited rather than to Greenstar Holdings Limited. At that point, did the Plaintiff suffer damage arising from the First Option (the issue of when the Plaintiff suffered damage arising from the Second Option is addressed separately below) ? Matheson argues that the fact that Greenstar Holdings Limited did not acquire the interest in the Ballynagran Lands had the result that “*the prospect of on-going royalty payments was undermined and the right to enforce in the absence of payment was lost.*” The Judge accepted that argument. In her view, actionable damage was suffered by the Plaintiff in 2005. That damage was, in her view, “*a loss of a right to enforce the payment of royalties*” (Judgment, para 30(2)).
  
62. I do not consider that the Plaintiff lost the right to enforce the payment of royalties in 2005. As Counsel for Matheson accepted, Greenstar Holding Limited’s contractual obligation to make royalty payments was not discharged or released in 2005 and remained a binding – if contingent - obligation of that company. If a royalty payment had subsequently become payable but Greenstar Holdings Limited refused to pay it, the Plaintiff could have sued.

63. It is the case that, had the land been transferred to Greenstar Holdings Limited, it would *prima facie* have been available as an asset against which to execute any judgment that the Plaintiff might obtain against the company. However, in the event that Greenstar Holdings Limited became insolvent, that may have been of little or no practical value (the position of the Plaintiff might have been different if he had some form of charge on the Lands but, on his case, the absence of such a charge was the result of Matheson's negligent advice in 2000 rather than a consequence of the 2005 transaction). But even if it can be said that the transfer of the lands to Greenstar Properties Limited in 2005 resulted in an increased risk of loss to the Plaintiff, that does not change the analysis in my view.
64. As the Plaintiff submits, the 2005 transaction did not affect the (contingent) contractual obligation of Greenstar Holdings Limited to make royalty payments in accordance with the Schedule to the First Option. Again, there is no reason to suppose, and no evidence to suggest, that Greenstar Holdings Limited's covenant to pay royalty payments would have been discounted or dismissed as "*worthless*" as at the time of the 2005 transaction or in the period after that transaction up to the point when Mr Carson was appointed as receiver.
65. Even if it could be said that, at some point prior to August 2012, the financial position of Greenstar Holdings Limited was such that what had been a *possibility* of loss became a *probability*, as I read *Cantrell*, a probability of *future* loss will not in itself constitute damage. Something more – a concrete impact on present value, whether of property or

other assets, such as a financial investment – is required. Where is that to be found here? The Plaintiff's rights under the First Option were not marketable commodities: he was expressly prohibited from assigning or transferring his rights under it. His rights had no market value (unlike the financial investments in *Gallagher* and *Cantrell*). While the exercise of the First Option had removed one significant contingency, the Plaintiff's right to receive royalty payments remained contingent as of 2005 and the risk that Greenstar Holdings Limited would default was contingent and uncertain. Even if a value could be ascribed to that risk, that would be too remote to constitute actionable damage.

66. These proceedings were commenced on 12 September 2013. The Plaintiff's cause of action in negligence arising from the First Option is statute-barred only if that cause of action accrued before 13 September 2007. The cause of action accrued only if actual damage was sustained by the Plaintiff prior to that date. Even if (contrary to the view just expressed) a probability of future loss is sufficient to constitute damage, the question arises as to whether there is evidence from which it could properly be inferred that loss became probable at some point prior to September 2007.
67. Clearly, by August 2012 Greenstar Holdings Limited was in serious financial difficulties. However, there is a complete absence of evidence as to when those difficulties began or as to the financial position of the company in the period between 2005 and 2012. The only (indirect) evidence is that significant royalty payments were in fact made in 2011 (for 2010) and 2012 (for 2011), prior to the appointment of the receiver, though it is not clear whether those payments were made by Greenstar

Holdings Limited or by a related company or companies. It follows from the fact that these payments were made that, in the period between 2005 and 2009, royalty payments equivalent to the amount of the *Initial Payment* of €3 million must have been generated. That in turn indicates that, in the same period, the operation of the landfill had generated *Net Income* of €30 million. The *Net Income* in each of 2010 and 2011 was in excess of €5 million. While these figures are not to be equated with profit, they are nonetheless substantial and suggest that the Ballynagran landfill was generating very significant revenue from which royalty payments could be made.

68. In my opinion, this (limited) evidence simply does not allow any inference that loss became probable at any point prior to September 2007.
  
69. I therefore conclude that the Plaintiff's claim in respect of the First Option is not statute-barred. Insofar as *Bell v Peter Browne & Co* [1990] 2 QB 495 may be said to point to a different conclusion – and I do not think that it necessarily does - I agree with Counsel for the Plaintiff that, in light of *Gallagher* (and *Cantrell* subsequently), the decision should not be followed here. In *Gallagher*, Fennelly J characterised the decision as resting on an “*assumption*” that the plaintiff's wife would fail to account for his one-sixth share of the property and dissipate the proceeds of sale (at para 98). It is clear from his judgment that Fennelly J regarded such an approach as inappropriate. Here, equally, it would be inappropriate to conclude that the alleged negligence of Matheson in relation to the terms of the First Option caused damage in 2000 or 2005 based on an assumption that Greenstar Holdings Limited would become insolvent or otherwise default on its contractual obligations.



### ***The 2005 Transaction***

70. The claim arising from the 2005 transaction is, in my view, in a different position.
71. The transfer of the Ballynagran Lands to Greenstar Properties Limited in 2005 effectively negated the Second Option. Whatever value that the Second Option had to the Plaintiff was therefore lost at that point. The possibility that Greenstar Properties Limited might have voluntarily agreed to sell the Lands back to the Plaintiff when the Greenstar Group was finished with them does not alter that position. Under the Second Option, the Plaintiff had a legally enforceable *right* to buy back the Lands, for a nominal consideration, following their remediation. That right was lost on the transfer of the Lands to Greenstar Properties Limited.
72. In my view, the loss of that right constituted actionable damage and the Plaintiff's cause of action in tort accrued at the time of the 2005 transaction. No doubt, it would have been difficult to quantify the Plaintiff's loss at that point. But difficulties and uncertainties in quantifying loss often present themselves and courts are often called upon to value the loss of opportunity: see for example *Philp v Ryan* [2004] IESC 105, [2004] 4 IR 241 (possible loss of life expectancy due to the loss of opportunity to avail of medical treatment) and *Moloney v Liddy* [2010] IEHC 218 (loss of opportunity to pursue a legal action). With appropriate expert evidence, a court could have made an assessment of the value of the option that was lost in 2005 and compensated the Plaintiff accordingly.

73. In any event, precisely the same difficulties of quantification would have presented themselves in 2012 when, according to the Plaintiff, actual loss was first suffered by him and his cause of action accrued. It was only at that point, the Plaintiff says, that the benefit of the Second Option was lost. That argument depends fundamentally on the assertion that Greenstar Holdings Limited could and would have ensured the transfer of the Lands back to the Plaintiff by Greenstar Properties Limited. However, there is no evidence whatever to support that assertion. In his oral submissions, Counsel for the Plaintiff accepted that, as of the 2005 transaction, the buy-back option was “gone”. That certainly was the position as a matter of law and no argument was made to the effect that the option could have been enforced against Greenstar Properties Limited, whether directly or indirectly (by way of action against Greenstar Holdings Limited). Therefore, while I agree with the Plaintiff that he suffered loss and damage when he lost the benefit of the Second Option, I do not accept that that occurred only in 2012. In my opinion, it is clear that the Plaintiff lost the benefit of the Second Option in 2005. I also disagree with the alternative argument made by the Plaintiff namely that, even if loss occurred in 2005, it became manifest only in 2012. As the Judge observed, the transfer of the Ballynagran Lands to a company other than Greenstar Holdings Limited was capable of discovery in 2005 and the loss arising from that transfer was therefore “manifest”, in the sense used in *Brandley*, at that point.
74. It was not argued that any cause of action in tort arising from the 2005 transaction would accrue only on the *Determination Date* (when the buy-back option granted by the Second Option would have become exercisable) or that any loss suffered by the Plaintiff

was merely contingent until that point. That is unsurprising. Any such argument would be inconsistent with the fact that the Plaintiff issued proceedings in September 2013 making a claim in respect of the loss of the option. The cause of action had to have accrued at that point (and, on the Plaintiff's case, it had accrued in 2012). There is no suggestion that the *Determination Date* occurred prior to the commencement of the proceedings. In fact there is no evidence as to whether a landfill continues in operation on Ballynagran Lands or, if not, whether the Lands have been remediated or not and none of these issues were canvassed in argument. The Plaintiff's claim is squarely based on the loss of the benefit of the Second Option which he says occurred in 2012 but which, for the reasons I have set out, I consider occurred in 2005.

75. As I noted in *Smith v Cunningham*, while the distinction between present loss and contingent/future loss might give the appearance of solidity, in reality the dividing line is blurry, imprecise and inevitably impressionistic. So too the distinction between the fact of damage/loss and its quantification. However that may be, it appears to me that the claim arising from the 2005 transaction falls on the other side of the line from the claim arising from the First Option. The First Option gave valuable (if contingent) rights to the Plaintiff. The fact that the First Option did not provide for the right to royalty payments to be secured on the Ballynagran Lands, and the fact that those Lands ended up being transferred to a company other than Greenstar Holdings Limited, did not cause any immediate loss to the Plaintiff. He might still have received every payment due to him under the First Option. In contrast, the Plaintiff irrevocably lost his rights under the Second Option in 2005. Those rights had a value and their loss caused immediate and real loss to the Plaintiff. Here “*real actual damage, which a person*

*would consider commencing proceedings for*” was sustained upon completion of the 2005 transaction.

76. Proceedings not having issued within six years of that transaction, as required by section 11(2)(a) of the 1957 Act, the Plaintiff’s claim in respect of the 2005 transaction is statute-barred. The Plaintiff cannot therefore pursue his claim for loss arising from the loss of the Second Option or for any other loss or damage claimed to arise from the 2005 transaction.

## CONCLUSIONS AND ORDER

77. For the reasons set out in this judgment, I have come to a different view, in part, to that of the Judge as to the appropriate resolution of the preliminary issue before the Court.
78. As O'Donnell J observed in *Cantrell*, section 11(2)(a) is capable of operating in an arbitrary and random way that, in the absence of a discoverability provision, may give rise to significant injustice for (potential) plaintiffs. The outcome of this appeal provides a concrete illustration of these effects. The claim made by the Plaintiff arising from Matheson's retainer in 2000 is not statute-barred, whereas the claim arising from the later retainer in 2005 is. That outcome is likely to leave both parties dissatisfied and reflects little credit on the law in this area.
79. I would therefore allow the Plaintiff's appeal to the extent indicated above. The parties should have an opportunity to be heard on the precise form of order to be made in the circumstances.
80. The High Court ordered the Plaintiff to pay the costs of the proceedings. It appears to me that that order must be set aside but, in light of the outcome of this appeal, it appears to me that it would be appropriate to hear the parties before any further order is made in relation to costs. A brief hearing to deal with the form of order and with costs will be arranged and the parties will be notified of that.

81. Before concluding, I would draw attention to the observations that I made in *Smith v Cunningham* regarding the procedure adopted in that case. The same procedure was adopted here. That is not how preliminary issues on the Statute ought to be determined. However, despite my misgivings as to the procedure followed here, I have considered it appropriate to determine this appeal on its merits.

*Donnelly and Faherty JJ have authorised me to record their agreement with this judgment and with the orders proposed.*