

Approved
No redactions required



THE COURT OF APPEAL

CIVIL

RECORD NUMBER 2018 / 289

Whelan J

Neutral Citation Number [2021] IECA 268

Ní Raifeartaigh J

Collins J

BETWEEN

MARK SMITH

Plaintiff/Respondent

AND

MARK CUNNINGHAM,

KEVIN SOROHAN, ANNE-MARIE SOROHAN

AND PAUL KELLY PRACTICING UNDER THE STYLE AND TITLE OF

PAUL KELLY & COMPANY SOLICITORS

Defendants/Appellants

JUDGMENT of Mr Justice Maurice Collins delivered on 20 October 2021

PRELIMINARY

1. The law governing the limitation of actions may lack glamour but its vital practical importance cannot be doubted. Statutes of limitation have been a feature of the Irish legal system for many centuries. A comprehensive limitation act was first enacted in Ireland in 1634.¹ The 1634 Act – amended from time to time – was replaced by the Common Law Procedure (Ireland) Act 1853 which continued in force until its repeal by the Statute of Limitations 1957 (“*the 1957 Act*”). The 1957 Act, amended and supplemented by later enactments, remains the principal source of law in this area.
2. Every limitation regime involves policy choices. Among the policy issues and choices that arise in this context are what the basic limitation period(s) should be (and whether different periods should apply to different causes of action) and in what circumstances those basic periods should be extended or disapplied and/or the running of time postponed.
3. One significant such issue is whether the limitation rules should be subject to a

¹ *An Act for Limitation of Actions, and for avoiding of Suits in Law* (10 Chas 1, sess 2, c.6). This Act was assigned the short title of *The Trespass Act* by the Statute Law Revision Act 2007 before being finally repealed by the Statute Law Revision Act 2009.

“*discoverability*” test so that the applicable limitation period would start to run only where injury or damage is “*discoverable*” i.e. when a reasonable person exercising reasonable diligence would have discovered such.²

4. In *Morgan v Park Developments* [1983] ILRM 156 – a property damage claim – the High Court (Carroll J) read such a test into section 11(2)(a) of the 1957 Act,³ animated by the Court’s view that an interpretation of that section that would bar a claim before the plaintiff was aware of it was “*indefensible in the light of the Constitution.*”⁴ However, *Morgan v Park Developments* was overruled by the Supreme Court in *Hegarty v O’ Loughran* [1990] 1 IR 148 – an action for personal injuries – with the Court holding that there was no scope to construe section 11(2)(a) or (b)⁵ so as to read in a discoverability test as a matter of statutory interpretation. *Hegarty v O’ Loughran* left open the possibility of a constitutional challenge to section 11(2) as so construed. However, when such a challenge was subsequently brought in *Tuohy v Courtney* [1994] 3 IR 1 – a professional negligence action arising from a property transaction – it failed, the Supreme Court concluding that section

² While it is convenient to refer to a discoverability *test*, that should not obscure the fact that there are many possible variants of such a test: see per McKechnie J for the Supreme Court in *Brandley v Deane* [2017] IESC 83, [2018] 2 IR 741, at paragraphs 80 and 81.

³ As enacted, section 11(2)(a) provided that, other than for actions for personal injuries and slander claims “*an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.*”

⁴ At page 160.

⁵ Section 11(2)(b) as enacted provided that actions for personal injuries “*shall not be brought after the expiration of three years from the date on which the cause of action accrued.*” Section 11(2)(b) was repealed by the Statute of Limitations (Amendment) Act 1991 and the governing provision for personal injuries actions is now section 3 of the 1991 Act.

11(2) involved the balancing of conflicting constitutional rights by the Oireachtas and that the balance struck by the Oireachtas was not so contrary to reason and fairness as to constitute an unjust attack on the constitutional rights of persons in the position of Mr Tuohy.

5. In the aftermath of *Hegarty v O' Loughran*, the Oireachtas legislated to introduce a discoverability regime for personal injuries actions in the form of the Statute of Limitations (Amendment) Act 1991 ("*the 1991 Act*"). Such legislation had been recommended by the Law Reform Commission in 1987⁶ and the 1991 Act was based on the draft Bill prepared by the Commission. However, despite repeated judicial prompting⁷ and Law Reform Commission recommendations,⁸ the Oireachtas has not to date legislated to provide for a discoverability test in relation to tort claims generally. (A version of the discoverability test applies to defective product claims under section 7 of the Liability for Defective Products Act 1991 but that limited exception reflects the requirements of article 10(1) of the Council Directive 85/37/EEC rather than any policy choice on the part of the Oireachtas).

⁶ *Report on the Statute of Limitations: Claims in respect of Latent Personal Injuries* (LRC 21-1987)

⁷ In the words of McKechnie J, "*the courts have lamented the unjustness of this situation for many decades now*": *Brandley v Deane* at para 82 and following. See also the comments of O'Donnell J in the recent decision of the Supreme Court in *Cantrell v Allied Irish Banks plc* [2020] IESC 71, [2021] PNLR 9 at paragraph 146 and following.

⁸ *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64-2001) and *Limitation of Actions* (LRC 104-2011). Notably, in its 2011 Report the Commission recommended the introduction of a basic limitation period (of 2 years) for civil claims, beginning on the date of knowledge of the person initiating the claim. That period would apply to both contract and tort claims (other than defamation claims).

6. The recent decisions of the Supreme Court in *Brandley v Deane* [2017] IESC 83, [2018] 2 IR 741 (“*Brandley*”) and in *Cantrell v Allied Irish Banks plc* [2020] IESC 71, [2021] PNLR 9 (“*Cantrell*”) appear to cast some doubt on the correctness of both *Hegarty v O’ Loughran* and *Tuohy v Courtney*. But, however the law may develop in the future, the present legal position is clear: “*a discoverability test cannot be read into or deduced from*” section 11(2) of the 1957 Act: per McKechnie J in *Brandley v Deane*, para 85.

7. The Statute of Limitations (Amendment) Act 1991 excised section 11(2)(b) from the 1957 Act and made some consequential adjustments to the language of section 11(2)(a). In substance, however, 11(2)(a) remains as it has been since 1957, namely that “*an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.*” This language may seem beguilingly straightforward. Its simplicity is, unfortunately, apparent rather than real. It has generated a large and complex body of case-law concerning the issue of when a cause of action in tort “*accrues*”.⁹ The 1957 Act itself provides no guidance on this point. It is clear from the authorities that as regards torts which are not actionable *per se* – and that category includes claims for negligence and breach of duty – the cause of action does not accrue until damage is sustained. But even in claims involving damage to property, significant issues may arise in identifying the precise point when a claim in negligence “*accrues*”. *Brandley* is testimony to the potential complexities involved in such an exercise. Where the claim is for financial loss, the

⁹ The language of accrual in the 1957 Act was new and appears to have derived from the (UK) Limitation Act 1939.

exercise is more difficult still and, from the point of view of litigants, one fraught with uncertainty. That is graphically illustrated by *Cantrell*. There, the High Court (Haughton J) held that the plaintiffs' claims in tort for alleged misselling were not statute-barred. This Court came to the contrary conclusion. On further appeal, the Supreme Court restored the decision of the High Court. These conflicting decisions were based on different views as to when damage had been suffered by the plaintiffs and thus when their causes of action in negligence had "*accrued*" for the purposes of section 11(2).

8. How section 11(2)(a) is interpreted and applied is obviously a matter of the greatest practical importance. McGee, *Limitation Periods* (8th ed; 2018), at para 1.007, suggests that the law of limitations may be divided into three "*basic issues*" as follows:

"(1) When does time start to run?"

(2) How long is the limitation period?"

(3) What happens when time expires?"

Of these, the first is perhaps the most fundamental. It is critically important that the point in time when the relevant limitation period – whatever it may be – starts to run can be clearly and predictably identified. In any well-functioning legal system, it is essential that litigants and their advisors are able to identify the point at which a claim has become - or will become - statute-barred. That end point cannot be identified if the start point is obscure or uncertain.

9. In the aftermath of *Hedley Byrne & Co v Heller & Partners* [1964] A.C. 465, claims in negligence for financial loss have become a staple of litigation in this jurisdiction. *Finlay v Murtagh* [1979] IR 249 clearly permits concurrent claims in contract and tort. *Henderson v Merritt Syndicates Limited* [1995] 2 AC 145 is a very significant decision in this context. Concurrent contract and negligence claims give rise to particular issues in the limitation context because, although the same six year limitation period applies to contract and tort claims, that period may – and frequently will – start to run at a later point in respect of the tort claim because that claim “accrues” only when damage is actually sustained whereas the contract claim “accrues” upon breach: see the judgment of O’Donnell J in *Gallagher v ACC Bank plc* [2012] IESC 35, [2012] 2 IR 620. In *Gallagher* – as here – a claim was made in contract as well as in tort. There – as here – it was accepted that the contract claim was statute-barred. That was also the position in *Cantrell*, where O’Donnell J reiterated his view that it is undesirable that there should be a difference in the running of the statute in what are identical claims, though framed in contract and in the tort of negligence and observed that it is “*more than a little odd*” that the same alleged wrongful act having the same consequences could in some cases be barred in contract before the cause of action in tort may have accrued (at para 147). I respectfully agree.
10. Significant policy issues arise as to what limitation rules should apply to claims in negligence for financial loss and how such rules should interact with the rules applicable to claims in contract. Any detailed discussion of these issues is beyond

the scope of this judgment.¹⁰ But whatever the policy choices that may fall to be made, the fundamental question of when time starts to run in respect of such a claim ought to be capable of a clear answer. Section 11(2)(a) signally fails to provide such an answer. The resulting uncertainty is not in the interests of litigants. Neither is it in the public interest that significant court resources should have to be devoted to the resolution of limitation disputes such as that presented here. Limitation rules are intended to bring certainty.¹¹ Where, instead, those rules generate time-consuming and expensive satellite litigation, legislative intervention is obviously and urgently required.

¹⁰ O’ Sullivan, “The meaning of ‘damage’ in pure financial loss cases: contract and tort collide” (2012) 4 PN 248 – cited extensively by O’Donnell J in *Cantrell* – discusses some of the distorting effects of permitting concurrent tortious liability in respect of what in reality are contractual claims. In her view, “*the limitation tail is wagging the substantive dog*”. Writing extra-judicially, Jackson LJ (co-author of the standard work on professional negligence) has suggested that, if it is felt that the contractual limitation periods are unsatisfactory “*then surely the remedy is to amend the law of limitation, not to mangle the law of tort. The fact that a contractual claim is statute-barred is not a good reason to ‘invent’ a tortious claim.*” (“*Concurrent Liability: Where Have Things Gone Wrong*”; Lecture to the Technology & Construction Bar Association and the Society of Construction Law on 30 October 2014). In this context, it should be explained that section 14A of the (UK) Limitation Act 1980 (inserted by the Latent Damage Act 1986), which introduced a discoverability test for claims other than personal injury claims, applies only to claims in negligence and not to claims in contract. The Law Commission has recommended the adoption of a basic limitation period applicable to both claims in contract and claims in tort but that recommendation has not been implemented to date. As noted already, the Law Reform Commission here has also recommended the introduction of a basic limitation period and implementation of that recommendation would bring significant clarity and rationality to this area of the law.

¹¹ Every limitation regime involves some trade-off between certainty and flexibility. The introduction of a discoverability test in this area would necessarily increase uncertainty (though that could be mitigated by the introduction of a “*long-stop*” as recommended by the Law Reform Commission). However, in its current form section 11(2)(a) is arguably the worst of all worlds in that its operation is characterised by both inflexibility of application *and* uncertainty of outcome.

THE FACTS

11. There is no dispute about the material facts and they can be set out relatively briefly. In April 2006 the Plaintiff and his then wife entered into negotiations with the Second and Third Defendants (*“the Vendors”*) for the purchase of a newly-constructed dwelling house at Gubadorish, Drumlish, County Leitrim (*“the Property”*). Planning permission for the construction of the Property had been granted by Leitrim County Council on 4 March 2004 (*“the Planning Permission”*), subject to a number of conditions. It appears that construction of the Property was completed in late 2005/early 2006 and on 23 March 2006 the First Defendant – an Engineer retained by the Vendors – executed a *Certificate of Compliance with Planning Permission and Building Regulations* (*“the Compliance Certificate”*). The Compliance Certificate certified (*inter alia*) that the development of the Property was covered by the Planning Permission and that, having inspected the site, it was the First Defendant’s opinion that the Property had been *“constructed and completed in substantial compliance with”* the Planning Permission. It also certified substantial compliance with the Building Control Act 1990 and the Building Regulations made under that Act. Though not apparent on the face of the Certificate, it appears from the Statement of Claim subsequently delivered in the proceedings that the First Defendant had made the application for planning permission (paragraph 15) and it is evident from the Certificate that he had inspected the development periodically in the course of construction.
12. The Plaintiff and his wife agreed to buy the Property from the Vendors for €240,000,

the purchase being financed by a mortgage with Start Mortgages. The Fourth Defendants (“*the Solicitors*”) were engaged by the Plaintiff and his wife to act for them in the transaction. A contract was executed on 13 June 2006, with the sale closing some 4 weeks later, on 12 July 2006. In due course, the Plaintiff and his wife were registered as full owners in the Land Registry and the Solicitors certified their title to Start Mortgages as required by the conditions of the mortgage funding. It appears that the Solicitors’ fees in respect of the transactions have never been discharged.

13. Unfortunately, the Plaintiff’s marriage broke down in the course of 2007 and in early 2008 the Property was put back on the market. A buyer was quickly found and in May 2008 the Plaintiff and his wife signed a contract for the sale of the Property for €280,000. A different firm of solicitors acted for the Plaintiff and his wife in this transaction.
14. It appears that the original Planning Permission was not included in the papers made available to the new firm and the file did not contain receipts of payment in respect of financial contributions payable under the permission. That led the new solicitors to seek confirmation of the position from Leitrim County Council, the Planning Authority that had granted the Planning Permission. On 10 June 2008 the Council wrote to the new solicitors advising that all financial conditions were complied with at that stage. However, that letter went to state that:

“Condition No 2 of the grant of permission has not been complied with. A

revised dwelling design was required for the approval of the Planning Authority prior to the commencement of the development. This development is now considered unauthorised and the matter has been referred to the Building Control and Enforcement Office for his immediate attention.”¹²

15. This unexpected and unwelcome development had, of course, to be disclosed to the solicitors acting for the intended purchasers. At around the same time, the Planning Authority inspected the Property. It also appears that the First Defendant made a submission to the Planning Authority, presumably with a view to persuading it that the Property as built was in fact compliant with the Planning Permission. The upshot of that activity was a further letter from the Planning Authority to the First Defendant, dated 29 July 2008, which explained in more detail the concerns of the Planning Authority in relation to condition 2 (including the fact that the windows that had been installed were “*exactly the type of window*” that had been “*rejected at the planning application stage*”) and identified a number of instances of non-compliance with other conditions of the Planning Permission, over and above the previously identified issues relating to condition 2. The letter concluded by stating that the Authority could not turn a blind eye to such “*transgressions*” and that, unless the various matters were “*resolved*”, “*the Authority will have no option other than to commence enforcement proceedings in respect of the development.*”

¹² Condition 2 of the Planning Permission follows on a heading “*Pre-commencement conditions (requiring comprehensive submissions to be agreed in writing with the planning authority, prior to any works on site)*” and provided that “*The applicant shall submit a revised dwelling design, particulars to be submitted to the Planning Authority for written approval, the revisions shall provide for: windows in the front elevation shall have a vertical emphasis. Glazing shall be clear and plain and shall not be Georgian or latticed.*”

16. The contract for sale of the Property was subject to certain conditions including a satisfactory planning search. In September 2008 the intended purchasers served a 28 day completion notice under General Condition 40. Due to the planning issues that had emerged, the Plaintiff and his wife were not in a position to complete within the contractual period. In October 2008, following the expiry of the 28 day period, the purchasers decided not to proceed with the purchase and required the return of their deposit paid.
17. Shortly after the withdrawal of those purchasers the planning position was regularised by a grant of retention permission (evidently applied for by the Vendors, presumably with the consent of the Plaintiff). Such permission was granted on 5 November 2008. But, as it is put in the Plaintiff's Replies to Particulars of 29 June 2015, by the time retention permission was obtained the property market "*had slipped very substantially*". By November 2008, Ireland was fast in the grip of the financial crisis and the property market was in precipitous decline. The Property remained on the market but it did not sell. According to the Statement of Claim, it was valued at less than €100,000 in March 2010. Later in 2010 an order for possession was granted to Start Mortgages after the Plaintiff had become unemployed and could not keep up the mortgage repayments.
18. It is clear from the above narrative that, to the extent that the Solicitors acted negligently in their handling of the purchase of the Property (and the Solicitors deny any wrongdoing), such negligence occurred in the period up to 12 July 2006, when

Approved
No redactions required

the purchase closed. The Solicitors had no subsequent involvement in relation to the Property. It is also clear that the planning issues that subsequently came to light in June/July 2008 were present at closing and were capable of being identified at that point (even if the Plaintiff and his advisors were not aware of them). That is not in dispute.

THE PROCEEDINGS

19. These proceedings were commenced on 26 May 2014. At that stage, almost 8 years had passed since the Plaintiff and his wife had purchased the Property, almost 6 years had passed since they had first become aware of the planning issues and more than 5½ years had passed since those issues had resulted in the loss of the sale of the Property. It is not apparent from the papers why there was such delay in bringing proceedings. The Solicitors make the point that, on the premise that time began to run for the purposes of the 1957 Act on 12 July 2006 (the date on which the Plaintiff's purchase of the Property completed) - as the Solicitors urge is the position - the Plaintiff had until 11 July 2012 to bring proceedings. He therefore had a period of over 4 years following the disclosure of the planning issues in which to sue and a period in excess of 3½ years after the collapse of the sale in which to do so. This is not, the Solicitors emphasise, a case in which the Plaintiff's claim was statute-barred before he was ever aware that he had such a claim.
20. In any event, a Statement of Claim was delivered in August 2014. It pleads that the Solicitors (*inter alia*) "*failed to ensure the Plaintiff got a good marketable title to the premises*" and "*failed to ensure that all legal preconditions were met to enable the Plaintiff to receive a good marketable title*". In Replies to Particulars dated 29 June 2015, it is said that the Solicitors failed to advise the Plaintiff and his wife to retain their own engineer to establish that the Property was in compliance with the Planning Permission. If that had been done – so it is pleaded – the "*defect on title and the fact*

that the dwelling house was not built in accordance with the terms and conditions of Planning Permission would have been immediately flagged.” Separately, it is said that the Solicitors should have conducted planning searches which, if carried out, would have disclosed the correct position.

21. In their Defence, the Solicitors plead that the claim against them is statute-barred. By way of substantive defence, they plead that they were entitled to rely on the Compliance Certificate issued by the First Defendant. In addition, the Solicitors plead that they were entitled to rely on Replies to Requisitions furnished by the Vendors’ solicitors to the effect that there was no “*unauthorised development*”.¹³ However, for the purposes of this preliminary issue, the Plaintiff’s claim against the Solicitors has to be taken at its height and it must therefore be assumed that he would succeed in that claim at trial.
22. No Reply appears to have been delivered by the Plaintiff but he did raise particulars of the Solicitors’ Defence and paragraph 1 of that document is worthy of note in that it suggests that the Plaintiff’s position at that stage was that time had started to run in “*June 2014*”, on the basis that the “*defects*” were not reasonably discoverable before then. The paragraph is in the following terms:

¹³ This is, of course, a standard requisition: see the discussion in Wylie & Woods, *Irish Conveyancing Law* (4th ed; 2019) at para 8.61 and following, where condition 32 of the Law Society’s standard form contract is also discussed. The discussion in para 8.63 of certificates/opinions of compliance is also worthy of note, suggesting as it does that it is normal practice for purchasers and their solicitors to rely on certificates provided by the vendor in transactions involving newly constructed property, subject to the certifier being appropriately qualified. The qualifications of the First Defendant do not appear to be impugned by the Plaintiff here.

“In view of the clear facts herein that the Plaintiffs could not reasonably be aware of the defects the subject-matter of these Proceedings until in or around June 2014 explain how it is alleged that the Statute of Limitations 1957 can be relied upon.”

The reference to June 2014 appears to be an error and it seems that the reference should be to June 2008. There is no dispute that the Plaintiff became aware of the “defects the subject-matter of these Proceedings” at that time which of course serves to highlight the unexplained failure to bring those proceedings until May 2014.

23. Although the Plaintiff’s pleadings are considerably less clear on this point than one might expect, it appears that the damages sought by him include the loss arising from the loss of the sale of the Property. There is no plea in the Statement of Claim to the effect that this is a “no transaction” case. In other words, it is not pleaded that, had the Solicitors fulfilled their duty of care, the Plaintiff and his wife would never have bought the Property nor – so far as one can tell from the pleadings– are damages claimed on that basis.

MOTION AND HIGH COURT DECISION

24. In July 2016 the Solicitors brought a motion seeking to have the limitation issue tried as a preliminary issue. While no formal order to that effect was made, the hearing of the motion appears to have been treated by agreement as the hearing of such issue. The motion was heard on affidavit, without any oral evidence. Again, that appears to have been done by agreement of the parties.
25. The motion was grounded on an affidavit sworn by Ann Kelly, who was by then the principal in the Solicitors. Her affidavit makes various points on the issue of liability to which it is unnecessary to refer beyond recording that the Solicitors strongly maintain that they were not guilty of any wrongdoing *vis-à-vis* the Plaintiff and Ms Kelly avers that the Solicitors have obtained expert advice to the effect that they were entitled to rely on the Certificate of Compliance in the circumstances here. In any event, Ms Kelly says, any claim arose on completion of the transaction in 2006 and is therefore statute-barred.
26. A replying affidavit was sworn on the Plaintiff's behalf by Brian Leahy, a solicitor in the firm of Brendan T Muldowney, the solicitors acting for the Plaintiff in these proceedings. Again, that affidavit focuses on issues of liability rather than limitation, with Mr Leahy making extensive reference to Law Society material which, he suggests, provides support for the Plaintiff's case against the Solicitors. In the course of the affidavit Mr Leahy says the following:

“Moreover had the [Solicitors] advised the Plaintiff herein to engage the services of a competent independent qualified engineer or architect they would in the ordinary way have ascertained that there was a fundamental flaw in that the dwelling house was not built in compliance with Condition number 2 of the said Planning Permission in that the dwelling house as erected purporting to be in compliance with [the] original Planning Permission was not at all the same dwelling house nor built in accordance with the plans and design of the initial Planning Permission. ...

I say and believe that the kernel or fulcrum and crux of the matter is that the Plaintiff herein was allowed by the [Solicitors] in dereliction of the latter’s duties and responsibilities to purchase a dwelling house which was not in compliance with Planning Permission, had not good and marketable title and hence and thus the Plaintiff was deprived of his opportunity to sell the property and suffered loss and damage as a result thereof..”

I will refer to this characterisation of the Plaintiff’s essential complaint – which appears to me to be entirely accurate– further below.

27. The motion was heard by Meenan J. For the reasons set out in his reserved judgment of 26 June 2018, the Judge held that the Plaintiff’s claim in negligence and breach of duty against the Solicitors is not statute-barred. Although not a property damage claim, the Judge considered that the principles set out in *Brandley v Deane* applied.

The distinction drawn in *Brandley v Deane* between “defect” and “damage” was, in the Judge’s view, determinative of the limitation issue here. Whereas a “defect” had occurred in July 2006 when the Compliance Certificate was purportedly relied on, the “damage” did not occur until the contract for the sale of the property was rescinded in October 2008.¹⁴ It would have been open to the purchaser to have completed the sale in which case no loss would have been suffered. However, the purchaser having opted to rescind the contract, it was at that point that the damage occurred.¹⁵

28. The Judge referred to the decision of the Privy Council in *Maharaj v Johnson* [2015] UKPC 28, [2015] 5 LRC 592 which had been relied on by the Solicitors. If one applied the reasoning of the Board, it would follow that the 2006 transaction was a “flawed transaction” and that it was at that point that damage occurred. However, the Judge considered that such reasoning was not consistent with *Brandley* and in particular he considered that the Board did not have regard to the “fundamental distinction” between “defect” and “damage” and, accordingly, *Maharaj v Johnson* was not an authority on which the Solicitors could rely.
29. In the Judge’s view, the “precise date” that the Plaintiff’s cause of action (in negligence) had accrued was 16 October 2008.¹⁶ That was, of course, some months *after* the Plaintiff had first become aware of the issues around compliance with the

¹⁴ At para 19.

¹⁵ At para. 23.

¹⁶ At para 23.

Approved
No redactions required

Planning Permission (on or around 10 June 2008). It follows from the Judge's analysis that, in his view, the Plaintiff had not suffered "*damage*" - and therefore had no cause of action in negligence against the Solicitors - as of June 2008. That seems rather surprising. As it was put by Mr Leahy in his affidavit, there was a "*fundamental flaw*" in the transaction in that the Property as built "*was not at all the same dwelling house nor built in accordance with the plans and design of the initial Planning Permission*". The "*crux*" of the Plaintiff's case was that the negligence of the Solicitors had allowed him to "*purchase a dwelling house which was not in compliance with Planning Permission*" and which "*had not good and marketable title.*" On the face of it, the absence of good marketable title appears indeed to have been a "*fundamental flaw*" such as to constitute "*damage*". Clearly, however, that was not the view taken by the Judge.

APPEAL

30. The Solicitors appeal against the High Court’s decision. They say that the Judge misapplied the principles in *Brandley* which, they suggest, are limited in their scope to property damage claims. The case as pleaded against the Solicitors was that there were defects in the title to the Property. Those defects were present at completion and were capable of being ascertained at that point. The defects devalued the Property immediately and constituted damage. That there might have been difficulty and/or uncertainty in quantifying that damage in monetary terms did not take away from that fact that the Plaintiff had, on his case, suffered non-negligible loss in 2006. The Plaintiff had in 2006 acquired property that was less valuable than the property he should have acquired and he could at that point have sued the Solicitors for the difference in value or the cost of putting the title issues right. Reliance was placed in this regard on the Supreme Court’s decision in *Gallagher v ACC Bank plc* [2012] IESC 35, [2012] 2 IR 620 (“*Gallagher*”) and the decision of this Court in *Cantrell v Allied Irish Banks plc* [2019] IECA 217. As regards *Brandley*, it was said that, in any event, the Judge was wrong to equate the title defects here with the latent defects in the foundations that McKechnie J was addressing himself to. That had led him to hold that the cause of action accrued even later than the date on which the defects were actually discovered by the Plaintiff by reference to a fortuity – the date of rescission of the contract – that had no intrinsic connection to the cause of action.
31. In response, the Plaintiff supports the analysis of the Judge. He says that he did not suffer any loss until the contract was rescinded. Until that point, any loss was a purely

contingent one; there was merely the “*possibility of loss*” which was not sufficient to complete the cause of action. The Plaintiff cited the decision of the Supreme Court in *Gallagher* and that of the House of Lords in *Law Society v Sephton & Co (a firm)* [2006] UKHL 22, [2006] 2 AC 543 in support of that proposition. Damage was “*manifested*” only when the purchaser elected not to proceed. Emphasis was placed on a passage from the judgment of Ryan P in this Court in *Brandley v Deane*, which was cited by McKechnie J in his judgment, to the effect that no cause of action arose in that case when the defective foundations were laid as those defects could have been identified and put right later in which case any loss would have been averted.¹⁷ Here, similarly (so it was said) the title defects could have been remedied (as in fact they were subsequently remedied by obtaining retention permission) at any point up to the contract being rescinded and that would have avoided any loss.

¹⁷ [2016] IECA 54, at para 18 cited at para 23 of the report of *Brandley v Deane*.

DISCUSSION

Framework

32. A large number of authorities, from both this jurisdiction and elsewhere, were referred to by the parties in their helpful written and oral submissions.
33. Of these authorities, the most significant are the decisions of the Supreme Court in *Gallagher* and *Brandley*. The decision of this Court in *Cantrell* was also cited extensively in argument. However, that decision has since been reversed by the Supreme Court. The judgment of O'Donnell J (as he then was) in *Cantrell* (with which Clarke CJ and Dunne, Charleton and O'Malley JJ agreed) contains a close analysis of *Gallagher* and *Brandley* – much discussed in this appeal also - as well as a comprehensive survey of the numerous authorities considered in those decisions, many of which were also the subject of submission here.
34. I do not propose to repeat the exercise undertaken by O'Donnell J in *Cantrell* (or the similar exercise previously undertaken by Fennelly J in *Gallagher*) though it will be necessary to refer further to certain of the authorities considered by him. First, however, I shall endeavour to identify the main points to be drawn from the Irish authorities:

(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 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].¹⁸ 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. This distinction between “*defect*” and “*damage*” was central to the reasoning of the Judge here (though of course this claim is a claim for financial loss, not one in respect of property damage or personal injury) and it will be necessary to consider the issue in more detail in due course.

(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*”

¹⁸ McKechnie J appeared to acknowledge that the position *might* be different where a building claim was framed as a claim for pure economic loss: see his discussion of *Irish Equine Foundation Ltd v Robinson* [1999] 2 IR 442 at para 117 and following. Fortunately, it is not necessary to consider that difficult issue further here.

[*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. Such uncertainties 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* [1982] 2 All ER 753, 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. I have no illusions as to the practical utility of the above analysis. It does not, and does not purport to, provide any form of bright-line rule or principle of general application capable of producing predictable and repeatable results. In the abstract, the distinction between present loss and contingent/future loss might seem clear-cut. In practice, however, the dividing line is blurry and imprecise and – inevitably - impressionistic. So too the distinction between the fact of damage/loss and its quantification. Pragmatism and predictability make uncomfortable companions. The resulting 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. One issue which does not appear to have been definitively addressed in the Irish authorities to date - and which was not addressed in the parties' submissions either – is where the burden of proof lies when an issue of limitation falls for determination.

Limitation is a matter of defence and it is clear from the authorities that in all cases where the expiry of the relevant limitation period simply bars the remedy and not the right – and the limitation period in section 11(2)(a) operates in that way – a defendant who wishes to rely on a limitation defence must specifically plead it. So much is clear from the decision of the Supreme Court in *O’ Reilly v Granville* [1971] IR 90 (itself a negligence claim). It might be thought to follow that the burden of establishing that a claim is statute-barred should rest on the defendant and that indeed is the view expressed in Brady & Kerr, *The Limitation of Actions* (2nd ed; 1994). It was also the approach adopted by Charleton J in the Supreme Court *O’ Sullivan v Ireland* [2019] IESC 33, [2020] 1 IR 413, at para 70, where he observed that “*Ordinarily, the burden of demonstrating the application of a statutory provision as to limitations to the plaintiff is on the defendant.*” As one distinguished commentator has observed “*it seems very odd to require the defendant to plead limitation without having any onus of proof.*”¹⁹ Nevertheless, the position in England and Wales appears to be that “[w]here the defendant has pleaded that the claim is statute-barred, the burden of proving that the cause of action arose within the statutory period lies on the claimant”: *Halsbury’s Laws of England, Limitation Periods* (2021) at para 1047 (See also McGee, *Limitation Periods* (8th ed, 2018) at para 21-014). A different view appears to have been taken in Australia and New Zealand: Canny, *Limitation of Actions* (2nd ed; 2016) at para 2-18. The author suggests, however, that the English approach is to be “*preferred.*”

¹⁹ Andrew Burrows (now Lord Burrows JSC), “Some Recurring Issues in Relation to Limitation of Actions” (January 3, 2014). in *Defences in Tort* (Eds Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, (2015), Oxford Legal Studies Research Paper No. 14/2018.

37. One can readily understand why, where a plaintiff seeks to rely on a ground such as disability, mistake or fraudulent concealment to postpone or extend a limitation period that would otherwise bar the action, they should bear the burden of establishing that ground. Equally, where a plaintiff asserts that their “*date of knowledge*” was later than the date of accrual, one can see force in the argument that the burden of proof should lie on the plaintiff. That was the view of Charleton J in *O’ Sullivan* (also at para 70) and, while the issue does not appear to have been discussed by Finlay Geoghegan J in her judgment in that appeal, it is nevertheless clear that she too thought that the burden was on the plaintiff in that respect (at para 151). Where, however, the issue is when a cause of action accrued, the rationale for imposing any burden on the plaintiff seems to me to be highly contestable. As I have said, however, the issue was not addressed in argument and for that reason – and also because the issue is not determinative of this appeal – it does not appear appropriate to express any concluded views on it.

When was “real actual damage” manifest here?

38. The key question to be determined on this appeal is whether (as the Solicitors contend) the Plaintiff’s failure to obtain good marketable title in July 2006 constituted damage sufficient to complete any claim in negligence that the Plaintiff may have had against the Solicitors or whether (as the Plaintiff contends) there was no such damage until the sale of the Property was lost in October 2008.

39. In either scenario, there is no difference between the occurrence of the damage and its manifestation. As is clear from *Brandley*, damage is “*manifest*” once it is “*capable of being discovered and capable of being proved by the plaintiff*” (my emphasis). Here, the failure to obtain marketable title – specifically the fact that the Property had not been constructed in accordance with the Planning Permission – would have been apparent upon appropriate inspection of the Property and a comparison of the as-built development with the development authorised by the Planning Permission. As the Plaintiff himself says “[*h*]ad that been done then the defect on title and the fact that the dwelling house was not built in accordance with the terms and conditions of Planning Permission would have been immediately flagged.”²⁰ It follows that the “*defect on title*” was capable of being discovered (however unlikely such discovery may have been) and capable of being proved by the Plaintiff in July 2006 and insofar as that “*defect*” constitutes the relevant “*damage*”, then such damage was manifest at that time. Equally, if it is the loss of the sale of the Property that constitutes the relevant “*damage*”, it was manifest immediately on its occurrence.

40. Did that “*defect on title*” constitute “*damage*” in the sense indicated in the authorities? *Prima facie*, the conclusion might seem inescapable. The Plaintiff and his wife had agreed to purchase – and had been led to believe that they had in fact acquired - a dwelling with good marketable title which was in substantial compliance with the terms of the Planning Permission. That is not what they in fact obtained. Instead (so the Plaintiff claims in these proceedings) the conditions of the Planning

²⁰ Replies to Notice of Particulars (29 June 2015), at paragraph 3(A). See also paragraph 4(A).

Permission had not been complied with in multiple respects (see para 16 C) of the Statement of Claim). That had a number of obvious consequences:

- The purchase of the Property had proceeded (and had been funded by Start Mortgages) on the basis that the Plaintiff and his wife would obtain good title which was not the case.
- To the extent that the Property did not comply with the Planning Permission, it was unauthorised development for the purposes of Part VIII of the Planning and Development Act 2000 (as amended) and the Plaintiff and his wife as owners and occupiers of it became liable to enforcement action (including, in certain circumstances, criminal prosecution) by the Planning Authority.
- Any such action would have significant consequences for the Plaintiff and his wife.
- Even in the absence of enforcement action (which could be taken at any time within 7 years), the Property was unauthorised which clearly impacted adversely and immediately on its marketability and value. This is perhaps the key point. The price paid by the Plaintiff and his wife was for a dwelling house that was planning compliant. That is not what they obtained and, on any view, what they obtained was less valuable.
- While it was open to the Plaintiff and his wife to seek retention permission,

the preparation of such an application would involve expense, as well as the payment of a statutory fee to Leitrim County Council (in the event, of course, these costs seem to have been borne by the Vendors). Furthermore, an application for retention might be refused or granted subject to conditions involving further expenditure. (Retention permission was, of course, granted in 2008 but I do not think one can work backwards from that decision and conclude that it was inevitable that such permission would be granted). If retention permission was sought and refused, it would presumably follow that the Plaintiff and his wife would have to carry such modifications to the Property as were necessary to bring it into compliance with the Planning Permission (assuming that could be done).

41. Having regard to these matters, it seems difficult to avoid the conclusion that the Plaintiff (and his wife) “*acquire[d] something different and worth less than they ought to*” in July 2006 and that, as a result, they suffered “*real actual damage, which a person would consider commencing proceedings for.*” Consider the position if the Plaintiff had become aware of the planning issues in the period immediately after the purchase of the Property and had consulted a solicitor at that stage. Is it plausible to suggest that such a solicitor should have advised him that he and his wife had no claim in negligence against the Solicitors because they had not yet suffered “*real actual damage*”? Or that such damage would arise only if they later sought to sell the Property and the planning issues caused the sale to collapse? Given that the Property was necessarily diminished in value because of the title defect – even if not wholly unmarketable, its marketability was clearly significantly impaired - and

where remedying the defect (assuming that it could be remedied) would necessarily involve expense (even if that was not fully quantifiable at that stage), any such suggestion would appear to fly in the teeth of the clear injunction in *Cantrell* to adopt a pragmatic and common-sense approach to what constitutes “*damage*” in this context.

42. In this context, it is important to recall that the law does not require that *damages* be quantified or quantifiable before *damage* can be said to have been suffered such as to complete the tort of negligence. If the Plaintiff had brought a claim in negligence against the Solicitors in the immediate aftermath of the 2006 transaction, and if he succeeded in establishing negligence on their part, there would no doubt have been significant scope for dispute as to the correct assessment of damages. The decision of the High Court (Clarke J as he then was) in *Kelleher v O’ Connor* [2010] IEHC 313, [2010] 4 IR 380 illustrates some of the complexities that might have arisen. There may have been debate as to whether this was a “*no transaction*” or “*flawed transaction*” case or one that came within the category of intermediate case referred to by Clarke J (at para 57). It is likely that there would have been debate as to whether the measure of damages should be diminution/difference of value or the cost of remedying the planning issue (which would, in turn, depend on whether retention permission could be obtained). There may also have been debate around the awarding of general damages. But the issue raised by this appeal is not what *damages* might have been awarded to the Plaintiff in a scenario where he sued the Solicitors in the immediate aftermath of the 2006 transaction but rather whether, at that point, he had suffered “*real actual damage*” such as to be in position to properly plead and

prove a claim in negligence.

43. Before reaching any definitive conclusion, however, the Judge’s analysis warrants further consideration. As already mentioned, that analysis turns to a significant extent on the distinction between “*defect*” and “*damage*” discussed by McKechnie J in his judgment in *Brandley*. *Brandley* was, of course, an action for property damage arising from latent building defects. However, its discussion of the issue of when actions in tort for negligence “*accrue*” for the purposes of section 11(2)(a) is not limited to such actions, As Fennelly J noted in *Gallagher*, “*the principle must be the same whether the damage takes the form of personal injury, damage to physical property or financial loss*” (at para 107). But even if the principle is the same, its application is clearly context-sensitive and it appears to me that, as is evident from the discussion in *Brandley* itself, the *defect/damage* distinction has special significance and meaning in the context of defective building claims
44. As is evident from *Brandley*, that distinction has a long history in that context, dating back at least to the decision of the House of Lords in *Pirelli v Oscar Faber & Partners* [1983] 2 AC 1. As understood in *Pirelli* and subsequent decisions (many discussed in *Brandley*), a “*defect*” is some latent condition in a building, whether resulting from design, material or method of construction, that may or may not develop and give rise to physical damage to the building. In *Brandley*, the defect involved the use of unsuitable materials in the foundation; in *Pirelli*, it was the use of unsuitable materials to line a very tall industrial chimney. In each case, it was held that it was only at the point that physical damage to the structure occurred (in the

form of cracks) that a cause of action in tort for negligence accrued. An analogous approach arguably applies in the case of certain personal injury claims (see the judgment of Griffin J in *Hegarty v O' Loughran*, cited in this context by McKechnie J in *Brandley*). For instance, exposure to asbestos may cause cellular change (defect) which may or may not progress to mesothelioma or other cancer (injury/damage).

45. While the language of “*defect*” is also used here, in my view there is no meaningful analogy with the position in *Brandley*. The issue is not one of nomenclature or label. The *defect* here – the fact that the Property was not compliant with planning permission and was therefore an unauthorised development – was an immediate and significant blot on title, with concrete adverse implications for the Plaintiff and his wife. It did not develop or progress to something different or more serious. The title defect that came to light in June 2008, and that led to the loss of the sale of the Property, was precisely the defect that existed and was capable of discovery in July 2006. I agree with the submission of the Solicitors that the critical question is whether actionable loss was caused to the Plaintiff on completion of the purchase in July 2006. If it was – as appears to me to be the case – then it follows that the defect/damage distinction in *Brandley* is of no assistance to the Plaintiff.
46. The fact that that defect was capable of remedy – and was in fact remedied – does not point to any different conclusion. If the title defect constituted actionable damage as of completion, its subsequent remedy could not retrospectively alter its character. Had the Plaintiff become aware of the defect at that time and successfully applied for retention, that clearly would not have precluded him from making a claim to

recover the costs involved. The observations of Ryan P in *Brandley* which the Plaintiff rely on do not, in my view, have the import suggested. The former President was addressing himself to the position in the period between the installation of the foundations and the completion of the construction and its handover to the plaintiffs. In that period, the defendants could have identified the defects in the foundations and in that event they would have been entitled to remedy them. In such a scenario, damage would have been averted. While the former President regarded that as “*an illustration of the absence of loss at that point and the unavailability to the plaintiffs of any right of action there and then*” (at para 18) the very same point could in fact be made regarding physical damage to the buildings occurring during construction. Any such damage could equally have been identified and remedied before hand-over but that does not imply that, if not identified and remedied, it would not then have constituted actionable damage. Here, it may be said, the Vendors could have remedied the planning issues in the period prior to completion and, if they had done so, no cause of action would have arisen. But the fact is that they did not do so. That they did so subsequently, at their expense, does not suggest that the Plaintiff did not suffer damage on completion; it rather implies the opposite – a recognition of that damage and of the Vendor’s liability to take the necessary steps to remedy it.

47. The Judge’s observation that the Plaintiff suffered no loss until 16 October 2008 because “*it would have been open to the purchaser to complete the sale for the agreed price notwithstanding the defect in the title and thus the plaintiff would have suffered no loss*” also appears to me to be problematic in a number of respects. It is difficult to see how a transaction entered into in *May 2008* might be relevant – still

less be of decisive importance – to the question of whether the Plaintiff suffered damage upon completion of the purchase of the Property in *July 2006*. The May 2008 transaction might never have happened or might have happened at a different time. The Plaintiff and his wife might have remained in the Property for many years. In any event, the Judge’s analysis seems, with respect, somewhat artificial. It may indeed be the case that, had the 2008 transaction proceeded, the Plaintiff could no longer have pursued a negligence claim against the Solicitors. That, of itself, does not indicate that he could not properly have brought such a claim in the period prior to that transaction. More significantly, perhaps, the reality is that the transaction did *not* proceed, precisely *because* the Plaintiff was not in a position to show good marketable title *because* he had not received such title in July 2006, despite contracting for and paying for it. On this view, the loss of the sale in 2008, while undoubtedly aggravating the loss that the Plaintiff suffered as a result of the 2006 transaction, was merely a downstream consequence of the damage already done in 2006.

48. I therefore respectfully differ from the view taken by the Judge. In my opinion, the Plaintiff (and his wife) suffered damage at the time they purchased the Property and, accordingly, any claim in negligence against the Solicitors accrued at that point. It follows that any claim is statute-barred.

49. This conclusion is, I believe, consistent with authority. Canny, *Limitations of Actions* (2nd ed; 2016) suggests that where “*a party enters into a transaction (such as the purchase of an interest in land) as a result of negligent advice, and obtains less than*

what he was told by his solicitor that he was going to obtain (such as if he purchased only a leasehold interest rather than a freehold) the cause of action accrues when he enters the transaction” (at para 12-27). *Tuohy v Courtney* is cited in support of that proposition. There appears to be no available record of the judgment of the High Court (Blayney J) holding that the plaintiff’s claim in that case was statute-barred but it appears from the decision of the Supreme Court in the subsequent constitutional challenge that the Court was of the view that the cause of action had accrued either at the time of the contract or the conveyance of what the plaintiff understood to be freehold property but which was, in fact, leasehold property without any entitlement either to buy out the fee simple or to a new lease. These title issues were undoubtedly more serious than the issues here but it seems to me that the differences are matters of degree rather than principle. Notably, the claim was held to be statute-barred notwithstanding the fact that (as the High Court held in the constitutional proceedings) the plaintiff’s loss had only crystallised many years after the transaction, when a sale of the house that he had negotiated fell through because of the unsatisfactory nature of the plaintiff’s title.

50. In view of the observations made by the Supreme Court in *Gallagher* and *Cantrell*, decisions of the courts of England and Wales in this area must be treated with a degree of caution. Insofar as *Forster v Outred* suggests that a contingent liability constitutes actionable “*damage*” in itself, regardless of the probability of the occurrence of the contingent event or the impact of that contingent liability on present value, it does not represent good law in this jurisdiction. Nevertheless, it seems clear that neither Fennelly J in *Gallagher* nor O’Donnell J in *Cantrell* had any

difficulty with the decision when read narrowly – as deciding no more than that the execution of the mortgage by the plaintiff had caused her immediate damage because it immediately diminished the value of the mortgaged land. That is how the High Court of Australia explained the decision in *Wardley* and its analysis was approved by the House of Lords in *Sephton*. *Wardley* and *Sephton* were in turn discussed with evident approval in *Gallagher* and *Cantrell*.

51. Here, for the reasons already set out above, I consider that the Plaintiff was immediately and tangibly worse off as soon as the purchase of the Property was completed. Whether the transaction is viewed as a “*flawed transaction*” or a “*no transaction*” or the intermediate category referred to by Clarke J in *Kelleher*, the crucial point, in my view, is that, at that point, the Plaintiff and his wife received something manifestly less valuable than that which they had contracted for and which they had paid for. They paid €240,000 for a dwelling-house constructed in accordance with planning law. That is not what they received. What they received was something entirely different and less valuable. They were therefore measurably worse off for having entered into the transaction. In the language of the caselaw, the balance of benefit and burden was clearly adverse at that point. Insofar as the position was remediable, any remedy would involve additional expense. There was therefore actionable damage in the narrower sense applied in *Forster v Outred*.

52. On this analysis, this is not a case where the loss was purely contingent, in contrast to the position in *Wardley* and *Sephton*. The Plaintiff and his wife suffered immediate financial detriment on completion, even if the full extent of that detriment

may not have been capable of precise quantification at that point. For the same reason, there is a clear difference between the position here and that in *DW Moore v Ferrier* or *Shore v Sedgwick Financial Services*. In contrast to both of those cases, this is a not a case where there was merely a *possibility* (or even a *probability*) of future loss at the time of the transaction nor (in contrast to *Shore*) is it a case where the analysis of loss is dependent on the subjective approach of the claimant to risk. It is a case where immediate and tangible loss was sustained at the time of the transaction.

53. Finally, I should refer to the Privy Council decision (on appeal from the Court of Appeal of Trinidad and Tobago) in *Maharaj v Johnson* to which the Judge referred to in his judgment. In *Maharaj*, the claimants had engaged the defendant solicitors to act on their behalf in the purchase of property in 1986. The sale was effected by L as personal representative of her deceased's husband's estate. In 2008, the claimants contracted to sell the property to the developer for a substantial price, many multiples of what had been paid in 1986. However, it then emerged that the claimants did not have good marketable title to the property because the 1986 conveyance had been executed on behalf of L pursuant to a power of attorney that turned out to have been defective (because it only authorised transactions carried out on behalf of L in respect of her own personal property and not in respect of property held by her as personal representative of the estate of her late husband). As a result, the legal interest in the property had not vested in the claimants (though the equitable ownership had done so on payment of the consideration). Efforts were made to locate L and have her execute a deed of rectification prior to the closing date of the sale to

the developer were unsuccessful and the sale was lost. L was located shortly afterwards and executed the necessary deed which was duly registered.

54. Lord Wilson gave the majority judgment of the Board. In its view, had the difficulty with the power of attorney been identified at the time of the 1986 conveyance, it could and would have been addressed, either by L executing the conveyance personally or executing a further power of attorney in appropriate form (para 21). The case was therefore “*an obvious case of a flawed transaction*” (para 22). That did not mean, by itself, that the claimants suffered actual damage on entry into the transaction (para 26). However, on the facts such damage had been suffered. The equitable interest was “*significantly less valuable to them than a legal interest would have been*” (para 27(b)). While the flaw could be remedied, that was not in the sole power of either the claimants or defendants and there was a risk that further costs would have to be incurred (para 27(c)). These risks “*were such as to generate an immediate and (no doubt with difficulty) a quantifiable reduction from the value of the asset which the claimants should have received on 6 February 1986 to the value of the asset which they did receive.*” (para 28). These risks were not, in the Board’s view, such as to render the claimant’s loss “*purely contingent*” (ibid, referring to *Sephton*).

55. The Judge was of the view that the reasoning of the Board in *Maharaj* is not consistent with the Supreme Court’s decision in *Brandley* because it failed to have regard to the fundamental distinction between “*defect*” and “*damage*” (Judgment, para 22). As I have explained, I do not consider that this case presents any

meaningful analogy with the position in *Brandley*; nor, in my opinion, is there any inconsistency between *Maharaj* and *Brandley*. The analytical framework in *Maharaj* – and in particular its focus on the issue of whether the claimants suffered actual damage, and not merely contingent loss or damage, at the point of entering the 1986 transaction – appears to me to be entirely consistent with *Gallagher*, *Brandley* and *Cantrell*.

56. The Judge appears to have been of the view that, if the reasoning of the Board in *Maharaj* were applied here, it would follow that the transaction of July 2006 was a “*flawed transaction*” and that it was at that point that the damage occurred (Judgment, at para 22). In my view, there may be scope for argument as to whether this is a “*flawed transaction*” case. If the planning issues had been identified prior to completion, it may be that they would have been remedied and that the purchase of the Property would have proceeded. The fact that the Vendors successfully applied for retention when the difficulties became apparent in 2008 seems to support such a supposition. But it may be that the Plaintiff and his wife would not have proceeded in such circumstances. The Plaintiff’s pleadings are rather lacking in clarity on this issue. As I have observed, however, the claim is not pleaded as a “*no-transaction*” case and the argument that the damage suffered by him was the loss of the sale in 2008 appears to suggest that the claim is indeed one based on a “*flawed transaction*”. But even if that is so, it does not *necessarily* follow that the Plaintiff had suffered actual damage on entering into it. The issue is in every case to be assessed by reference to the particular facts, not determined by the application of any *a priori* rule. That point is made by Fennelly J in *Gallagher* and by O’Donnell J in *Cantrell*.

Approved
No redactions required

It is also made by the Board in *Maharaj*. So the question in all cases is when actual damage was suffered. For the reasons set out already, it seems to me that, however the 2006 transaction falls to be characterised in terms of “*no transaction*”, “*flawed transaction*” or “*intermediate transaction*”, immediate loss and damage was suffered by the Plaintiff and his wife in 2006.

CONCLUSIONS AND ORDER

57. For the reasons set out in this judgment, I have come to a different view to that of the Judge as to the appropriate resolution of the preliminary issue before the Court. In my view, any alleged negligence on the part of the Solicitors in relation to the purchase of the Property in July 2006 resulted in actual damage at the time of the transaction. In arriving at that conclusion, I am conscious of the injunction in *Cantrell* to avoid any overly-refined or theoretical conception of damage and instead to prefer “*sensible pragmatism to relentless logic.*” In the particular circumstances here, that approach seems to me to point clearly to the conclusion that “*real actual damage, which a person would consider commencing proceedings for*” was sustained upon completion of the purchase in July 2006. The damage here was not nominal or notional: it was real and significant.
58. It follows that the Plaintiff’s cause of action for the tort of negligence against the Solicitors accrued at that point. It is accepted that his cause of action in contract accrued at that point also. These proceedings were not commenced until 2014, significantly after the expiry of the six year limitation period provided for by section 11(2)(a) of the 1957 Act. In the absence of any suggestion of any factor that might affect the running of time in the ordinary way – there is no suggestion of disability, concealment or mistake - the Plaintiff’s claim against the Solicitors is statute barred.
59. 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, is capable of giving rise to significant injustice for (potential) plaintiffs. As it happens, such is not the position here. This is not a case where (as in *Tuohy v Courtney*) the plaintiff became aware of a potential claim only after any such claim had become statute-barred. The Plaintiff here became aware of the planning issues in June 2008. The sale of the Property collapsed in September/October 2008. The Plaintiff then had until July 2012 to commence proceedings. That was, on any view, more than ample time within which to seek advice and initiate litigation. That is, of course, happenstance to a certain extent and it does not affect the issue of principle.

60. I would therefore make an order allowing the Solicitors' appeal and declaring that the Plaintiff's claim against the Solicitors is statute-barred.
61. Before concluding, some observations about the procedure adopted here appear appropriate. As noted above, the application before the High Court was for an order seeking the trial of a preliminary issue on the Statute. No formal order in such terms appears to have been made and instead the parties appear to have agreed to treat the motion as the trial of the issue. No statement of agreed facts was put before the court.
62. The general principle in civil litigation is that all issues are addressed in a single unitary trial: per Charleton J in *O' Sullivan* (at para 65). There is an obvious practical benefit in having limitation issues determined on a preliminary basis, *provided that* it can be done justly and fairly. As the High Court of Australia noted in *Wardley*, there is a risk that, at such a stage, "*insufficient is known of the damage sustained by*

the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question” of whether the claim is statute-barred or not. Before the High Court is asked to depart from the general principle of a unitary trial by directing the trial of a preliminary issue on the Statute (and the decision is always one for the court to make; as Charleton J emphasised in *O’ Sullivan*, it remains the responsibility of the judge in every case to ensure that such a step will facilitate the effective and efficient administration of justice), the parties and their legal advisers need to consider carefully whether the issue is suitable for determination in that way and what material the court will require in order to determine the issue properly. Where the relevant facts can be agreed, a statement of agreed facts should be provided to the court for the purpose of considering whether to make the order sought. If the relevant facts cannot be agreed, that may itself be an indicator that the issue is not suitable for preliminary determination (though, of course, the court has a residual power in an appropriate case to direct the trial of a preliminary issue on oral evidence). In my opinion, a court cannot properly adjudicate on an application seeking the trial of a preliminary issue on the statute without knowing whether or not the relevant facts are agreed. Assuming that the facts are agreed, the court must then assess whether those agreed facts provide an adequate evidential basis for a just determination of the limitation issue or whether the issue is such that it can properly be determined only at the trial of the proceedings. As is all too evident from the authorities discussed above, in cases such as this an intense examination of the facts will be necessary in order to determine the issue of limitation and in some instances that can only properly be done at trial. In such cases, the pragmatic attraction of an early determination of a limitation defence will have to yield to the requirements of

justice.

63. While this is not how matters proceeded in the High Court here, the Judge nonetheless considered it appropriate to determine the limitation issue and he obviously took the view that the material before him was sufficient for that purpose. In the circumstances, and despite my misgivings as to the procedure followed here, I have considered it appropriate to determine this appeal on its merits.

64. Finally, the Plaintiff was awarded the costs of the motion in the High Court. That order must be set aside and, in light of the outcome of this appeal, it appears to me that the Solicitors are entitled to the costs of the proceedings against them, including (but not limited to) the costs of the motion in the High Court and the costs of the appeal to this Court. If the Plaintiff wishes to contend for a different order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, the Plaintiff may be liable for the additional costs of such hearing: In default of receipt of such application, an order in the terms proposed will be made.

Whelan and Ní Raifeartaigh JJ have authorised me to record their agreement with this judgment and with the orders proposed.