[2020] IESC 71

AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000011

Clarke C.J.
O'Donnell J.
Dunne J.
Charleton J.
O'Malley J.

Between/

GERALDINE CANTRELL

Appellant

AND

ALLIED IRISH BANKS PLC, THE SECOND BELFRY PROPERTIES (U.K.) PLC, TULLAMONA LIMITED, THE FOURTH BELFRY PROPERTIES (U.K.) PLC, LEYALLY LIMITED, THE FIFTH BELFRY PROPERTIES (U.K.) PLC, MONSAL LIMITED, ~~B.D.O (A FIRM)~~, SEAN HENNEBERRY, TONY KILDUFF, WILLIAM LEDWIDGE, JOHN ROCKETT, JOHN ROGER WILKINSON, ~~ANN BLACKMORE~~ AND ESSEX TRUST LIMITED

Respondents

and the following seven sets of proceedings:

1. bearing High Court Record Number 2014 No. 6899 P and entitled as between

LAURENCE MCMULLIN

Appellant

AND

ALLIED IRISH BANKS PLC AND OTHERS

Respondents

2. bearing High Court Record Number 2014 No. 6898 P and entitled as between

BERNADETTE GOODWIN

Appellant

AND

ALLIED IRISH BANKS PLC AND OTHERS

Respondents

3. bearing High Court Record Number 2014 No. 6913 P and entitled as between

MARY HONOHAN

Appellant

AND

ALLIED IRISH BANKS PLC AND OTHERS

Respondents

4. bearing High Court Record Number 2014 No. 6812 P and entitled as between

PETER TIERNEY

Appellant

AND

ALLIED IRISH BANKS PLC AND OTHERS

Respondents

5. bearing High Court Record Number 2014 No. 6979 P and entitled as between

BRIAN SPIERIN

Appellant

AND

ALLIED IRISH BANKS PLC AND OTHERS

Respondents

6. bearing High Court Record Number 2015 No. 4218 P and entitled as between

BRIAN O'REILLY

Appellant

AND

ALLIED IRISH BANKS PLC AND OTHERS

Respondents

7. bearing High Court Record Number 2014 No. 7166 P and entitled as between

EDWARD SHEEHAN AND EVELYN SHEEHAN

Appellant

AND

ALLIED IRISH BANKS PLC AND OTHERS

Respondents

Judgment of Mr. Justice O'Donnell delivered the 10th day of December, 2020.

I – Introduction

A. Background

1. The point at which a cause of action can be said to have accrued is not in itself a subject that might attract the interest of even the most diligent law student. Indeed, such a student might be surprised to learn that it remains an issue of legal controversy. It was settled more than a century ago that a cause of action arose or accrued when every fact which it would be necessary for the plaintiff to prove in order to support his right to judgment of the court was in existence: *Read v. Brown* (1888) 22 Q.B.D. 128. This might appear no more than a statement of the obvious. In the case of a tort such as the tort of negligence, where it is necessary to prove damage to establish the cause of action, it follows that the cause of action accrues when there is both a negligent act (or omission), and damage. The question of what amounts to damage and when, accordingly, a cause of action in negligence accrues has been the subject of intense debate in this case, and in a number of cases over the past 30 years or more. That is not because of the intrinsic interest or significance of the issue, but rather because s. 11(2)(a) of the Statute of Limitations 1957 ("the 1957 Act") provided that:-

> "Subject to paragraphs (b) and (c) of this subsection, 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.*" (Emphasis added)

It will be necessary to consider later statutory amendments to that provision, but it is accepted that s. 11(2) applies in this case.

2. While in most cases, the negligent act (or omission) and the damage will occur at the same time, the requirement that there be both a negligent act/omission and damage raises the possibility that, in some cases, damage may not occur until some time after the negligent act, with the result that the cause of action does not accrue, and consequently that time does not run under s. 11(2) until that later date. The possibility of retarding the running of the Statute of Limitations is the subject of such intense scrutiny in the case law, not because it provides a last gasp lifebelt for the tardy plaintiff and his or her lawyers – although it may have that effect on occasions. Instead, it has been the subject of debate in a large number of cases where it is alleged that damage, and quite possibly the negligence causing the damage – and therefore the possibility of a claim in respect of a cause of action – was not reasonably capable of being discovered within three or six years of the negligent act, as the case may be. This could arise in the context of a personal injuries case where, for example, a person sustains an injury which did not become symptomatic for a number of years. It may also arise in the context of damage to property where a defective design or method of construction may only manifest itself long after the building was built, handed over and paid for. It may also arise in cases of professional negligence. For example, a solicitor may be negligent in accepting title for a property on behalf of his client, but that may only come to light when the client seeks to sell the property many years later. A particular issue which has arisen in recent years, in the aftermath of financial crisis, is where a disappointed investor may seek to claim in respect of investments which have proved unsuccessful.

It is in the nature of many investments that they are intended to be medium or long-term in nature and may be expected to fluctuate to some extent so that a loss, which the plaintiff may subsequently attribute to the negligence of a particular advisor, may not be said to have occurred or been detectable until some time after the advice was given and the investment made or the asset acquired.

3. In the case of personal injuries, this difficulty was addressed by the Statute of Limitations (Amendment) Act 1991 ("the 1991 Amendment Act"), which introduced the possibility of an extended limitation period where the ingredients of a cause of action were not reasonably discoverable within the primary statutory period. Section 7 of the Liability for Defective Products Act 1991 ("the Defective Products Act") permits a similar, though not identical, extension of time in the case of claims in respect of defective products. However, in the case of property damage and claims for financial loss, whether as a result of professional negligence or otherwise, the rule remains that set out in s. 11(2) of the 1957 Act: namely, that a claim will be statute-barred if not initiated within six years of the accrual of the cause of action. Hence in the latter cases, the intense focus on the date of accrual of the cause of action with, inevitably, plaintiffs seeking to extend the interval between the negligent act or omission, and the alleged damage (and thus extend the end point of the limitation period), and defendants seeking to narrow and close it. This is, therefore, the very real practical significance of the issue which arises for determination in this and nearly every other case in which the question of accrual of a cause of action arises.

4. However, it should be recognised at the outset that, while the practical consequence of the legal issue in this case is its impact on the limitation period in these proceedings, and that there is some overlap between the issue of the occurrence of damage and the problem of latent damage – the somewhat dry and technical legal question which arises in this case – it is not addressed directly to that issue. The court is not asked to decide at

what point in this or in similar cases a claim *should* be barred. The rules for accrual of a cause of action were not devised to determine the appropriate time within which a particular claim ought to be brought. Instead, the legal issue is a technical one which, in theory, can arise in other contexts, such as the date upon which an obligation to pay interest may arise, or the date upon which proceedings may be commenced, or, as in *Read v. Brown*, the venue where proceedings can be brought. The resolution of that discrete legal issue is accordingly inherently unlikely to be capable of providing a comprehensive and satisfactory solution to the problem posed by the application of limitation periods to claims for latent damage. Instead, the determination of the date of accrual of a cause of action has a largely unpredictable and random effect on particular claims. Identifying a later date for the occurrence of damage in a negligence claim does not extend the limitation period – it means merely that the same limitation period commences from a later date. The occurrence of damage is not the same as the point at which a cause of action might reasonably be discoverable. Furthermore, it is only in those torts where damage is an ingredient of a cause of action that the possibility of a later start date for the limitation period can arise: in torts actionable without proof of damage or in other causes of action, such as breach of contract, the cause of action will arise on the occurrence of the wrongful act or breach, even if that could not be known by the plaintiff at that time or for some considerable period thereafter. For this reason, judgments delivered in this court in recent years have drawn attention to the potential for injustice created by the fixed limitation period, and the need for legislative consideration in all cases arising outside the field of personal injuries and defective products. This, however, has not occurred to date, and it will be necessary to return to this issue later in this judgment. However, for the moment it is necessary to explain how the particular issue arises in this case.

B. Facts

5. These cases are eight so-called "pathfinder" cases selected from more than 300 proceedings brought by disappointed investors in a series of Belfry schemes promoted by the first-named respondent, Allied Irish Banks plc. ("AIB"), a bank of which the appellants were customers and/or employees. The remaining respondents are directors of the respective Belfry schemes. The proceedings concern five schemes known as Belfry 2, 3, 4, 5, and 6 respectively, and which were launched annually in the years between 2002 and 2006, and all of which, while initially successful, experienced catastrophic losses, resulting in the value of the appellants' investments being wiped out, or almost wiped out, in each case.

6. The factual background is set out in an admirably comprehensive judgment of Haughton J. in the High Court ([2017] IEHC 245) and to which recourse may be had for a detailed account of the facts and the legal issues which initially arose. For the purposes of the legal issues arising in this appeal, it is, however, possible to set out the relevant facts in outline only.

7. Each Belfry scheme was directed towards providing investors with exposure to the commercial property market in towns and small cities in the UK. The properties were to be managed and traded during the lifetime of the funds. Profit in each fund was expected to accrue from rental income, capital appreciation, and the trading of properties during the lifetime of the funds.

8. In each case, the structure of the investment was similar. A prospectus was issued and investors were invited to subscribe for shares in a company (Belfry 2, 3, 4, 5, or 6, as the cases may be), a subsidiary of which would acquire commercial properties in the UK, which would then be managed by an identified management company. It was envisaged that property acquisitions would be funded by a mixture of capital provided by the investors, and borrowings to be secured on the properties to be acquired. It was

further envisaged that approximately 80% of the company's capital for acquisitions would be provided from borrowings. The investors received an annual report containing the accounts of each fund as of the 31st of March of each year, the valuation of the properties described as a Property Update, and a NAV, being the Net Annual Value of the individual investment at that point. It should be noted that the NAV did not simply track the valuation of the properties held by the fund. Since the fund sought returns from rental income and the profits realised from sale of properties, the NAV reflected the overall value of the fund.

9. The subscribers obtained shares in an Irish company which shares would then be held on trust for the investors by a trustee company. Although the company had power to seek a listing on a stock exchange, it was not anticipated that this would be done. The directors had power to refuse to register a transfer of shares to a person of whom the directors did not approve. Accordingly, under the heading "Liquidity", investors were informed that "it may not be possible to encash, realise or transfer the investment prior to its maturity".

10. The major difference between the schemes was the amount invested and borrowed. The schemes were all initially successful, and each Belfry scheme launched in each succeeding year became larger and more substantial. Belfry 1 had raised IR£14.6 million in equity in 2001, and Belfry 2 raised €15.4 million the following year. In 2006, Belfry 6 raised €68 million and secured four times that figure in debt. The nature of the borrowing – and indeed the identity of the lender – was not known to the investors at the time of subscription to the funds. In each case, however, borrowing was negotiated shortly after the closing of the funds and, in each case, the loan agreement contained a loan to value covenant ("the LTV covenant") which provided that if the value of the property fell below 80% of the initial value, or below the amount lent, then the lender was entitled to activate the clause, and a floating charge would crystallise, in which case

the lender would be entitled to take control of the property and sell it in reduction of the debt.

11. The fortunes of each fund, and therefore each investment, followed the same trajectory of initial success followed by a calamitous fall as a consequence of the impact of the financial crisis. The main difference between the funds is that the earlier the fund, the greater its initial success and increase in valuation, with the consequence that the earlier funds were somewhat slower to fall into negative territory: that is, the point when the valuation of the fund fell below the initial investment. Similarly, the point at which the valuation of the property held by each fund fell below 80% of the original price was different for each fund. However, in all cases, the value of the property did fall below 80% of the purchase price and the valuation of the investment fell below the amount of the initial investment, and indeed eventually reached a point in each case where a nil valuation was applied.

12. The appellants in each of the proceedings, taken together, illustrate nearly all the types of investment which were made in the different schemes by different investors. The first-named appellant, Geraldine Cantrell, was an investor in three of the schemes. She is the only appellant in these current proceedings who invested in the Belfry 2 fund, which was launched on the 2nd of April, 2002. Ms. Cantrell invested €200,000 in the fund on the 9th of June, 2002. She also invested €160,000 in Belfry 4 on the 10th of August, 2004. Finally, she invested €80,000 in Belfry 5 on the 24th of June, 2005.

13. Mrs. Bernadette Goodwin and her late husband were investors in the Belfry 3 fund. They invested €150,000 on the 3rd of July, 2003. Mrs. Goodwin's husband was terminally ill at that time. This fact is relied on in the proceedings proper, but does not appear to give rise to any different argument in relation to the question of the Statute of Limitations.

14. Mr. Tierney was an investor in Belfry 3. He invested €75,000 on the 10th of July, 2003. He is an employee of the bank, and was encouraged to invest in a product which he would be marketing. To that end, the bank offered to waive the 2% commission fee which was payable and paid by customers such as the Goodwins and Ms. Cantrell. The bank also advanced to him €75,000 by way of a staff home loan, which was an interest-only loan secured by an equitable deposit of the title deeds on the appellant's family home owned by him and his wife.

15. Ms. Honohan was an investor in the Belfry 3 fund, and appears to have invested Stg£75,000 on or about the 15th of July, 2003.

16. Mr. Edward and Mrs. Evelyn Sheehan were investors in the Belfry 4 fund, which was launched on the 15th of March, 2004. They invested €150,000 on the 24th of September, 2004.

17. Mr. McMullin and Mr. Spierin were, along with Ms. Cantrell, investors in the Belfry 5 scheme, which was launched on the 9th of March, 2005. Mr. McMullin invested €217,000 in July 2005, and Mr. Spierin invested €100,000 on the 27th of July, 2005.

18. Finally, Mr. Brian O'Reilly was, like Mr. Tierney, an employee of AIB, and worked for AIB International Financial Services Ltd. He was offered an incentive as a member of staff to invest in the Belfry 6 fund in that the bank offered to waive the 2% commission fee ordinarily payable. The bank also offered him an interest-only mortgage loan in the sum of €101,000 to fund his investment. It was to be repayable over seven years and secured on property jointly owned by Mr. O'Reilly and his wife. Mr. O'Reilly signed an application form on the 8th of December, 2006, and invested a sum of €101,000 in the Belfry 6 fund.

C. The History of the Belfry 2 Fund

19. By letter dated the 5th of August, 2008, Belfry 2 wrote to all of the investors, including Ms. Cantrell, enclosing the Property Update and consolidated financial statement of the group for the year ended 31st of March, 2008. The valuation of the property appeared to show that it was valued at Stg£69,655,000, just below the original property cost of Stg£70,275,000. Under the heading "Net Asset Value", the letter set out that Ms. Cantrell's original investment of €200,000, which had a NAV as of the 31st of March, 2007, of €491,000, had, by the 31st of March, 2008, declined to €262,459. The letter also explained that the fact that the fund was highly geared – that is, that it was heavily dependent on debt financing – meant that the 11.7% fall in the value of the property was magnified in its impact on shareholders. The investors were also informed that the loan to value percentage now stood at 77%. The apparent discrepancy between these figures may be explained by the fact that the value of the individual's investment reflected not merely the present value of the property but also gains made in respect of disposals of property and rental income received.

20. The following year, on the 19th of March, 2009, Belfry 2 wrote to its investors, including Ms. Cantrell, to provide an update on recent developments. This letter was the first express reference to the LTV covenant. It explained that funding by way of loan had originally been obtained from Bradford and Bingley plc, but that the loan had been purchased by GE Real Estate Finance Limited ("GE") when it acquired the business of Bradford and Bingley. GE had recently called for an independent valuation of the portfolio. The estate agents and valuers, CBRE, had revalued the portfolio in February 2009 at just under Stg£49 million, representing a 31.1% decline in the overall value of the property portfolio since the previous year. At this value, "all equity within the fund would be eroded". The investors were further informed that "the revised valuation had resulted in the group now breaching its 80% loan to value (LTV) covenant in the loan

agreement with GE, and GE was requesting that the breach of the LTV covenant be remedied by the 20th of March, 2009"; that is, the day after the letter was dated. If this was not achieved, it would be open to GE to declare an event of default under the loan agreement, and appoint a receiver to the group or its properties individually. The investors were told that the group was attempting to renegotiate its loans, and thus remedy the LTV covenant breach. Following further correspondence, Belfry 2 wrote to investors on the 7th of September, 2009, stating that the property update prepared as of the 31st of March, 2009, showed a decrease of 29% in the overall value of the property portfolio. Under the heading "Investment Valuation", it was stated that "the re-evaluation of the portfolio together with the adverse movement in the Euro/Sterling exchange rate, has resulted in the value of your investment being written down to nil".

21. Correspondence in subsequent years confirmed that Ms. Cantrell's investment was valued at nil, that property was being sold to partially discharge the lending, and that investors would not have any liability in respect of the anticipated substantial shortfall.

D. The Performance of Belfry Funds 3, 4, 5, & 6

22. By a letter of the 5th of August, 2008, Belfry 3 wrote to investors in that fund, including Mr. Tierney, Mrs. Goodwin, and Ms. Honohan, indicating that the overall value of the property portfolio had reduced in value by 12.5%. By letters of the same date, Belfry 4 wrote to investors, including Ms. Cantrell and Mr. and Mrs. Sheehan, indicating that the overall value of that portfolio had reduced by 13.7%. Belfry 5 wrote to Ms. Cantrell, Mr. McMullin and Mr. Spierin on the same date, outlining a decrease of 10.3% in the value, and Belfry 6 notified Mr. O'Reilly on the same date of a reduction in value of 13.2%. These losses also had an impact on the loan to value percentages. In the case of Belfry 3, this was 75%; in the case of Belfry 4, it was 82%; in the case of Belfry 5, it was 75%; and in Belfry 6, 74%. For reasons that are not entirely clear, it was only in the

case of Belfry 4 (which, it will be recalled, stood at 82% at that point) that there was a specific reference to the LTV covenant. Investors were informed that the valuation at 82% exceeded the original LTV covenant with the original lenders, and had resulted in the group having to renegotiate the terms of its loan facility in the short term. None of the other letters of the 5th of August, 2008, in respect of Belfry 3, 5, or 6, contain any reference to the LTV covenant.

23. Again, in each case, there was further correspondence with the investors. In the case of Belfry 3 and 4, a letter of the 7th of September, 2009, notified the investors for the first time that the revaluation of the portfolio had resulted "in the value of the investment being written down to nil". In the case of Belfry 5, the company had written to investors on the 17th of June, 2009, stating that the valuation as of the 31st of March, 2009, meant that "all equity within the company has been completely eroded". Again, consolidated audited accounts and a Property Update as of the 31st of March, 2009, were forwarded to investors on the 10th of September, 2009. The letter stated that the revaluation of the portfolio had "resulted in the value of your investment being written down to nil". In relation to Belfry 6, the company wrote to investors, including Mr. O'Reilly, on the 25th of June, 2009, referring to an independent valuation as of the 31st of March, 2009. The letter stated that at that value "all equity within the company has been completely eroded". On the 4th of December, Mr. O'Reilly had been sent the consolidated audited financial statements and property update for the year ended the 31st of March, 2009. The letter stated that the revaluation of the property had been carried out and had resulted in "the value of your investment being written down to nil as of the 31st of March 2009".

24. While, accordingly, the investments all follow the same trajectory, and, in each case, the investors were notified at some point that the value of their investment had been written down to nil, there was, in some cases, some small recovery of value in subsequent years. Accordingly, in the case of Belfry 3, Mr. Tierney's original

investment of Stg£52,733 was valued at nil as of the 31st of March, 2009, recovered to Stg£24,830 as of the 31st of March of the following year, dropped slightly to Stg£22,686 on the 31st of March, 2011, had declined to Stg£7,970 as of the 31st of March, 2012, before returning to nil on the following anniversary in 2013, and recovering slightly to Stg£1,119 on the 31st of March, 2014, and Stg£3,075 as of the 31st of March, 2015. Similarly, in the case of Belfry 5, some value was attributed in subsequent years.

25. One fixed point in this dispute is the date of the commencement of the proceedings. All the appellants, with the exception of Mr. O'Reilly, commenced their proceedings on the 6th of August, 2014. Mr. O'Reilly commenced his proceedings on the 26th of May, 2015. Thus, it can be said at one level that if the causes of action accrued before August 2008, then they are *prima facie* statute-barred (subject only to any question that the commencement of the Statute of Limitations was delayed pursuant to s. 71(1)(b) of the 1957 Act by fraudulent concealment on the part of the respondents, which issue is not the subject of this appeal). It can, conversely, be said that, if the causes of action accrued after August 2008 (or May 2009, in the case of Mr. O'Reilly) that the proceedings are correspondingly in time. It might not, therefore, be necessary to identify the precise date of accrual of the particular causes of action to resolve the issue in this case. However, since these proceedings are intended to provide guidance for a large number of other similar cases in respect of the Belfry funds, and since, moreover, the issue has been identified as one of general public importance, and therefore likely to have an impact on many other cases, I think it is necessary to seek to identify the precise point at which the relevant causes of action accrued.

26. The High Court judge found that the claims of breach of contract, and breach of fiduciary duty were statute-barred. In the case of each such claim, the cause of action accrued when the investment was made, or, in respect of the LTV claims, when the respective loans were obtained on terms including an LTV covenant, or when there was

alleged mismanagement of the investments. All these events occurred before August 2008, and the claims were accordingly statute-barred. The High Court judge's conclusion in this regard was not the subject of an appeal to the Court of Appeal. The appellants' contention that the statute did not commence to run by reason of fraudulent concealment, pursuant to s. 71(1)(b) of the 1957 Act, was not determined in this application and is to be the subject of a separate hearing before the High Court. This appeal is, therefore, solely concerned with the claims in tort.

27. At para. 19 of his judgment, Haughton J. considered that the claims in tort could be analysed under three different headings:

(i) A claim in negligence or negligent misstatement relating to the terms of the prospectus and the advice given with regard to the relevant investment ("the misselling claims").

(ii) A claim in negligence and negligent misstatement relating specifically to the LTV covenants ("the LTV claim").

(iii) A claim in negligence in relation to the management of the investment whether by reference to the choice of the properties, or the rotation, or the degree to which the properties were traded and sold ("the churning claims").

28. This analysis was contested by the respondents, who argued, in particular, that the LTV covenant was not raised by the appellants as a separate claim or heading in negligence. It will be necessary to consider that argument in due course. However, it is helpful to adopt the analysis first made by Haughton J. in order to understand both his reasoning and the subsequent decision of the Court of Appeal.

E. <u>The Misselling Claims</u>

29. It is accepted that, for the purposes of the preliminary issue, the appellants' case must be taken at its height. Although, therefore, the respondent denies all allegations of

negligence, the issue of whether or not the claims are statute-barred must be addressed on the basis that the appellants' claims in negligence must be taken as established or capable of being established. It is clear that any of the negligent *acts* or *omissions* alleged in respect of the advice given to the investors, or the contents of the prospectuses circulated to them, must necessarily have occurred prior to each investment and therefore long before August 2008. It was argued on behalf of the appellants, however, that these acts or omissions did not cause damage, and therefore that the tort was not complete until a later date. This contention relies on the undoubted fact that, to a greater or lesser extent, each of the funds had been profitable at least initially, and it was only as the financial crisis bit that they deteriorated and began to lose money. As each fund had different assets, and – more importantly – different starting dates, the point at which each fund fell into negative territory was different. In each case, however, each fund prospered initially before a catastrophic downturn in or around 2008. The appellants maintain that while the investment was successful and profitable, no damage was suffered and no cause of action had accrued.

30. The issue of principle between the parties was therefore clear. The respondents contended that, even assuming the appellants' allegations of negligence to be established, damage was suffered and the cause of action accrued immediately when the investment was made, either because – in the case of all investors other than Mr. Tierney and Mr. O'Reilly – a commission was paid, or because the asset which the investor acquired was (on this hypothesis) something different and riskier than they ought to have received if the respondents had not been negligent, and that was sufficient damage to complete the tort. Neither the High Court nor the Court of Appeal accepted that the payment of commission could itself constitute damage. Accordingly, most attention has been focussed on the claim that once the investment was made, in reliance, it is said, on negligently provided advice or a negligently misstated prospectus, damage for the

purpose of the law of tort had accrued even if, in its initial phase, the fund, and therefore the investment, increased in value. If so, then these claims were statute-barred in the same way as the corresponding contractual claims. The appellants argued, however, as already noted, that it was only when the investment value fell below its starting value that there was any damage and that the cause of action could be accrued. Even if this argument was accepted, there remained an issue as to when precisely the cause of action accrued. However, the broad issue of principle between the parties was clear.

31. The same essential arguments were deployed in the case of the LTV covenant claim subject, however, to two important distinctions of fact. In the first place, the loans had not been negotiated nor the LTV covenants agreed at the time the individual investors made their investments, but only after the funds closed and borrowings were negotiated. While this is important for the purposes of accuracy, and might be significant in another case, the lapse of time before proceedings were commenced meant that this difference in starting point would not itself result in any different conclusion on the question of whether time had run. More importantly, it was contended on behalf of the appellants that the LTV covenants led to a complete collapse in the value of the investment. While there was a dramatic fall in the property market which led to significant losses and a reduction in the value of the investment, it was, it is said, the gearing of the investment and, in particular, the LTV covenants which led to the complete writing-down of the value of the investments to nil. It was alleged that, once the covenant was breached, the lender could take over the assets and sell at a price which, by definition, would mean that the shareholders could not recover anything, since the lender had advanced 80% of the purchase price and the value of the property had fallen below that amount.

32. These loans, concluded with Bradford and Bingley plc, were finalised some months after each scheme closed. For Belfry 2, the loan was concluded on the 11th of December, 2002, while for Belfry 3, the loan was concluded far closer to the closing date for

applications to the scheme, on July 22nd, 2003. Thereafter, Belfry 4's loan was concluded on the 15th of October, 2004; the loan for Belfry 5 was concluded on the 28th of September, 2005; while, finally, the loan for Belfry 6 was finalised on the 18th of December, 2006.

33. It is clear that this argument depends on a number of facts which may or may not be established. However, the significance of this argument is that it leads to a conclusion that damage was caused by the assumed negligence of the respondents in respect of the LTV covenant, *not* when the investment merely dipped below parity, but rather when the existence of the covenant, on the appellants' hypothesis, caused the complete collapse in the value of the investment and in it being written down to zero. A refinement of this argument was that it was not even necessary that the breach of covenant be acted on by the lender. It was enough that the existence of the covenant necessarily had the effect of destroying the shareholder value, once the valuation of the property dropped below 80% (or, perhaps, once it was clear that it was going to do so). While, therefore, the essence of the legal argument in this regard was the same as that advanced in respect of the misselling claims, it would, if accepted, have the effect of fixing a later date for the occurrence of damage and the consequent accrual of the cause of action. The respondents, for their part, maintained (as they had in relation to the misselling claims) that there was no gap in time between the alleged negligence and the damage: the negotiation of the loan including the covenants meant that, on the appellants' hypothesis, the appellant had received a more risky investment than they should have, which itself was sufficient damage to complete the tort and allow the cause of action to accrue and time to run.

34. Finally, a different dispute arose in respect of the churning claims. The appellants did not rely in this instance on any difference in time between the negligent act or omission and the causing of damage. The argument here relied on the fact that any claim of

negligence in relation to the management of the investment could only arise after the investments were made, and the individual properties purchased and managed. The respondents for their part maintained, however, that, on an analysis of the pleadings and the relevant facts, any such actions, while occurring after the date of entry into the investment, nevertheless had occurred and been completed more than six years prior to the commencement of the earliest proceedings on the 6th of August, 2014.

F. The Decision of the High Court

35. Much of the argument in the High Court concerned the interpretation to be given to the relatively recent decision of this Court in *Gallagher v. ACC Bank plc* [2012] IESC 35, [2012] 2 I.R. 620 ("*Gallagher*"), and the comprehensive judgment delivered in that case by Fennelly J. The plaintiff there had invested €500,000 in a fixed-term investment known as Solid World Bond 4. The investment was, however, quite different in structure to the investments here. The bond was to run for a period of five years and eleven months and was capital guaranteed. The bond was intended to passively track the value of a basket of shares in ten blue-chip companies and the investor was to receive 80% of the increase, if any, measured at the end of the period. The shares in the basket could not be altered during the period of the investment. While the bond was linked to the fortunes of the shares in the basket, the fund did not acquire shares in those companies. Instead, 79% of the monies were placed on deposit and 17% used to purchase an option to cover the risk of increased value and the remaining 4% was allocated to fees. The plaintiff's investment was to be funded by borrowing from ACC itself. However, the investment failed to generate sufficient returns to pay the interest on the loan, and the plaintiff (and many others) sued. On a preliminary issue, the High Court (Charleton J.) held that the claim was not statute-barred but on appeal, the Supreme Court disagreed, reversing the decision of the High Court.

36. The judgment of Fennelly J. contains a comprehensive review of the relevant Irish case law, and the case law of the Courts of England and Wales, and Australia, all of which have had to grapple with the question of the accrual of a cause of action in the tort of negligence (or any tort which is not actionable *per se*), particularly in the context of financial loss. The dispute between the parties to these proceedings is clearly illustrated by their respective approaches to the decision in *Gallagher*. The respondents maintain that that decision establishes a general principle applicable to negligence claims in respect of investments: namely, that damage normally occurs when the investment is made. The appellants maintain, however, that *Gallagher* was a case decided on its own particular facts which are not replicated here. Moreover, on the appellants' argument, the decision in *Gallagher* endorses an approach that it is only when it can be said that, as a matter of probability, the burdens of an investment outweigh its benefits that damage can be said to have occurred and a cause of action accrued. The appellants argued that this point was reached only when the value of the investment first dropped below the amount originally invested in the case of the misselling claims, and when the investment was first written down to nil for the purpose of the LTV claim.

37. The High Court judge considered that a cause of action accrued only when damage could be established. In the case of the misselling claims, this was when it could be said that the value of the investments fell below the amount invested. In the case of the LTV claims, this was when the shareholder investments were first written down to nil. As already set out, the date upon which investors in the respective funds were first notified of a nil valuation varied somewhat. In the case of the misselling claims, the relevant Property Updates and consolidated accounts were prepared for the year ended the 31st of March, but they were only signed off later, normally in June of each year, and communicated shortly afterwards to investors. The judge considered that the date of

finalisation and approval of the accounts was the point at which damage could be said to have occurred.

38. Applying this approach to the facts, Haughton J. found that the cause of action in respect of misselling accrued in respect of Belfry 2 and 3 when the valuation of the investment (and not the properties) dropped below the original amount invested. In the case of Ms. Cantrell, the NAV of her €200,000 investment in Belfry 2, made in 2002, was €491,100 as of the 31st of March, 2007, and had fallen to €262,459 as of the 31st of March, 2008, but was still above parity at that point. The accounts were signed off by the directors on the 7th of July, 2008, and the accounts, the Property Update, and the NAV communicated to Ms. Cantrell by letter of the 5th of August, 2008, which Haughton J. considered should be deemed to have been delivered, and therefore received, as of the 7th of August, 2008. However, since the judge considered that damage occurred when the accounts and valuations were finalised and not when those figures were communicated to investors, the question of when the information was to be deemed to have been received was not a necessary part of the judge's reasoning. The proceedings were commenced on the 6th of August, 2014. It followed from the judge's analysis of when damage occurred in the shape of a valuation of the investment below the original investment figure that the cause of action had not accrued prior to the 6th of August, 2008, but at some point thereafter since, as of the 6th of August, 2008, the NAV was still positive. The claim was accordingly not statute-barred. The same considerations applied to the investors in Belfry 3 (Ms. Goodwin, Mr. Tierney and Ms. Honohan) since the NAV as of the 31st of March, 2008, in respect of that fund was still considerably in excess of the amount of the initial investment.

39. However, the same reasoning led to the opposite conclusion on the facts relating to the investments in Belfry 4, 5, and 6. In each case, the NAV on the 31st of March, 2008, was below parity although, in the case of Belfry 5, the reduction was quite marginal.

Nevertheless, Haughton J. concluded that the claims became statute-barred on the sixth anniversary of the signing by the directors of the accounts showing a fall in value below parity, which occurred in respect of Belfry 4 and 5 on the 7th of July, 2008. In the case of the claim relating to Belfry 6, the accounts were approved by the board and signed off at some point between the 22nd of July, 2008, and the 5th of August, 2008. Mr. O'Reilly, who is the only appellant in respect of Belfry 6, commenced his proceedings on the 26th of May, 2015. Accordingly, all those proceedings were also statute-barred. The net outcome was that the misselling cause of action was found to have accrued when damage occurred and that was, the judge considered, when accounts were signed off which showed a negative NAV for the first time. The misselling claims in respect of Belfry 2 and 3 were therefore not statute-barred, and the claims in respect of Belfry 4, 5, and 6 were.

40. In relation to the LTV claims, the same analysis was applied. In this case, however, the point to be identified was not when the NAV first went into deficit, but rather when the NAV was first written down to nil. In the case of some funds, accounts and valuations disclosing a nil value were signed off prior to communication with the investors, but in others, the investors were notified by letter that the investment had been written down to nil prior to being furnished with the accounts. Haughton J. considered that the earlier date in each case was the applicable date. The relevant dates were set out at para. 30.7 of the High Court judgment as detailed in the below table.

Scheme	**Notification of nil value**	**Accounts signed off**
Belfry 2	7th of September, 2009	20th of July, 2009
Belfry 3	7th of September, 2009	20th of July, 2009
Belfry 4	17th of June, 2009	27th of August, 2009
Belfry 5	17th of June, 2009	4th of September, 2009

Belfry 6	25th of June, 2009	4th of December, 2009

41. It is important to note that the Property Updates issued to investors for the year ended the 31st of March, 2009, had all indicated that there remained some shareholder value in the funds. It was, accordingly, only when the investors either received the correspondence, or the accounts and Property Update, as the case may be, that it appeared that the valuation of the investment had been written down to nil. In the case of Belfry 6 investors, they received a letter on the 25th of June, 2009, but the relevant accounts were not signed off until the 4th of December, 2009. However, Mr. O'Reilly's claim had been commenced on the 26th of May, 2015, and, on the approach taken by the High Court judge, was accordingly in time. It followed, more clearly, that all other claims were also in time, having been commenced in August 2014, which was less than six years after the first point at which it could said that the NAV had been written down to nil.

42. Finally, Haughton J. turned to the churning or mismanagement claims. While these claims all related to factual matters alleged to have occurred subsequent to the investment, in each case, the last properties had been acquired before 2008, and the activity of the fund at that point, and thereafter, had been limited to disposals of property. Accordingly, any damage alleged to have occurred as a result of the acquisition of inappropriate properties, or the incurring of unnecessary fees in respect of such acquisitions, had all occurred more than six years prior to the commencement of proceedings, and those claims were statute-barred.

G. <u>The Decision of the Court of Appeal</u>

43. The respondents appealed the decision of the High Court to the Court of Appeal. The appellants did not cross-appeal against those aspects of the High Court decision which

found that elements of the claim had been statute-barred. The decision of the Court of Appeal ([2019] IECA 217, Baker J.; Peart and McGovern JJ. concurring) focussed primarily on the claim in respect of the LTV covenant. Baker J. quoted para. 45 of the statement of claim which stated that:-

> "The simple existence of an LTV covenant held the potential to, and did, cause the plaintiff loss after the date of her investment, when property valuations declined and investment value was written down to nil. A small downward movement in property valuations handed effective control to the Lender, irrespective of whether or not the covenant was triggered and removed discretion from the managers of the properties in which the funds were invested. This meant that the properties would be sold in order to protect the Lender's position and prevent at any possibility of the recovery of property value."

44. At para. 32, Baker J. analysed this claim as follows:-

> "This, in essence, is a plea that, irrespective of whether or not the LTV covenant was triggered by the Lender, the existence of the LTV covenant caused a risk or an injury to the plaintiff. The plea as thus characterised must be seen as a plea that it was not the triggering of the LTV covenants but its existence, and the failure to explain the effect the covenants might have in a downturn, which completed the tort. I will return later to that proposition."

45. The Court of Appeal considered whether the facts of these cases could be distinguished from those in *Gallagher*. The judgment considered and rejected four points of possible distinction between the cases, before concluding that the case could not be safely distinguished from *Gallagher*. Baker J. considered that damage occurred, and a cause of action accrued, when the LTV covenant was agreed. This was because the appellants alleged that they had suffered damage by reason of the existence of the LTV covenant

which may or may not have resulted in loss to them, or, more properly, may have resulted in more or less loss to them, the quantum of which might depend on the market and other factors. It was not a case of a contingent liability. Rather, the case concerned risk. The agreement of the LTV covenants gave rise to increased risk, which was a present and not contingent risk (para. 123).

46. The Court of Appeal also considered the recent decision of this Court in *Brandley v. Deane* [2017] IESC 84, [2018] 2 I.R. 741 ("*Brandley*"), where McKechnie J. reviewed the law relating to latent damage and the Statute of Limitations. That case, however, concerned physical damage to property, where it was alleged that defects in the laying of foundations led to cracks appearing some 18 months after the foundations were laid. McKechnie J. held that time began to run when damage manifested itself. He distinguished between the point at which damage occurred, on the one hand, and when such damage was reasonably discoverable on the other. Neither date was the correct point at which the cause of action accrued. That point was when damage manifested itself or was manifest. A working definition of damage being manifest was that "damage must have been *capable of being discovered and capable of being proved* by a plaintiff". (Emphasis added).

47. The judgment of Baker J. considered that the damage here could be characterised as increased risk which occurred, and was therefore manifest, when the LTV covenants were agreed. It followed that the claims in respect of the LTV covenants were statute-barred. It followed from the same analysis that the claims in respect of misselling of Belfry 2 and 3 were also statute-barred.

48. On this appeal, the parties have essentially repeated the arguments made in the courts below. The appellants have focussed on the arguments which found favour in the High Court, and the respondents rely on the argument accepted in the Court of Appeal. However, the appellants also seek to argue that an application of the decision in

Brandley would lead to a conclusion that damage was not "manifest" until receipt by the respective appellants of the finalised accounts, which must have occurred when the letter of the 5th of August, 2008, was received. Under the investment agreement, the date of receipt of correspondence was deemed to be two days after it was sent. If so, the appellants maintain that the cause of action accrued as of that date, with the consequence that the claims in respect of Belfry 4, 5, and 6 would also be (just) within time. The respondents dispute that it can be said that damage became manifest only when the accounts were communicated to the appellants, and maintain, moreover, that the appellants are not entitled on this appeal to seek to overturn the High Court decision in respect of Belfry 4, 5, and 6, when that was not appealed to the Court of Appeal.

49. It is, I think, apparent that the critical battleground between the parties is the interpretation of two recent decisions of this Court: *Brandley v. Deane*, and, perhaps most importantly, *Gallagher v. ACC*. The significance of these decisions can, however, only be understood against the background of the case law considered in both cases. I think it is necessary, therefore, to set out the major landmarks which were surveyed in both decisions.

II – Accrual of a Cause of Action

A. Beginnings

50. Since the issue in this case is one of both common law and the interpretation of similar limitation provisions which are found in a number of common law jurisdictions, a convenient starting point is *Cartledge v. Jopling* [1963] A.C. 758, [1963] 1 All E.R. 341 ("*Cartledge*").

51. At the time of that decision, both the common law and statute law in Ireland and the UK were aligned. Section 2(1)(a) of the UK Limitation Act 1939 ("the UK 1939 Act") provided that "the following actions shall not be brought after the expiration of six years

from the date on which the cause of action accrued ... (a) actions founded on... tort". The *Cartledge* case involved nine related cases of pneumoconiosis where the plaintiffs had worked as steel dressers, and had inhaled dust during the manufacturing process. The evidence was that pneumoconiosis could occur, and be detected by x-ray long before it became symptomatic. The House of Lords, while expressing considerable regret as to the conclusion to which it came, nevertheless agreed with both the High Court and Court of Appeal that the cause of action in negligence accrued when the pneumoconiosis was caused, and not when it was symptomatic or when it could reasonably have been discovered. The court considered that it could not adopt the approach taken by the US Supreme Court in *Urie v. Thompson* (1949) 337 U.S. 163, which had been prepared to hold that the Federal Employers' Liability and Boiler Inspection Acts should be interpreted as providing that in cases such as silicosis, a cause of action could only be said to have accrued when the disease could reasonably have been discovered by the plaintiff. The House of Lords considered this was not possible, at least in part because s. 26 of the UK 1939 Act (identical, in this respect, to s. 71 of the Irish Statute of Limitations 1957) provided for the:-

> "postponement of the cause of action in cases of fraud, or where the cause of action was concealed by fraud, and in each case the period of limitations should not begin to run until the person had discovered the fraud or with reasonable diligence have discovered it".

52. The principal speech was delivered by Lord Pearce, but the speech of Lord Reid bears particular attention in the present context, and was quoted by McCarthy J. in *Hegarty v. O'Loughran* [1990] 1 I.R. 148 ("*Hegarty*"), and McKechnie J. in *Brandley*:-

> "It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and

cannot be discovered by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.

But the present question depends on statute, the Limitation Act, 1939, and s. 26 of that Act appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions where fraud or mistake is involved: it provides that time shall not begin to run until the fraud has been or could with reasonable diligence have been discovered. Fraud here has been given a wide interpretation, but obviously it could not be extended to cover this case. The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered. So the mischief in the present case can only be prevented by further legislation."

53. It is noteworthy, however, that the legislative response in the UK was almost immediate. A report on the operation of the Statute of Limitations had already been prepared, and legislation drafted in light of the outcome of the *Cartledge* case in the Court of Appeal. The Limitation Act 1963 thus provided for a discoverability test limited, however, to personal injuries actions. It is also to be noted, however, that in *Kamloops v. Nielsen*

(1984) 2 S.C.R. 2 ("*Kamloops*"), the Supreme Court of Canada had interpreted accrual of a cause of action to include a discoverability test, and that the same conclusion was arrived at in New Zealand, and upheld by the Privy Council in *Invercargill City Council v. Hamlin* [1996] A.C. 624 ("*Invercargill*").

B. <u>Provable Injury Capable of Attracting Compensation</u>

54. The issue arose for determination in Ireland in *Hegarty*. The plaintiff's claim arose out of an alleged medical negligence which, it was said, was only discoverable sometime after the operation of which the plaintiff complained. In the High Court, Barron J. had found that the claim was statute-barred, holding that the cause of action accrued when the negligent act (the operation) occurred. The Supreme Court dismissed the appeal, but adopted a somewhat different test, namely, that the cause of action in negligence accrued "when a provable personal injury, capable of attracting compensation, occurred to the plaintiff". Finlay C.J. considered that there was no question of an ambiguity in the Act which could lead to an argument that, under the double construction rule, the court should adopt an interpretation which avoided unconstitutionality. Finlay C.J. was also careful to observe that he did not consider that it was necessarily the case that an interpretation barring a cause of action which could not be reasonably discovered would be unconstitutional. On the question of interpretation of the Act, he considered that the postponement of the running of the limitation period in cases of fraud or concealed fraud under s. 71 of the 1957 Act meant that that Act had to be interpreted as providing that a cause of action accrued when damage occurred, even if not reasonably discoverable. The judgment of Griffin J. was to similar effect, adopting, with approval, the approach of Finlay C.J. that "[u]ntil and unless the plaintiff is in a position to establish by evidence that damage has been caused to him, his cause of action [in negligence] is not complete".

55. By the time *Hegarty* was decided, the law in England and Wales had developed further, in particular with the passage of the Latent Damage Act 1986 ("the 1986 Act"), which provided that in claims for negligence, there was a basic six-year limitation period, with the possibility of a further three-year period from the point at which the plaintiff had the knowledge required to bring an action and the right to bring such action. This, in turn, was subject to a long-stop provision that any such action would, however, be definitively statute-barred 15 years after the negligent act. It is significant, for the present purposes, that the 1986 Act maintained the existing common law on the accrual of a cause of action both directly, for the date of commencement of the primary period of limitation, and indirectly, for the extended period of limitation created by the Act, since that period commenced only when the plaintiff knew that he or she had a right to bring such action. In Ireland, there was also a legislative response to the decision in *Hegarty*, and the Oireachtas enacted the Statute of Limitations (Amendment) Act 1991, which provided that an action claiming damages for personal injuries could not be brought after the expiration of three years after the accrual of the cause of action or the date of knowledge (as defined), if later. The Act did not, however, deal with cases of latent damage to property or financial loss.

56. *Tuohy v. Courtney* [1994] 3 I.R. 3 ("*Tuohy*"), was one such claim. It concerned a claim of professional negligence brought against two solicitors in respect of the purchase by the plaintiff of leasehold premises in which it was found that the plaintiff's own solicitor had been negligent in failing to advise him in relation to the title, and that the acquisition of the leasehold title in the particular case did not permit him to qualify for the legislative provisions providing for acquisition of the freehold interest by the owner of the leasehold interest. However, it was also held that such a claim arose on the acquisition by the plaintiff of the title, and was accordingly statute-barred. The plaintiff had also argued that if the provisions of s. 11(2)(b) of the 1957 Act were to be interpreted in this

way, they were inconsistent with the Constitution. Lynch J. in the High Court rejected that claim, and the Supreme Court dismissed the appeal.

57. Finlay C.J., writing for the court, acknowledged that a person whose claim was barred in circumstances such as those arising in the plaintiff's case could be said to suffer a severe apparent injustice and would be entitled reasonably to entertain a major sense of grievance. However, he considered that the legislation was to be viewed as an exercise by the Oireachtas in balancing constitutional rights and duties: in this case, the plaintiff's right to litigate claims and the defendants' right in his property to be protected from unjust and burdensome claims, and also the public interest in the avoidance of stale or delayed claims. The task of the court was not to impose its view as to the correct balance, but to determine if the balance contained in the impugned legislation "is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights". Finlay C.J. acknowledged that the type of case involved was reasonably rare, and that the courts had a jurisdiction to protect defendants from stale claims, as set out in *O'Domhnaill v. Merrick* [1984] I.R. 151, and *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135. However, the court did not consider that the existence of these features made an inflexible six-year limitation period clearly unconstitutional. That was, objectively viewed, a substantial period for the commencement of claims. He considered that the decision on whether or not to include a discoverability test was a matter of policy and not a proper matter for judicial intervention.

C. The "Flawed Transaction" Cases

58. It is now necessary to turn to those cases, mostly in the courts of England and Wales, which illustrate the many different ways in which the date of accrual of a cause of action in negligence and, in particular, the point of occurrence of damage, can be said to give rise to difficult issues of analysis. One of the most important decisions is the decision

of the Court of Appeal of England and Wales in *Forster v. Outred* [1982] 2 All E.R. 753 ("*Forster*"). In this case, the plaintiff was the freehold owner of property. In 1973, she executed a mortgage deed at the office of the defendants, who were her solicitors, charging her property by way of legal mortgage in favour of a company as continuing security for payment on demand by the company of all present or future actual or contingent liabilities owed by her son to the company. In due course, the son went bankrupt, owing money to the company. In January 1975, the company made a formal demand of the plaintiff under the terms of the mortgage for payment of the son's liabilities. She paid almost Stg£70,000 to the company and commenced proceedings against the firm. There were further procedural complications in the case which are not relevant to the broader issue and, for present purposes, the relevant proceedings were commenced in March 1980. If, therefore, the cause of action accrued on the execution of the mortgage, the claim was statute-barred, but if the cause of action only accrued when demand was made by the company, or at any later date, proceedings would be within time.

59. As subsequent judgments have pointed out, the judgment, if not *ex tempore*, was delivered almost immediately after completion of the argument. Nevertheless, the formulation of the issue and arguments by Stephenson L.J. have remained apposite. He recounted the argument of counsel for the defendants at p. 760 of the report as follows:-

> "Counsel for the defendants contends that when she signed the mortgage deed she suffered actual damage. By entering into a burdensome bond or contract or mortgage she sustained immediate economic loss; her valuable freehold became incumbered with a charge and its value to her was diminished because she had merely the equity of redemption, varying in value at the whim of her son's creditors; she could not sell the land without discharging the mortgage; she could not prevent her son from borrowing on the security of her mortgage

to the extent of the full value of the land; she could have sued the defendants in February 1973 for an indemnity or for damages on the basis of the diminished value of the land to the amount of the outstanding debt to the mortgagor."

Stephenson L.J. also set out the argument of counsel as to the meaning of damage, an argument which, it appears, the judge accepted:-

> "What is meant by actual damage? Counsel for the defendant says that it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage. It was also suggested in argument, and I would accept it that 'actual' is really used in contrast to 'presumed' or 'assumed'. Whereas damage is presumed in trespass and libel, it is not presumed in negligence and has to be proved. There has to be some actual damage."

60. Stephenson L.J. concluded:-

> "Although there is no more direct authority than those cases among those which have been cited to us, I would accept counsel for the defendants' statement of the law and would conclude that, on the facts of this case, the plaintiff has suffered actual damage through the negligence of her solicitors by entering into the mortgage deed, the effect of which has been to incumber her interest in her freehold estate with this legal charge and subject her to a liability which may, according to matters completely outside her control, mature into financial loss, as indeed it did. It seems to me that the plaintiff did suffer actual damage in those ways, and subject to that liability and with that incumbrance

on the mortgage property was then entitled to claim damages (not, I would think, indemnity and probably not a declaration) for the alleged negligence of the solicitor which she alleges cost her that damage. In those circumstances her cause of action was complete on 8 February 1973 and the writ which was issued on 25 March 1980 was issued too late to come within the six year period of limitation."

61. A concurring judgment was delivered by Dunn L.J. He concluded that, in cases of financial or economic loss, the damage crystallises and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment. Later, he said:-

> "[a]s soon as she executed the mortgage the plaintiff not only became liable under its express terms but also, and more importantly, the value of the equity of redemption of her property was reduced. Before she executed the mortgage deed she owned the property free from incumbrance; thereafter she became the owner of a property subject to a mortgage."

62. It is possible to see in these judgments the outline of the competing arguments which have framed the debate in all subsequent cases. The decision is capable of a narrow reading, but the language used is more expansive. It was undoubtedly the case that the court considered that Mrs. Forster had suffered actual damage when she executed the mortgage since at that time it had the effect of immediately diminishing the value of her land. Her interest in the property would be capable of valuation, and would have been valued differently, and less, the day after the mortgage was executed than the day before. To that extent at least, the case was clear-cut.

63. However, the language used in *Forster* was capable of much broader application, and was capable of suggesting that, where any transaction was entered involving a contingency, it was not necessary to weigh the occurrence of that contingency, before

concluding that some actual damage had been done sufficient to permit a cause of action to accrue. Thus, the first sentence of counsel's argument adopted by Stephenson L.J. is consistent with the narrow reading: that is, that actual damage is any detriment, liability or loss capable of assessment in money terms, but the subsequent part of the sentence goes further and includes "liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss or a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases". It is perhaps implicit in this formulation that only such contingencies as were capable of assessment in money terms at the time of the transaction could be said to be actual damage. It is apparent, however, that in subsequent cases, courts were prepared to hold that any transaction giving rise to a possibility of future liability could satisfy the test.

64. In *UBAF v. European American Banking Corporation* [1984] 2 All E.R. 226 ("*UBAF*"), the plaintiff, a UK bank, participated, at the suggestion of the defendant bank, in a syndicated loan to two companies which later defaulted. The loan was entered into as a result of a letter from the defendant to the plaintiff supplying information about the loans and the group, and which the plaintiff claimed to have a negligent misstatement. One issue which arose was whether the cause of action had accrued on the execution of the loan in September 1974, on the occurrence of the misrepresentation, or on the occasion of the borrower's default. The issue arose somewhat indirectly because the specific issue before the Court of Appeal of England and Wales was an application to set aside service, which in turn depended on the question of whether or not it could be said that the claim was barred. The court considered that the resolution of the limitation issue would require evidence, and could not be resolved on a preliminary basis. Accordingly, the matter was not finally determined, but the conclusion that the case could not be said to be clearly statute-barred was significant since, if the cause of action had accrued when the loan

was advanced, time had certainly run. However, Ackner L.J. considered that it was possible – although it might be improbable – that on the date on which the plaintiff advanced the monies, the value of the chose in action was in fact not less than the sum the plaintiff lent or even exceeded it. The mere fact that an innocent but negligent misrepresentation caused the plaintiff to enter into a contract which it otherwise would not have entered did not inevitably mean that it suffered damage by merely entering into the contract.

65. In *DW Moore v. Ferrier* [1988] 1 W.L.R. 267 (*"DW Moore*"), a company sued a solicitor for negligence in drafting a non-compete clause to be executed by a new director, purporting to restrain competition from the director should he leave the company and set up in competition. The Court of Appeal of England and Wales concluded that damage was suffered immediately when the defective non-compete clause was executed, and not when the employee departed, even though there was no certainty that an employee would leave the company, or would seek to compete with it. However, Bingham L.J. concluded that if a claim could have been commenced for breach of contract (and that cause of action undoubtedly accrued on the execution of the defective covenant) and more than nominal damages would be awarded, it could not be said that damage had not been suffered sufficient to complete the tort of negligence and accordingly the cause of action had accrued on the execution of the covenant.

66. A similar case was *Bell v. Peter Browne and Co.* [1990] 2 Q.B. 495. In that case, solicitors drafted a settlement between a husband and wife in the context of divorce proceedings, providing that the family home would be transferred into the wife's name, with the husband having a one-sixth interest in equity which would be paid to him in the event that the wife was to sell the house in the future. However, the solicitors failed to take any steps to secure the husband's interest so that when the wife sold the house some eight years later, she did not account to him for his one-sixth share and the husband

sought to recover his loss from the solicitors. While Nicholls L.J. acknowledged that the case was a troublesome one, he considered that the uncertainty surrounding the wife's future intentions related only to the question of the quantum of loss, and that damage had occurred at the point when the transfer was executed without the husband having the degree of protection that would be afforded by a formal document securing his interest. Again, the claim was barred. This case, and similar cases such as *DW Moore v. Ferrier* and *Forster v. Outred*, have come to be characterised as "flawed transaction" cases – a party wishes to obtain something from a transaction but, due to negligence, normally on the part of a professional adviser, does not.

D. <u>The "No Transaction" Cases</u>

67. This type of case is contrasted with those where a party enters a transaction but would not have done so if the adviser or another party had not been negligent. These are sometimes described as "no transaction" cases.

68. The issue arose in a somewhat different context in *Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd (No. 2)* [1997] 1 W.L.R. 1627 ("*Nykredit*"). This was a component part of earlier proceedings reported as *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Company Ltd* [1997] AC 191, in which the House of Lords had to consider the assessment of damages in cases where it had been established that loans had been advanced on foot of valuations which negligently overvalued properties and where, in the financial crash, the values of all properties had fallen precipitously. The plaintiffs maintained that they were entitled to recover the loss on the loans advanced less the residual value of the property. The defendants maintained, however, that even if the valuations had been competently valued, the lending banks would have suffered loss on their securities caused by the fall in the property market, and the defendants should not be responsible for that loss. Lord Hoffman delivered a judgment, concluding

that the correct level of damages was the difference between the true valuation and the negligent valuation provided for by the defendants.

69. The *Nykredit* proceedings related to a claim for interest consequent on that decision. Under the relevant provisions of s. 35(A)1 of the Supreme Court Act 1981, the court was empowered to award simple interest on the debtor damages for all or part of the period between the date on which the cause of action arose, and the date of judgment. It was accepted that the date on which the cause of action arose was the date of accrual of the cause of action and, consequently, the date upon which it could be said that actual damage had been occasioned to the banks who had lent on foot of the negligent valuation. Lord Nicholls delivered the leading judgment and quoted, with apparent approval, the extract from *Forster v. Outred* set out at para. 59 above, and stated that he agreed with it. However, in the particular case, he considered that the plaintiffs' cause of action had arisen when a relevant measurable loss had first been revealed. In this case, since the borrower had defaulted at once, and the amount lent had at all times exceeded the value of the property, the loss had occurred at about the time of the loan transaction and therefore the interest should be awarded from the date on which the plaintiffs had sustained their full allowable loss, which the court considered was December 1990, and not when the plaintiffs realised the security in February 1993.

70. However, for present purposes, it is interesting that Lord Nicholls considered that there was no fixed rule and the matter was one to be determined in relation to the particular evidence. He observed:-

> "In one sense, the lender undoubtedly suffers detriment when the loan transaction is completed. He parts with his money, which he would not have done had he been properly advised. In another sense, he may suffer no loss at that stage because often there will be no certainty he will actually lose any of his money: the borrower may not default. Financial loss is possible, but not

> certain. Indeed, it may not even be likely. Further, in some cases, and depending on the facts, even if the borrower does default the overvalued security may still be sufficient."

He considered that the basic comparison to be made was between the amount of money lent by the plaintiff which he would still have in the absence of the loan transaction plus interest at a proper rate, on the one hand, and "the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property", on the other. That basic comparison was a means of identifying whether the lender had suffered any loss as a consequence of entering into the transaction. He continued:-

> "If he has not, then currently he has no cause of action against the valuer. The deficiency in security has, in practice, caused him no damage. However, if the basic comparison throws up a loss, then it is necessary to inquire further and see what part of the loss is the consequence of the deficiency in the security.
>
> ...
>
> The basic comparison gives rise to issues of fact. The moment at which the comparison first reveals a loss will depend on the facts of each case. Such difficulties as there may be are evidential and practical difficulties, not difficulties in principle."

71. Lord Nicholls also referred with approval to *First National Commercial Bank plc v. Humberts* [1995] 2 All E.R. 673 ("*Humberts*"), which provides a useful illustration of the application of the rule which did not result in the accrual of the cause of action on the date of the transaction. In that case, the evidence established that the financial deal made by the plaintiffs was less valuable than it would have been had the defendants' valuation been correct. However, the relevant measure compared what the plaintiffs paid out and what they received under the transaction. On the evidence, the plaintiffs did not suffer any relevant damage when they parted with their money and entered into the

transaction. It was not until later that their outlay plus cost of borrowing or notional profit obtainable elsewhere exceeded the value of the security. In *Nykredit*, however, as already observed, the borrowers' covenant was worthless. The borrowers defaulted at once, and the amount lent at all times exceeded the true value of the property. Thus, the cause of action arose at the time of the transaction or thereabouts, and, by December 1990, the bank had sustained its full allowable loss and interest ran from that date.

72. In a concurring judgment, Lord Hoffman stated that it was necessary to identify the particular breach of duty of care which founded the cause of action. It had been determined that the valuer owed no duty of care to the lender in respect of entering into the transaction as such, and it was therefore insufficient for the purpose of establishing liability on the part of the valuer to prove that the lender was worse off than he would have been if he had not lent the money at all. The lender was required to show that he was worse off as a lender than he would have been if the security had been worth what the valuer said. It was, of course, the case "that the lender cannot recover if he is, on balance, in a better or no worse position than if he had not entered into the transaction at all. He will have suffered no loss". In order to establish a cause of action in negligence, "he must show that his loss is attributable to the overvaluation that is, that he is worse off than he would have been if it had been correct". Lord Hoffman considered that:-

> "[t]here 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 on 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 lenders recovery had become dependent on the realisation of a security and that security is inadequate."

73. It appears from the foregoing 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 follows that, in some cases, damage will occur and a cause of action accrue at an intermediate point.

E. Benefits & Burdens

74. An important case in this sequence is *Law Society v. Sephton* [2006] UKHL 22, [2006] 2 A.C. 543 ("*Sephton*"). This case is, however, unusual, in that it appears to be one of the few cases where there was no contractual relationship between the parties, and accordingly no parallel contractual claim. As the noted tort lawyer, Tony Weir, observed "these cases are for the most part "fake-tort, real-contract" cases" (P. Birks (ed.), *The Frontiers of Liability: Volume 2* (1994: Oxford University Press)). In pursuance of its function in regulating solicitors, the Law Society of England and Wales requires solicitors to submit accounts prepared by accountants and certified by them containing information prescribed by the Law Society. It was accepted that this relationship gave rise to a duty of care owed by the accountants to the Law Society. The defendant firm certified the accounts of a solicitor's practice between 1989 and 1995, and a partner signed such report stating that he was satisfied that the solicitor had substantially complied with the solicitors' accounts rules. In fact, the accountant's firm had not made a proper examination of the relevant documents, and in the period between 1990 and 1996, the solicitor had misappropriated a total of Stg£750,000 from his client account. This gave rise to the possibility of a claim upon the Law Society's compensation fund. In July 1996, a former client of the solicitor made a claim on the compensation fund and over subsequent years, the Law Society made payments out of the fund compensating

former clients of the solicitor for sums lost through his misappropriations. In 2002, the Law Society issued proceedings in negligence against the defendants. The High Court found that the cause of action accrued as soon as the solicitor misappropriated monies after the Law Society's receipt of the relevant reports and were accordingly statute-barred. The Court of Appeal reversed, and the matter was appealed to the House of Lords.

75. The facts in the *Sephton* were also more complex than other cases, in that the number of links in the chain between the negligence asserted and the loss and damage suffered was perhaps more complex and contingent than in other cases. The Law Society had a possibility of compensating any client of the firm who suffered financial loss. The negligently certified accounts failed to disclose a deficiency, and consequently gave rise to the risk of a claim. However, it was necessary for a loss to be sustained by a client, which was not made good by the solicitor, before there could be a claim on the Law Society's compensation fund and the possibility of damage to the Law Society. The compensation scheme did not give a direct legal right of compensation to any disappointed client, although the terms of the fund were enforceable in public law. The House of Lords unanimously considered that the loss and damage was not sustained until a claim was actually made.

76. This conclusion was significant in its own right, since it was an example of a very significant lapse in time between a negligent act and the damage completing the tort, and an implicit rejection of any blanket rule that loss was suffered at the time of the transaction (in this case, the delivery of certificates by the accountants in respect of the years 1989-1995). This was so even though it could be said, to use some of the language adopted in this case, that the Law Society had a significantly increased risk of a claim on the fund once the accounts were negligently certified. Indeed, that was what the High

Court had decided when it concluded that the Law Society's claim was statute-barred. The argument of counsel in the House of Lords was recorded at p. 545 of the report:-

> "At that point there was an adverse consequence for the Solicitors' Compensation Fund in that it was liable to a future quantifiable claim from a victim of the solicitor's dishonesty. Consequently, what the Law Society had suffered was a sufficient "detriment, liability or loss capable of assessment in money terms" when the money was misappropriated."

The language quoted was that of *Forster v. Outred.*

77. However, while the case itself turned upon somewhat unusual facts, it is of more general application, because the House of Lords discussed the existing case law, and endorsed the decision of the Australian High Court in *Wardley Australia Limited v. State of Western Australia* (1992) 175 C.L.R. 514 ("*Wardley*"), which had in turn adopted a significantly narrower interpretation of the decision in *Forster v. Outred.* The decision seemed to suggest that the reasoning in the case extended further that the somewhat unusual facts of *Sephton* and had implications, therefore, for cases such as the present.

78. Lord Hoffman acknowledged that the passage from the judgment of Stephenson L.J. in *Forster v. Outred* had been adopted with approval in *Nykredit.* However, he considered that the context of *Nykredit* was quite different. It was not, he considered, a case of contingent liability. Rather, the issue was whether the bank's cause of action arose immediately, or when the amount it was owed exceeded the value of its rights under the transaction, being the borrower's covenant plus security. This, he considered, was entirely in accordance with the principles in the *Wardley* case, and, in particular, the extract from the judgment of Brennan J. in which he had said that whether loss or damage was suffered in a transaction involving the payment of money, transfer of property or diminution in the value of an asset or incurring of liability, depended on the value of the benefit, if any, acquired by the plaintiff in paying the money, transferring

the property, or having the value of the asset diminished, or incurring the liability. A transaction in which there were benefits and burdens resulted in loss or damage only when an adverse balance was struck. *Nykredit*, in Lord Hoffman's view, could be analysed, therefore, as deciding that:-

> "in a transaction in which there are benefits (covenants for repayment and security) as well as burdens (payments of the loan) and the measure of damages is the extent to which the lender is worse off than he would have been if he had not entered into the transaction, the lender suffers loss and damage only when it is possible to say that he is on balance worse off. It does not discuss the question of purely contingent liability".

79. In that respect, he accepted the analysis of the principal judgment in *Wardley* of Mason C.J., Dawson, Gaudron, and McHugh JJ., and which considered that *Forster v. Outred* was explicable:-

> "by reference to the immediate effect on the execution of the mortgage on the value of the plaintiff's equity of redemption ... It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. For our part, we doubt the decision has travelled so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date... If... the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, the plaintiff first suffers loss or damage on entry into the contract, we do not agree with them.

> In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual: until that happens the loss is prospective and may never be incurred".

Lord Hoffman considered that a principle could be discerned that:-

> "a contingent liability is not as such damage until the contingency occurs. The existence of a contingent liability may depress the value of other property, as in *Forster v Outred & Co.* [1982] 1 WLR 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone as in this case, the contingency is not damage."

80. On this analysis, *Forster v. Outred* is explicable solely because the repayment was secured by a mortgage, which it could be said depressed the value of the property then and there. Lord Walker of Gestingthorpe made this, if anything, clearer, by considering, at p. 559, the hypothetical circumstance that, had the plaintiff in *Forster* given merely a personal covenant guaranteeing her son's debt and not given any security over any of her assets, that that would have been a different situation and, by implication, actual loss would not have been suffered at the time of the execution of the guarantee. He adopted with approval an observation made by Saville L.J. in *Humberts* at p. 679, as follows:-

> "In all those cases, however, the court was able to conclude that the transaction *then and there* caused the claimant to lose, on the basis that if the injured party had been put in the position he would have occupied but for the breach of duty, the transaction in question would have provided greater rights, or imposed lesser liabilities or obligations than was the case; and that the difference between these two states of affairs could be quantified in money terms at the date of the transaction." (Emphasis added).

Lord Walker considered that there was no good reason to stretch the "defective product" analogy to cover every situation in which a professional or commercial advisor carelessly gives inadequate advice and so produces the state of affairs which carries the risk of future loss.

81. Lord Mance, for his part, observed that in *Forster v. Outred*, the claimant had, by entering a transaction, "clearly depreciated the value of her house in a measurable way". However, negligence in causing a claimant to enter a transaction which they would not otherwise have entered may not immediately – or indeed ever – cause immeasurable loss to any particular asset. At para. 71*ff.*, he drew together a number of authorities rejecting the proposition that the plaintiff *necessarily* suffers loss on entry to an agreement, notwithstanding that the loss to which he was subjected by the agreement is loss upon a contingency: what is required is actual loss on entry, quite apart from the contingent loss threatened at a later date. He pointed out that, if the facts had been known contemporaneously, some statistical or experience-based assessment could have been made of the likelihood of a claim or claims emerging, and of the fund having eventually to make payments as a result of the solicitor being able to continue his scheme of fraud. But he did not consider that the law should treat purely contingent loss assessed on so remote a basis as sufficiently measurable, in the absence of any change in the claimant's legal position, and of any diminution in value of any particular asset. Even where the negligence brought about a specific transaction, and thus a claim in the claimant's legal position, the mere entry into a transaction under which financial loss is possible but not certain was not sufficient detriment.

82. The decision in *Sephton* is also significant for its endorsement of the decision of the High Court of Australia in *Wardley*. The facts of that important case are perhaps closer to the common case where it is argued that financial loss and damage sufficient to complete a tort and permit accrual of a cause of action occurs at some point after the

alleged negligent act. A merchant bank, Rothwells, was in financial difficulty as a result of the worldwide collapse in stock markets in 1987. The State of Western Australia was persuaded to grant an indemnity to National Australia Bank Limited against a facility that the bank was prepared to provide to Rothwells. The State did so after a meeting in October 1987, at which the defendant, Wardley, another merchant bank, had made representations that Rothwells was merely suffering liquidity problems rather than capital difficulties, and was not owed any substantial sum by any particular entity. Rothwells later repaid the facility to National Australia Bank, but went into liquidation shortly thereafter, and the liquidator brought a challenge seeking the repayment of the monies as a voidable preference. The bank then called in the indemnity and the State compromised the claim and commenced proceedings against Wardley. All this was within the limitation period. However, the State later sought to amend the proceedings to include a further representation it alleged had been made in October 1987. That was resisted by Wardley, who argued that by the date of the proposed amendment, any such claim was statute-barred on the basis that damage had been suffered and the cause of action had accrued when the indemnity was provided. The trial judge agreed. He considered that, on the State's case, it had assumed a risk of loss that was very much greater than it had been led to believe, and the assumption of a significantly greater than represented risk of loss was itself a category of loss. However, the full court of the Federal Court allowed the State's appeal, and the High Court of Australia unanimously dismissed the appeal from that decision.

83. Although there was no contract between Wardley and the State of Western Australia (and therefore no contractual claim), this was a commercial transaction, and thus closer, perhaps, to the class of cases in which a claim for financial loss is made arising from negligence and/or negligent misstatement. As is already apparent from the passage as adopted by the House of Lords in *Sephton*, the High Court of Australia emphatically

rejected the contention that damage was suffered when the transaction was entered into. Two slightly different rationales were advanced.

84. The principal judgment was a joint judgment of Mason C.J., Dawson, Gaudron and McHugh JJ., which concluded that there had to be some actual damage and that prospective loss was not enough. The transaction may have been disadvantageous to the plaintiff, who may have thereby suffered a detriment, but that in itself did not equate with the legal concept of loss or damage. In many cases, the disadvantageous character of the agreement could not be ascertained until some future date.

85. The judgment considered that the outcome of *Forster v. Outred* was explicable on the narrow basis that, in the particular case, there had been an immediate effect on the plaintiff's equity of redemption by the execution of the mortgage. The judgment also referred to another Australian case, *Jobbins v. Capel Court Corporation* (1989) 25 F.C.R. 226, where it had been claimed that an investment in a film had been induced by negligent misrepresentation, but the claim had been held to be statute-barred. The judgment in *Wardley* expressed some doubt as to that decision, and was clear that the cause of action did not accrue when the agreement alone was made. The judgment continued at p. 529:-

> "On this aspect of the case, the question was whether the investment was worth less than the applicant contracted to pay for it and, if so, when the applicant first sustained loss or damage. How that question could be answered in the absence of evidence is not evident to us. Although the investment lacked the represented qualities, it may have been worth no less than the consideration provided by the applicant".

86. Brennan J. delivered a concurring judgment and said, in a passage adopted with approval in both *Sephton* and *Gallagher*:-

> "But if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is borne – that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those event occur. ... In other words, no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is "worse off than if he had not entered into the transaction"."

F. Further Developments

87. The decision in *Sephton*, together with approval of the broader decision in *Wardley*, might have seemed to suggest that in more cases, the courts would be willing to find that damage was not suffered at the time of the transaction, but rather on some future event, when real financial loss ensued. However, in *Shore v. Sedgwick Financial Services Limited* [2008] EWCA Civ. 863, [2008] W.L.R. D. 255 ("*Shore*"), the Court of Appeal of England and Wales had to address a claim brought against pension advisors in circumstances where the plaintiff had been a member of an occupational pension scheme established by the company of which he was managing director. The company was acquired by British Steel, and the pension scheme was to be wound up. Members of the scheme were given three options, one of which was to leave their benefits in the existing scheme. The defendants advised the plaintiff to transfer his accrued benefits under the pension scheme into an income drawdown scheme. The scheme, however, performed poorly and the value of the plaintiff's investment dropped considerably.

88. It was held by the trial judge that the plaintiff first suffered loss at the point when his pension rights under the PFW scheme were "demonstrably less valuable than they

would have been under the scheme from which he transferred". The Court of Appeal upheld the trial judge's conclusion that the claim was statute-barred, but held that it became statute-barred at an earlier point, namely when the fund was transferred.

89. Dyson L.J. considered that the case was not a pure contingent liability case. He said that:-

> "There is no sense in which Mr Shore was exposed by the PFW scheme to a contingent liability or indeed any liability. The scheme gave him certain rights including the right to withdraw income. But it imposed no liability on him. The judge spoke of a "contingent risk" … I do not think he meant that Mr Shore was exposed to a contingent liability on investing in the PFW scheme. If he meant no more than that the PFW scheme exposed him to a risk of lower income than he would have received under the Avesta scheme, then it seems to me that the word "contingent" adds nothing to "risk". There was unquestionably such a risk and whether it eventuated would depend on certain contingencies (as all risks necessarily do)."

90. Dyson L.J. considered that the plaintiff's claim was that the PFW scheme was inferior to the earlier scheme because it was riskier:-

> "It was inferior because Mr Shore wanted a secure scheme: he did not want to take risks. In other words, *from Mr Shore's point of view*, it was less advantageous and caused him detriment. If he had wanted a more insecure income than that provided by the Avesta scheme, then he would have got what he wanted and would have suffered no detriment. In the event, however, he made a risky investment with an uncertain income stream instead of a safe investment with a fixed and certain income stream which is what he wanted.
>
> The analogy with the investor who is negligently advised to buy shares rather than government bonds does not assist [counsel for the plaintiff]. In my

judgment, an investor who wishes to place £100 in a secure risk-free investment and, in reliance on negligent advice, purchase of shares does suffer financial detriment on the acquisition of the shares despite the fact that he pays the market price for the shares. It is no answer to this investor's complaint that he has been induced to buy a risky investment when he wanted a safe one to say that the risky investment was worth what he paid for it in the market. His complaint is that he did not want a risky investment. A claim for damages immediately upon the acquisition of the shares would succeed. The investor would be at least entitled to the difference between the cost of buying the government bonds and the cost of buying and selling the shares." (Emphasis in original).

91. Dyson L.J. also considered that if the court was induced to move away from the "secure rock of the date when Mr Shore was committed to the PFW", there was no proper basis for choosing one date rather than another. Accordingly, he held that the claim was statute-barred.

92. A further important case was considered in the Court of Appeal of England and Wales (Arden, Longmore, and Lloyd L.JJ.): *Axa Insurance Limited v. Akther and Darby* [2009] EWCA Civ. 1166, [2010] 1 W.L.R. 1662. The case concerned an after-the-event ("ATE") legal expenses insurance, which allowed members of the public to bring personal injury claims on a "no win, no fee" basis underwritten by the insurer. A panel of solicitors was maintained under the scheme and was required to vet claims and to accept into the scheme only claims which had prospects of success of at least 51% and were likely to meet a minimum value threshold of Stg£1,000. The panel of solicitors was also required to conduct cases with reasonable care thereafter and notify the insurer for withdrawal of indemnity where the success rate of the claim fell to below 50% and/or where it became clear that damages would not exceed Stg£1,000. Axa, as assignee of

the insurer, brought proceedings against the defendant panel of solicitors, alleging negligence and breach of duty in the vetting and the conduct of the claims. A majority of the Court of Appeal, Arden and Longmore L.JJ., held that the claims were statute-barred. Damage did not accrue by the incurring of a purely contingent liability, there had to be measurable loss in addition to the incurring of that liability for time to run. However, in relation to the vetting of the claims, it was considered that the insurers' book of business carried liabilities as soon as the respective policies had been underwritten so as to incur liabilities in excess of those which would have been incurred if the vetting breaches had not occurred. In respect of the claims relating to how the proceedings had been conducted, again it was found that the damage occurred when the breaches took place, insofar as the insurer was thereby exposed to larger liabilities than it would have been but for the failure to notify.

93. Arden L.J. conducted a careful analysis of the judgment in *Sephton*. She pointed out that an unsecured liability is generally capable of quantification, but under the rule laid down in *Wardley* (and implicitly adopted in *Sephton*), there must be loss in addition to that caused by the contingent liability. However, she also pointed to the apparent illogicality of drawing a distinction between contingent liabilities which affect particular assets or the legal position of the person, and contingent liabilities with little or no effect on the legal position or the assets. Taking the example of *Forster v. Outred*, she pointed out that Mrs. Forster could have given the secured guarantee for the liabilities of the company, while her son could have given an unsecured guarantee for the same liabilities at the same time. On the distinction apparently made in the case, and, in particular, in the judgment of Lord Walker, the limitation period for her claim would be statute-barred but, in the case of her son's claim, would not start to run until a demand on the guarantee was intimated or made. This was so even though the son's legal position was clearly altered by the execution of the guarantee, as he had a liability to meet amounts due.

94. Arden L.J. considered that these distinctions were difficult to rationalise, and made it desirable that, at the appropriate time, the *Sephton* decision might be revisited by the Supreme Court. She took the view in the instant case that the insurers had suffered "other measurable loss" over and above assuming the contingent liability. If, she considered, immediately on signature, the insurers had sought to agree to transfer to a purchaser the benefit of its rights remaining after discharge of its obligations under any one of the policies in respect of which there had been a vetting breach, it would have received less for it than it would have done if the vetting breach had not occurred. There is a logic in this, but there remains something of a conundrum: in considering whether damage has occurred, a hypothetical exercise is carried out, assessing value at a time by reference to information which was not then known, while the actual value at the time which the market placed on the item was, by definition, higher – precisely because that information was not known.

95. Finally, in *Maharaj v. Johnson* [2015] 5 L.R.C. 592, the Privy Council considered an appeal from the Court of Appeal of Trinidad and Tobago. In 1986, a widow had sought to convey property owned by her late husband to the plaintiffs. The defendants acted as solicitors for her in the transaction. The conveyance was executed pursuant to a power of attorney granted by her. Almost 22 years later, the plaintiffs agreed to sell the property for $20 million. The plaintiffs had also explored the possibility of mortgaging the property and, for that purpose, title was investigated by lawyers on behalf of the prospective lender. Even though that transaction was not proceeded with and was superseded by the proposed sale, the examination of title continued, with the result that the plaintiffs were informed shortly before the proposed closing date of 29th of February, 2008, that they had not secured good title to the property, as the power of attorney only authorised transactions carried out on behalf of the widow in respect of her own property and not in respect of property held by her as personal representative of the estate of her

deceased husband. The purchaser, perhaps seeking a reason to escape from the deal, rescinded the contract on the closing date of 29th of February, 2008. The flaw was, however, capable of remedy, and only 12 days later, the widow was located and executed a deed of rectification which, after signature by the plaintiffs, was registered. However, it was not possible to revive the sale or find a substitute on what was presumably a falling market. In 2012, proceedings were commenced against the solicitors in respect of loss alleged to be suffered by the plaintiffs, the land in question then being worth only $4 million.

96. The Courts of Trinidad and Tobago held, on a preliminary application, that the proceedings were statute-barred. The majority of the Privy Council (Lord Wilson; Lady Hale, Lord Carnwath and Lord Hodge concurring; Lord Clarke dissenting) agreed. Faced with unhelpful authority in relation to the solicitors' negligence cases, the appellants sought to argue that this was a so-called "no transaction" case rather than a "wrong transaction" or "flawed transaction" case. Damages in contract are assessed on the basis that the breach of contract does not occur and the contractual duty is performed. In the case of tort, however, damages are assessed on the basis that the tort did not occur. In a flawed transaction case, of which *DW Moore v. Ferrier* was an example, the client wished at all times to secure something – an effective restrictive covenant. If the solicitors had not been negligent, the company would have received that. The consequence, therefore, of the negligence was a flawed transaction, and normally (though not always) damage was suffered at the point of the transaction when the client received the defective conveyance, covenant or product. On the other hand, there are the cases of which *Wardley* and *Nykredit* are examples where, if the negligence and breach of duty had not occurred, then the plaintiff would not have entered the transaction at all. These are so-called "no transaction" cases. In such cases, damages are to be assessed by comparing the position the plaintiff ought to have been in if there had been

no negligence, and normally therefore retaining its money plus, perhaps, accrued interest, or avoiding incurring a liability, and comparing that with what actually transpired.

97. The significance of this distinction in the present context is that 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. In many "no transaction" cases, it may also be the case that damage is suffered immediately on the entry into the transaction, and it is easier to argue that damage is not immediate, but is only suffered at some future point.

98. The majority of the Privy Council rejected the appellant's argument. Lord Wilson returned to the broad question of policy raised in all these cases. He acknowledged the attraction of advancing rather than retarding the accrual of causes of action, and the undesirability of significant differences in the limitation period for what were essentially identical causes of action. However, a balance had to be struck:-

> "Quite apart from the desirability of reducing disparity between parallel causes of action, the law encourages prompt claims and should not too readily derail an early complaint of a breach of a duty of care on the basis that the breach has not, or not yet, caused what the law recognises as actual damage. On the other hand, take a case, such as the present, in which the breach of duty was unknown to the claimants for 22 years. In its wider and over-arching function, the law fails if in such circumstances it provides that the action is time-barred because the breach caused them actual damage 22 years previously. [Counsel] on behalf of the claimants submits to the Board that, in certain of its decisions during the last 33 years, the Court of Appeal of England and Wales has forfeited balance by discerning actual damage in circumstances in which the damage was not actual at all."

99. Lord Wilson concluded that, on the authorities, the claim was a flawed transaction case and one, moreover, where damage was caused on the date of the transaction when the defective title was acquired, and accordingly the claim in tort was statute-barred. Lord Wilson did not, however, endorse the proposition that damage would *always* accrue at the time of the transaction in a flawed transaction case. That, he considered, would be to go too far:-

> "The fact that the transaction was flawed does not by itself mean that the claimant suffered actual damage on entry into it. Although in the words of Lord Hoffman in *Law Society v. Sephton* … 'it may be relatively easy … to infer that the plaintiff has suffered some immediate damage, simply because he did not get what he should have got', there is no substitute for attending to the particular facts and deciding whether such an inference is properly to be drawn from them."

100. However, he considered that this case was clear. The solution to the apparent harshness of the conclusion was for Trinidad and Tobago to mitigate the rigours of the limitation period by providing for an extended limitation period akin to that provided for under the UK Limitation Act of 1980, and permitting claims of negligence by claimants who had long been unaware of the existence of the cause of action. He noted, however, that even that provision would not have availed the plaintiffs in this case, because of the long-stop against any action after 15 years from the alleged negligent act.

101. Lord Clarke delivered a dissenting judgment, arguing, ingeniously, that it could not be ruled out, at least at a preliminary stage, that the defendants had owed the plaintiff a duty in contract to perform a task (in this case the securing of good title), which was capable of being performed at any time. If so, the defendants were arguably in breach of that continuing duty (or in continuing breach of the existing duty) and therefore the proceedings could not be said to be statute-barred.

III – Some General Considerations

A. Preliminary

102. It is useful to pause at this point to consider the overall picture presented by the case law in common law jurisdictions, and principally in England and Wales, on the accrual of a cause of action in negligence or negligent misrepresentation, causing financial loss. The merit of the common law method is that individual cases are resolved by reasoned decision-making. The demands made by the facts of the individual case, coupled with the requirement for rigorous reasoning, can, at its best, produce an incremental process leading to the refinement of an aphoristic rule of general application which, when applied, is capable of reliably distinguishing between the situations in which claims will succeed, and those in which they should not.

103. It is, I think, no disrespect to the deployment of considerable learning, analysis, and reasoning power in the case law considered above to observe that it has not succeeded in producing a principle that is entirely clear or satisfactory. The distinctions between no transaction cases and flawed transaction cases, and between contingent risk and contingent liability, between present damage and future contingent loss, are, in their own ways, helpful, but fall short of the objective of a single bright-line rule providing clear and satisfactory conclusions. This should not be surprising. It is doubtful that the historic curiosity of the common law rule that some torts were not complete until actual loss was suffered by the plaintiff is a tool of sufficient flexibility to deal with modern problems posed by financial loss suffered through professional default.

104. It is easier, and perhaps more useful, to seek to describe the position rather than to seek a single all-encompassing rule. In this regard, the observations of Dr. Janet O'Sullivan in "The Meaning of 'Damage' in Pure Financial Loss Cases: Contract and Tort Collide" [2012] 28(4) P.N. 248, are helpful.

105. Dr. O'Sullivan observes that the concentration on the question of accrual of cause of action in negligence is a consequence of the impact of limitation law on the principal contractual claim. It is important to recall that these claims are all for pure economic loss. The law of tort historically did not permit recovery for such claims, until the landmark case of *Hedley Byrne v. Heller* [1964] A.C. 465. It was later again that the question of liability for economic loss consequent on a negligent act was even contemplated. It was only in 1978 in Ireland that it was accepted, in *Finlay v. Murtagh* [1979] I.R. 249, that the contractual relationship between a professional person, in that case a doctor, and their client could also give rise to a concurrent cause of action in negligence, even in the field of personal injuries and physical damage. Nearly all the cases considered above are examples of claims based on contract, where the tortious claim is framed to attempt to circumvent the problems created by the limitation period. Dr. O'Sullivan suggests that, in approaching the question of loss and damage in these tort claims, the courts have nevertheless tended to be influenced by contractual concepts.

106. Dr. O'Sullivan describes the development of an initial rule, exemplified by *Forster*, that damage for these purposes included contingent liability. That rule was later qualified by an exception, illustrated in different jurisdictions by *Sephton* and *Wardley*, that pure contingent liability does not constitute damage. Subsequent authorities, notably *Shore* and *Axa*, appear, in turn, to have isolated *Sephton* and narrowed the scope of the exception in that case. This has led, in turn, to an approach where it is apparent that differences are discernible between the language used in a case of objective financial detriment, and the outcome of the litigation which seems to adopt a more subjective approach consistent with contractual concepts of loss of bargain, or the claimant not getting what he or she wanted, which is an approach with a strong contractual flavour. One example was the case of *Pegasus Management Holdings SCA & Anor. v. Ernst and Young* [2010] EWCA Civ. 181, where a company had sought to structure an investment

to attract rollover relief from Capital Gains Tax. The defendant, Ernst and Young, were the tax advisors. In 1998, the claimant required Stg£90 million worth of shares in a new company. In 2003, however, significant CGT was incurred, and proceedings commenced in 2005. The Court of Appeal held that the claim was statute-barred. Rimer L.J. said:-

> "It may well be that as of 2 April 1998 [the claimants] shares in Pegasus were worth exactly what he had just paid for them [however]... [t]he alleged flaw in E&Y's advice was therefore a material one, which immediately reduced [the claimant's] flexibility. It left him in a materially worse commercial position than he ought to have been in by inhibiting the way in which he might go about acquiring qualifying trades. He was so disadvantaged immediately upon the completion of the transaction. He was so disadvantaged not because the shares in Pegasus were worth less than he paid for them; but because those shares did not give him the control of a company with characteristics that would be proof against the Adverse Consequence".

Dr. O'Sullivan suggests that the aligning of the contractual and tortious causes of action has arguably had the effect of a gradual blurring of the distinction, with contractual concepts such as loss of bargain slipping unnoticed into tort reasoning.

107. To this analysis, I might add that the development from a rule of damage encompassing contingent liability in *Forster* through an exception for pure contingent liability in *Sephton* and subsequent limitation in *Shore* is, perhaps, an example of one of the less impressive features of common law reasoning first identified by Karl Llewelyn in the field of statutory interpretation and where he suggested a rule is advanced, but subsequently qualified by an exception almost as large as the rule itself. The application of the rule, or the exception, is presented as explaining the decision in any particular case. It is, however, the decision to adopt either the rule or the exception which

determines the outcome of the case, although the reasoning for that choice remains unarticulated and, to that extent, unexplored. To that extent, the outcome of these cases leads only to the general and unilluminating observation that it appears that some liabilities are more contingent than others.

108. I would suggest, with some diffidence, that part of the difficulty here may be the distinction between logic and experience, the latter of which was identified nearly a century and a half ago as the life of the law by Oliver Wendell Holmes in the opening pages of *The Common Law* (1881: Little, Brown & Co.). As a matter of pure logic, it is, perhaps, possible to put a present value on any future contingent liability. That, after all, is in different ways what insurers, stock markets, bookmakers, and the broader financial system attempt to do. It is, in theory, possible to put a value on, and possibly even find a buyer for, any future risk. At the same time, the legal system is both ingenious and flexible, and regularly values future contingencies. If, for example, in some of the cases discussed, the negligence had been discovered within the limitation period (with the consequence that the breach of contract would also have been identified) and proceedings commenced, then it seems likely that a court would have been able to estimate, and award, damages. There is, therefore, considerable attraction and logic in Bingham L.J.'s (as he then was) remark in *DW Moore v. Ferrier* 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 fall that the plaintiff has suffered sufficient damage to complete the parallel negligence claim.

109. However, that logic collides with experience. The loss and damage which completes a tort of negligence is loss and damage capable of being sued for. There is something more than a little troubling about a definition of damage that is so far removed from reality. Most litigants are not led to commence proceedings by the identification of negligence or indeed breach of contract. Instead, it is only when individuals or

businesses suffer actual damage that the question arises whether that can be attributed to the wrongful act of another person who could be required to pay compensation. But, as Dr. O'Sullivan observes, individual clients are being saddled with a definition of damage wholly unrelated to their layman's understanding of the situation. Moreover, the approach is not necessarily consistent with the approach of the law of tort in physical injury. A person who is exposed, for example, to asbestos may have a measurable risk of future contraction of asbestosis, but the damage is not suffered and a cause of action does not accrue in those circumstances, unless and until some asbestosis is manifest. See, in this regard, *Fletcher v. Commissioner for Public Works* [2003] IESC 13, [2003] 1 I.R. 465, and *Bittles v. Harland & Wolff plc* [2000] NIQB 13.

110. It is, however, impossible to assess the case law of the Courts of England and Wales on the accrual of causes of action in negligence without taking account of the impact of the change in the limitation regime with the introduction of the 1986 Act, which introduced a discoverability test together with a long-stop provision. This significantly altered the balance of which Lord Wilson spoke in *Maharaj*, since it at one and the same time reduced, although did not remove entirely, the number of cases where the rules on accrual of a cause of action could lead to an apparently harsh result, while encouraging a stricter approach to the question of accrual since that was still a necessary element in the limitation regime. Accrual of the cause of action fixed the date of commencement of the primary limitation period, but was also relevant to any extended period, since it was knowledge of the facts giving rise to a cause of action which it was necessary to establish to trigger the extended limitation period. In that context, precision, accuracy, and predictability become more valuable than flexibility capable of addressing some, if not all, difficult cases at a price of more general uncertainty. It is possible to speculate that the case law would not have developed in the same way if the discoverability test had not been introduced in 1986. If so, it is necessary to exercise caution in considering

the application of the jurisprudence developed in England and Wales in a context where no such legislative change has been made. This brings us back to the law in the jurisdiction, and to the decision in *Gallagher.*

B. *Gallagher v. ACC*

111. *Gallagher* is the leading case in this jurisdiction on the accrual of a cause of action in negligence in claims for financial loss. As often happens, however, the dispute which led to the consideration by the court of the general law did not arise in one of the standard circumstances where the issue had arisen in other jurisdictions. Instead, the facts in *Gallagher* are somewhat unusual. Although set out earlier in this judgment, it may be helpful to restate the relevant features here. The plaintiff invested in a financial product structured to provide a capital guarantee and the prospect of some modest gains. The Solid World Bond was fixed by reference to an identified basket of blue-chip shares expected to provide low risk and modest growth. The period of the investment was five years and eleven months, and the product could not be encashed at any time before the end of the period. If, at the end of that period, the valuation of the identified basket of shares had increased, then the investor would get 80% of the net increase. A mechanism was also included to provide for a smoothing of any fluctuations in price towards the end of the period to avoid the possibility of a dramatic and unpredictable fall (or rise) in the share price coinciding with the particular valuation date. No shares were to be purchased by the promoter or sold at the end of the period. There was simply a promise to pay out an amount fixed at the bottom end by the capital guarantee, and at the upper end by the then-increased value of the basket of shares. The product was structured to meet these requirements by placing 79% of the amount on deposit, 4% of the investment was allocated to fees, and the remaining 17% was used to purchase another product

designed to cover the upside risk in the investment: that is, the possibility of a pay-out over and above the return of the capital.

112. No complaint was, or could be, made about the product in itself. It was clearly targeted at investors who were risk-adverse but nevertheless seeking an alternative to placing funds on deposit. As such, it was designed to be cautious and to provide a prospect of modest growth with the avoidance of capital loss. The complaint made in the proceedings was, however, that the product was marketed to the plaintiff and others as a borrow-to-invest product. From the point of view of the financial institution, lending to fund the investment was attractive. In addition to the fees, and the 79% of the fund placed on deposit, the institution would also benefit from the interest payment. However, it was argued that a borrow-to-invest transaction was entirely unsuitable for the customer. The conservative structure of the product made it very unlikely that it would generate sufficient returns to repay the capital plus interest which the investor was obliged to pay. It was not, however, impossible. But it was akin to requiring a driver to achieve ambitious speed targets in a car engineered with safety and fuel efficiency as the priority. While not impossible with an extremely skilled driver, a following wind, and a clear road, it was nevertheless unlikely.

113. The structure of the product, and the nature of the case mounted, meant that, somewhat unusually, the court was presented with only two possible dates for the accrual of the cause of action – either the date of the initial investment, or the date of realisation of the investment five years and eleven months later if there was a negative outturn. In the circumstances of the case, no plausible case could be made for an intermediate date. In the High Court, Charleton J. held that the cause of action accrued on the realisation of the investment and the crystallisation of a loss. The Supreme Court reversed. It has not been suggested by either party to this appeal that the decision in *Gallagher* should be revisited. However, they have put forward contrasting interpretations of the judgment.

The respondents rely, understandably, on the outcome of the case as establishing a principle of more general application which, when applied to this case, would lead to the conclusion that the cause of action accrued, as in *Gallagher*, on the making of the investment. The appellants, for their part, rely on the *dicta* in the judgment of Fennelly J., and suggest that the outcome of *Gallagher* was, if anything, an exception rather than the rule and that, properly understood, the case should lead to the rejection of a contention that the cause of action accrued on the date of investment but rather accrued on a later date when, it was argued, loss could be said to have occurred. The High Court accepted the latter interpretation of *Gallagher* and the Court of Appeal tended towards the former.

114. In his judgment, Fennelly J. recorded seven clear propositions of law advanced by counsel for the appellant financial institution, apparently deduced from the English case law. Of particular importance in the present circumstances was the fifth proposition formulated as follows:-

> "Where an investor enters into a riskier investment than he would otherwise have done by reason of the negligence of a financial adviser, as a general rule time will start to run at that point, *i.e.*, the time of entering into the transaction."

If this proposition correctly reflects Irish law after *Gallagher*, then it is clear that the Court of Appeal decision must be correct. However, it is apparent that Fennelly J., while allowing ACC's appeal, did not accept the analysis set out in general, or the fifth proposition in particular. He observed that, having considered the English decisions, it was necessary to bear in mind the statutory change in that jurisdiction (para. 60). He speculated that after that change "it was possible to remedy any injustice and the courts may have been content to adopt a strict interpretation". Later, he observed that the later English cases did not contain the type of expression of regret found in *Cartledge v. Jopling* and other early cases, and that it may be that an explanation for this lies in the

mitigating provisions introduced in 1986. He considered that the later cases showed little concern for striking a just balance between the interests of plaintiffs and defendants.

115. Fennelly J. found particular difficulty with the decision in *DW Moore v. Ferrier*, considering it remarkable that the cause of action was held to accrue immediately following the negligent drafting of the non-compete clause (para. 97). He had the greatest difficulty with the outcome in *Shore* (para. 98). That was because although it appears that Mr. Shore got full market value for the rights he transferred, the court had considered that it was the possibility of actual financial harm that constituted the loss. At para. 109 of the judgment, he said explicitly that he did not consider that the mere possibility of loss, at least in terms of *Shore*, was enough. Dyson L.J. had applied a type of pure logic in saying that Mr. Shore had gotten a risky product which he did not want. Significantly, Fennelly J. observed that it was clear that at the date of transfer of the occupational scheme, Mr. Shore had gotten what was then full market value, and "it would not have been possible then to show that Mr Shore was at a loss". While there was a subsequent market downturn, the logic of the decision would have to apply in even better market conditions, *i.e.*, that damage would have been accrued even if market value had actually increased. Fennelly J. continued "I do not think it was just or fair to apply such a relentless logic to an uncertain situation. Some account has to be taken of probability". At para. 110, Fennelly J. reiterated that he did not think a cause of action accrued "when there is a mere possibility of loss". At para. 89 of his judgment, he quoted, with apparent approval, the analysis of *Shore* contained in the fourth supplement to the sixth edition of J. Powell & R. Stewart, *Jackson & Powell on Professional Liability* (2010: 6th ed, Sweet & Maxwell), where the authors commented that "[i]t is right to say that the reason why rights are less valuable may be that the claimant is

exposed to a risk or contingency against which he should have been protected, but that is not same as saying that the risk or contingency itself constitutes the loss".

116. Although Fennelly J. accepted the appellant's contention that the claim was statute-barred, it is noteworthy that he did not accept the propositions of law they advanced, apparently drawn from the English case law, and concluded that "fortunately it is not necessary to choose between the different approaches in the English cases". However, he did cite the judgment of Brennan J. in *Wardley* with approval, and observed that it was closer to the analysis of Charleton J. in the High Court.

117. How then is *Gallagher* to be understood both in the light of its reasoning and, as importantly, its outcome? It seems clear that Fennelly J. had decisively rejected the remorseless logic of a decision such as *Shore* – which, it should be noted, has been specifically relied on by the respondent bank, AIB, in this case – in favour of such decisions as *Wardley* and *Sephton*, favouring, as it is said the common law does, experience and pragmatism over pure logic.

118. In the High Court in this case, Haughton J. drew on these comments to find that the cause of action did not accrue on the making of the investment or the inclusion of the LTV covenant. He referred with approval to observations of Binchy J. in *Lyons v. Delaney and ors* [2015] IEHC 685 (Unreported, High Court, Binchy J., November 3rd, 2015), as to the fact-specific nature of the decision in *Gallagher*, and quoted with approval the observations of the authors of McMahon & Binchy *The Law of Torts* (2013: 4th ed, Round Hall), at para. 4535 that "one cannot read too much into the wider precedential value of the Supreme Court decision in *Gallagher* as it was based on the peculiar nature of the bond in question and on the specific nature of the plaintiff's pleadings".

119. At para 23.2 of his judgment, Haughton J. identified five respects in which he considered the facts in *Gallagher* could be distinguished from the present case: namely, that it was

a borrow-to-invest scheme; that the pre-selected basket was one which was incapable of making sufficient profit to repay the interest; that the basket itself could not be altered during the currency of the investment; that the claim related to interest which could be calculated from the date of investment up to trial; and, that the investment was for a fixed period of five years and eleven months, whereas the Belfry fund had an indicative horizon only of eight years.

120. In the Court of Appeal, Baker J. carefully analysed these distinctions and concluded that they did not provide a basis for distinguishing *Gallagher* from the present case. Insomuch as these distinctions related to the fixed-term nature of the investment, and the fact that the basket could not be altered or managed during the currency of the investment, I agree that these are differences of fact, but do not amount to points on which the case should be distinguished, in the sense that their presence or absence are not crucial to the conclusion of the case. Baker J. correctly identified the contention that the product was itself incapable of making sufficient profit or, as she put it, bound to fail from the outset, as central to the reasoning of Haughton J. She observed, again correctly in my view, that this somewhat overstated the position in *Gallagher*. Fennelly J. had concluded that it was unlikely, but not impossible, that the basket of shares would reach a valuation which would permit a positive pay-out. Indeed, it appeared that, at certain points in the lifetime of the investment, a valuation – if capable of being arrived at that point – would have been positive. Thus, she considered that the investment should be analysed on the basis that there was a *risk* that it would not produce a positive return.

121. Baker J. considered that the question was not one of contingent liability which might or might not happen. Instead, it was a case of a "present risk that something may or may not happen". It was an actual risk which left investors exposed to market forces even if the forces in the early days had had a positive effect. Her conclusions are to be found in particular at paras. 133-136. At para. 133, it was said:-

"[i]t is the inclusion of the LTV covenants in the borrowing arrangements that is the *damage* suffered by the Investors. It is true that the investments did well for a number of years, but when the borrowings were made and the LTV covenants agreed there was a *defect* which was not latent but one capable of being discovered on enquiry. The *loss* claimed to have been caused by the actions of entering into the LTV covenants as part of the borrowings was *manifest* at that time". (Emphasis added)

122. At para. 136, she concluded:-

"The dates are somewhat different in respect of the various funds but the proposition remains the same, namely that the LTV covenants did no more than create the risk or possibility of loss and that no provable loss occurred until actual loss occurred. *In my view, the very fact identified by Haughton J. that there was an "increase" in the risk from that bargained for or represented means that actual manifest damage could be shown to have been caused by that increased risk.*" (Emphasis added)

It followed, she considered, that loss occurred at the time of the loan transactions when the LTV covenants were agreed.

123. The question in this case can be narrowed, therefore, to whether, in analysing *Gallagher* as a case of present risk of future loss, and indistinguishable on that basis from the circumstances in this case, the judgment of the Court of Appeal is correct.

C. The decision in *Brandley v. Deane*

124. The decision of the Court of Appeal in this case also closely considered the recent judgment of this court in *Brandley v. Deane.* That, however, was not a case of a financial transaction, or indeed financial or economic loss. It was a claim of latent physical damage where, on the plaintiffs' case, the foundations for a building had been laid in

2004 defectively, were certified as complying, and the building completed sometime between September 2004 and February 2005. In December 2005, cracks appeared in the building, and proceedings were commenced in November 2010. If the cause of action accrued on the date the foundations were defectively installed, the claim was statute-barred. If it accrued on the date of occurrence of the cracks, then it was in time. The High Court (Kearns P.) held that the claim was statute-barred. The Court of Appeal (Ryan P.; Irvine and Hogan JJ. concurring) reversed, and that decision was unanimously upheld by this court.

125. The judgment of McKechnie J. is very detailed and precise and deserves careful consideration, particularly in cases of latent physical damage. In essence though, he distinguished between the date of the wrongful action, the date on which damage occurred, the point at which damage was manifest, and the date of discoverability, being the date upon which the damage could, or ought with reasonable diligence to, have been discovered. Relying on the observations of Finlay C.J. and Griffin J. in *Hegarty v. O'Loughran* that a cause of action accrued when *provable* personal injury capable of attracting monetary compensation occurred, McKechnie J. held that the cause of action accrued when the damage was manifest in the sense of damage capable of being discovered and capable of being proved, even if there was no reasonable or realistic prospect of it being discovered or proved in fact. Applying that test in the particular case, he concluded that the cause of action accrued when physical damage in the nature of cracking occurred, and that the claim was therefore not statute-barred.

126. This case is relied on by the appellants, in particular, who argue that it was apparent from the judgment that the damage must not just be manifest but must be *manifest to the plaintiff,* relying in that regard on passages in the judgment at paras. 90, 111, and 139(vi). On that basis, they argued in this court that Haughton J., while broadly correct in his approach, was nevertheless wrong to find that the misselling claims in respect of

Belfry 4, 5, and 6 were statute-barred on the basis that damage occurred when the accounts for each year were approved. Instead, they argued that the damage only became manifest to the plaintiff when the accounts and NAV were communicated to the plaintiff by letter. Applying the contractual provision which provided that notifications under the contract were deemed received within two days, the plaintiffs contend that, on this basis, the claims in respect of misselling of Belfry 4, 5, and 6 were (just) within time.

127. Of broader interest in *Brandley* are the general observations of McKechnie J. He expressed some scepticism of the reasoning in *Cartledge v. Jopling*, which was adopted in *Hegarty v. O'Loughran*, that it was not possible to interpret the common law on accrual of a cause of action to permit a discoverability test. He was also doubtful of the reasoning in *Tuohy v. Courtney*. He considered that the right to litigate claims was the primary vehicle by which both personal and fundamental constitutional rights can be articulated and given effect to. This was, indeed, the ultimate route to that end. It had to be positioned in its rightful place in the constitutional order and nothing else would suffice. While he accepted that a balancing of the factors involved was a matter for legislative judgement, he considered that that indulgence could not be open-ended. The law would greatly benefit from the introduction of a discoverability test and he added his voice to those who considered that the law on latent damage urgently needed reform. Paragraph 84 of his judgment bears quotation in full:-

> "In light of this, it is, may I respectfully suggest, perplexing why legislative silence, whether due to inertia, indifference or some other undisclosed reason, has persisted for so long, indeed for more than 30 years now after the passing of the Latent Damage Act 1986 in the UK. The voices and concerns of judges seem to matter little. If this should continue, I would see no reason why, in an appropriate case, the type of "root and branch" re-assessment of judicial deference in the face of ongoing legislative inaction, as mentioned by

McCarthy J., at page 164, in *Hegarty v. O'Loughran* [1990] 1 I.R. 148 should not take place. That is unless, of course, *Tuohy v. Courtney* [1994] 3 I.R. 1 is considered the last word on the section."

I will return to this issue later in this judgment.

IV – Discussion

A. General Observations

128. The length of the foregoing discussion is itself an illustration of the difficulty of this area of law, and perhaps the impossibility of providing a clear and comprehensive rule which will be capable of application in all cases and producing fair and just results. As the judgment in *Gallagher* acknowledged, in the absence of any legislative reform, the law must develop incrementally, which necessitates a close focus on the facts of individual cases.

129. First, however, I should say I do not consider that the appellants can advance the contention in this Court that Haughton J. was wrong to find that the Belfry 4, 5, and 6 claims were statute-barred and invite this Court to reverse that conclusion. There are basic rules of procedure designed to promote fairness in proceedings, accuracy and focus to the issues to be decided, and clarity to the outcome. The appellant sought and obtained leave to appeal to this Court from the decision of the Court of Appeal. The judgment and order of the Court of Appeal did not include any decision on this aspect of the decision of the High Court judge, precisely because that issue was not itself the subject of any appeal from the High Court to the Court of Appeal. The appellants have not sought to extend time to bring a leapfrog application from the judgment of Haughton J. in that regard, or to extend time to bring a separate appeal on the issue to the Court of Appeal.

130. While this Court has recently sought to emphasise the flexibility which appellate courts should exercise in considering arguments in relation to issues before them, the issues must, by definition, be before them. At the moment, the status of the judgment of Haughton J. on this point is that it is final and binding on the parties. It is not open to this Court to disregard the fact that that issue has not been appealed and nevertheless proceed to overturn the order or give a judgment which holds that it is wrong without overturning it. It will, however, be necessary to discuss the question of when damage is manifest in financial loss cases such as the present, in order to identify the date of accrual of the cause of action in respect of the claims made and which are properly the subject matter of this appeal.

B. The Characterisation of the LTV Claims

131. The respondents, for their part, contend that Haughton J. was simply wrong to separate out the LTV claims and treat them as a separate freestanding cause of action. They contend that, on a careful analysis of the pleadings, it is apparent that the appellants' contention in respect of the LTV claims was no more than as an aspect of misselling claims and an aspect of the manner in which the appellants alleged that the product sold was defective, and a claim which they argue accrued on the date of the transaction. I have, however, some difficulty with this argument as a route to disposing of the difficult legal issues raised in this case. I do accept that the court in *Gallagher* sought to identify the essence of the plaintiff's pleaded case, and the court should do so since any other approach would only give credit to obscure and confused pleadings, and encourage imaginative interpretation rather than clarity. However, Haughton J.'s judgment is founded upon his analysis of the pleadings as constituting a separate cause of action in respect of which he considered there was a separate accrual date. The Court of Appeal, in reversing his conclusion, appeared to accept this treatment of the LTV claims as a

separate claim. The issue of general importance which this Court has to address arises from those judgments, and I consider the Court must approach it therefore on the same basis. Happily, however, for reasons I will later address, I do not consider that a different outcome would necessarily follow even if the Court were to adopt the approach to the LTV issue contended for by the respondent.

132. It is clear that the decision in *Gallagher* requires the Courts to adopt a pragmatic approach in which the identification of damage for accrual of a cause of action must proceed on an incremental basis and that damage for the accrual of a cause of action must bear a close relationship to the layperson's understanding of that term. That is real actual damage, which a person would consider commencing proceedings for. The decision in *Gallagher* must be understood in this light. The approval in that decision of *Wardley* carries with it the narrower reading of the decision in *Forster*.

133. It follows, however, for even that narrower reading, that there must be cases in which it can be said that actual damage is suffered on the occurrence of the transaction even if that was not reasonably discoverable for some time. In *Forster*, this was the assumed or asserted diminution in value of the plaintiff's interest in the land on the execution of the mortgage itself. 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 to occur. I acknowledge the anomalies which are capable of being created by this distinction, as discussed by Arden L.J. in *Axa*, but, in endorsing *Wardley* and disapproving *Shore,* and rejecting the mere possibility of loss hypothesis, *Gallagher* clearly points Irish law in a more pragmatic direction. The distinction made in the extract from Jackson and Powell quoted by Fennelly J. is therefore applicable: rights may be less valuable by reason of exposure to a risk in which case a cause of action may accrue, but that is not the same as saying that the risk or contingent risk in itself constitutes the loss if that does not have a present effect on the value of the right.

134. Approached in this way, *Gallagher* is a relatively clear-cut example of the first limb of this proposition, and the narrow reading of *Forster*. At the time of Mr. Gallagher's investment, there was a high probability – though not a certainty – that the return would not cover the interest which he was obliged to pay; the investment, if it could have been sold, was almost by definition €500,000 or close to it at the time it was made. However, Mr. Gallagher and others who had acquired it in a borrow-to-invest transaction were in effect paying in the region of €541,000 for it. If the plaintiff had sought to sell the entire investment (including his interest obligation) at the time, he would not have got the equivalent of €541,000, but rather a lower price that would have reflected both the interest obligations and the likelihood of a recovery. The underperformance of the index basket was not certain, but it was probable, and that probability would have an immediate effect on the value of the plaintiff's investment. As Fennelly J. observed, some account must be taken of probability.

135. The distinctive and unusual feature of the present cases are that at the time of the making of the investment, and for some considerable time thereafter, the investments were more valuable than the original sum invested, even if to that figure is added something for interest. That is why the respondents have to contend that the defective nature of the investment, from the appellants' point of view, is the fact that they got a riskier product than they claimed they wanted and why it is contended, in turn, that that constituted damage. I think it is clear from *Gallagher*, however, that this is insufficient, and that damage is not suffered sufficient to complete the tort at that point. It is implicit in the analysis of *Gallagher* already set out that if the risk to the product had not rendered the investment less valuable, then no damage was 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.

136. This is also consistent with the distinction drawn in *Gallagher* in relation to the facts in *Shore* at para. 109 of the judgment. At the time of the transaction, Mr. Shore got full value. Accordingly, Fennelly J. considered it would not have been possible for him to show that he was at a loss. While Fennelly J. acknowledged that there had subsequently been a downturn in the fortunes, he specifically addressed the converse point, where the value of the transferred pension rights increased. It is clear that Fennelly J. considered that, in such circumstances, loss and damage cannot be said to be suffered.

137. This is also consistent with a line of authority in the English case law which has never been never repudiated. In *UBAF*, Ackner L.J. considered that evidence was necessary to establish whether damage had been suffered. In that case, he considered it was possible, although it may be improbable, that the date the plaintiff advanced the money, the value of the chose in action which they acquired was in fact not less than the sum which the plaintiff lent, or indeed even exceeded it. He gave the example of the more valuable red Bentley bought, as a result of an innocent misrepresentation, by the blue Bentley collector. This would unquestionably be a breach of contract, or a misrepresentation sufficient to permit rescission, but in tort, Ackner L.J. considered that the collector had no cause of action.

138. The observations in *Nykredit* are to similar effect. Lord Nicholls considered it was necessary to make what he described as a basic comparison between the position of the plaintiff if he or she had not entered into the transaction and the position under the transaction. If, by that comparison, he had not suffered loss, he had no cause of action. The deficiency in security in that case would have in practice caused him no loss. It was only when, adopting the language in *Wardley*, the benefits and burdens reveal a loss that a cause of action accrues. If that balance is dependent on the contingency, it is only when that contingency occurs, and affects the value, or the possibility of it occurring

affects that value, such as to create a loss, that a cause of action accrues. The *dicta* in both *Nykredit* and *UBAF* do not appear to have been challenged or doubted.

139. Applying that reasoning to this case, I think Haughton J. was broadly correct to hold that the cause of action in respect of the misselling claim accrued when the value of the investment first fell below parity: that is, the amount of the original investment (perhaps with deemed interest). In the circumstances of this case, that point appears to have been identified as the date on which the accounts were approved and the consequent NAV arrived at. Since, in the case of Belfry 2 and 3, that point did not, on the evidence, occur more than six years prior to the commencement of the proceedings, it was correct to hold that it had not been established that the claim was statute-barred. I can see the logic of the decision of the Court of Appeal in this case, but it seems to me that the decision in *Gallagher* is clear in its instruction to prefer sensible pragmatism to relentless logic. If so, it is insufficient to identify increased risk alone as damage leading to accrual of the cause of action at that point.

140. I do not, however, think that the date of accrual can be the date upon which the accounts and NAV were notified to the individual investors. That would be to introduce a considerable element of subjectivity into the question of the accrual of the cause of action which, in my view, the approach in *Brandley* was intended to avoid. For example, it would not, as I understand it, avail a plaintiff to contend that he or she was not in the country, did not receive correspondence, or suffered some mishap so that she did not receive the letter or even read it, or was suffering some disability. 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. The question of the particular plaintiff's circumstances may be relevant to a discoverability test but not, as I understand it, to the question of when provable injury can be said to have occurred.

141. Perhaps more importantly, I accept the respondents' argument that the mere fact that it is possible to distinguish between the concepts of wrongful act, defect, occurrence of damage, manifestation of damage and reasonable discoverability, does not mean that all cases must exhibit each separate and individual concept: it is entirely possible that all of the above will occur at the same point. In particular, occurrence of damage and manifestation of damage in the sense addressed by McKechnie J. in *Brandley*, will often be simultaneous. Furthermore, those cases in which it will be possible to distinguish between the two points will perhaps be more readily encountered in cases of physical damage rather than financial loss.

142. In any event, in this case, no particular significance is accorded by the contract to the date of adoption of the accounts, or indeed the NAV, which, it appears, was provided by the fund to the investors without any contractual obligation to do so. The NAV does not set a transfer or surrender price and accordingly fix a value for the investment for any given period. Rather, it is the assessment by the directors of the present value of the investment (or, more accurately, its value as of the 31st of March of the given year). It would be possible – at least in theory – to value that investment independently at any point taking the previous year's accounts, understanding the manner in which the NAV was derived, and seeking to adjust it by reference to developments principally in the property market. Therefore, the point at which the value of the investment dropped below parity was probably at some point during the financial year, rather than on the date each year on which the accounts were approved, or indeed the date of the year end of those accounts. That point was also identifiable and provable by any plaintiff, although it might be unreasonable to expect them to seek to do so, but it was, in the *Brandley* sense, manifest as it was capable of being proved.

143. This, I should observe, is slightly different to the point taken by Haughton J., although the issue does not appear to have been raised, nor would it appear to lead to any different

outcome, since no evidence was adduced to show, in the cases of Belfry 2 and 3, that that precise point was or could be said to have been reached more than six years prior to the commencement of the proceedings while, conversely, in the cases of Belfry 4, 5, and 6, the evidence with reference to the accounts shows that it had been reached prior to that point.

144. Turning to the claims made in relation to the LTV covenants and assuming, for these purposes, that they are separate claims, they must, I think, be taken as contending that the negotiation of loans containing LTV covenants caused separate and distinct damage. It is argued that it was the impact of the LTV covenants which had the effect of reducing the value of the investment to zero. The contention, as I understand it, is that as the valuation of the property dropped close to 80%, the LTV covenant became relevant, and had the effect of reducing the valuation of the appellants' investments to zero. For these purposes, I must take the case as made by the appellants without considering the merits or plausibility of the claim, or the appellants' capacity to establish it in fact. However, it is clear that applying the approach set out above, if the claim is framed in this way, then damage attributable to the alleged negligence in negotiating the LTV covenant is only suffered at the point where it can be established that the LTV covenant had a negative impact on the valuation. On the facts here, it was alleged there was a precipitous decline in the valuation of the investment which in each case occurred less than six years prior to the commencement of the proceedings.

145. Even if the case is approached as the respondents contend, as one of misrepresentation and misselling and in which the negligence was the failure to inform the investors of the possibility of an LTV covenant or its effect then, in my view, the same conclusion could follow. That is because the damage alleged to be suffered from this independent act of negligence or negligent misrepresentation is the decline in value of the investment attributable to the existence of the LTV covenant. If, as Fennelly J. observed, the

distinctions between no transaction cases and flawed transaction cases can be helpful but not decisive, then it is the case that, even in flawed transaction cases, the damage may not have necessarily occurred on the date of the transaction, although that may often be the case. However, even if the appellants' case in relation to the LTV covenant is to be treated as simple misselling, the damage is still alleged to be separate and distinct. It is alleged that the LTV covenant had an effect of reducing the value of the investment to zero and it is only at that point that damage occurs, and the cause of action accrues. It is possible, at least in theory, that an LTV covenant might not have an effect on the valuation of the investment when in good times it is valued at a multiple of its original value, but could have an impact on valuation as the possibility that it might take effect and be invoked comes closer. For these reasons, I consider that Haughton J. was correct to hold that, once again, it had not been established that the claims made by all appellants in this regard were statute-barred as it was not shown that the LTV covenant had a negative impact on the valuation of the investment prior to August 2008.

C. Concluding Observations

146. It must be apparent that the difficulty and consequent uncertainty in resolving issues of this type is undesirable. Furthermore, the position in Irish law as to the date of accrual of a cause of action in negligence is inherently unsatisfactory, and incapable of solving the serious difficulties raised by the problem of latent damage. In this case, for example, the outcome produced is somewhat random. The claims in respect of misselling of Belfry 2 and 3 can continue, while the claims related to investments which were later in time in respect of Belfry 4, 5, and 6, are, however, statute-barred. By the same token, a claim where the damage is said to have been slow to manifest itself will survive where a claim that the negligence has had immediate and perhaps catastrophic effect will be barred, even though it is possible that the negligence involved is more serious and

culpable. Furthermore, no interpretation of damage can solve the apparent injustice occurring in a case where professional advice is relied upon to secure an outcome, but where that failure does not become apparent for many years. Finally, the case law concentrates, of necessity, on the accrual of a cause of action in negligence. The problem of undiscovered – and perhaps undiscoverable – claims in respect of other causes of action remains unresolved and unaffected.

147. Returning, therefore, to the issue discussed in *Gallagher*, I repeat my view that, at the level of principle, it is undesirable that there should be a difference in the running of the statute in what are identical claims, though framed in the tort of negligence and in contract. I appreciate that Lord Goff of Chieveley explained in *Henderson v. Merrett Syndicates Limited* [1995] 2 A.C. 145 that the essential difference was because the remedy in contract was due to the will of the parties, whereas that in tort is imposed by the general law. However, that may be to prefer form to substance. The claims are only framed in tort to achieve a limitation advantage, by seeking to avoid the limitation problem that the contractual claim gives rise to. The proximity giving rise to the duty of care is the contract itself and, in most cases, the duty will be identical – that is, to use reasonable skill and care. Indeed, the contract by its terms may limit or exclude liability for any lack of skill and care. It is, in principle, therefore, more than a little odd that the same alleged wrongful act having the same consequences could be barred in contract in some cases before the cause of action in tort may have accrued. It is also undesirable that there should be a premium on identifying both separate individual causes of action causing separate acts of damage, leading to over-refined and contorted pleadings.

148. Furthermore, it must be apparent that if finding damage to have occurred at a somewhat later point than the negligent act does not solve the problem of latent damage and the absence of a discoverability test, it is also capable of creating fresh problems. That is because the effect of such a conclusion is not to extend the limitation period but simply

to retard its commencement. In theory, until a cause of action has accrued, no proceedings can be commenced. There may be cases in which a defendant had assets at an earlier point when a claim might have been brought, but may no longer be a mark by the time proceedings have been later commenced and brought to trial. This also gives rise to the prospect of further preliminary applications contending that, while some claims may be statute-barred and commenced too late, others should be dismissed as improperly commenced on the basis that the cause of action had not accrued at the date of initiation of the action.

149. For these reasons and more, I repeat my comments in *Gallagher* – made more than eight years ago now – that reform of the law is urgently required.

150. I also respectfully agree with the trenchant observations of McKechnie J. in *Brandley*, with which other members of that composition of the court agreed. While Lord Reid and Finlay C.J. were major figures in the development of the law in their respective jurisdictions, and their views are worthy of the greatest respect, I think that the decisions in *Kamloops* and *Invercargill*, respectively, would appear to show that there was at least some possibility that the common law could develop a discoverability test for accrual of a cause of action notwithstanding the concurrent existence of a statute of limitations. I accept, however, that it would certainly be more desirable that that result would be achieved by legislation which can both fix the primary limitation period, set a backstop period, and set out clear statutory criteria for determining discoverability. Furthermore, the enactment of the 1991 Act would appear to be based upon the concept of accrual of a cause of action as understood in *Hegarty v. O'Loughran*, and so further significant development at this point of the common law concept of accrual of a cause of action is perhaps unlikely.

151. Finally, I consider that there may be merit to McKechnie J.'s view that *Tuohy v. Courtney* may be open for reconsideration. At a minimum, it may be worth looking

again at the question of whether it is correct that a statute of limitations is to be seen as a balancing of constitutional rights and, even if so, whether the appropriate test is whether the hardship necessarily created is "so undue and so unreasonable having regard to the proper objectives of the legislation as to make it constitutionally flawed". There is no doubt that a six-year period of limitation is a more than generous period for the commencement of actions which can reasonably be brought by plaintiffs with means of knowledge, and it is indeed possible to envisage shorter periods which would not offend the Constitution. It might be thought, however, that the precise issue which now arises for consideration is what justification rooted in the Constitution can be advanced for the absence of a discoverability provision in cases of financial loss and property damage, particularly when it is provided for in cases of personal injury and defective products.

152. I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the High Court.

Donal O'Donnell
10/12/20