THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 217

Appeal No. 2017/266

2017/268

2017/271

2017/273

Peart J.
McGovern J.
Baker J.

BETWEEN/

GERALDINE CANTRELL

PLAINTIFF/

RESPONDENT

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, SEAN HENNEBERRY, TONY KILDUFF, WILLIAM LEDWIDGE, JOHN ROCKETT, JOHN ROGER WILKINSON, AND ESSEX TRUST LIMITED

DEFENDANTS/

APPELLANTS

BETWEEN/

LAURENCE McMULLIN

PLAINTIFF/

RESPONDENT

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS/

APPELLANTS

BETWEEN

BERNADETTE GOODWIN

PLAINTIFF/

RESPONDENT

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS/

APPELLANTS

BETWEEN

MARY HONOHAN

PLAINTIFF/

RESPONDENT

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS/

APPELLANTS

BETWEEN

PETER TIERNEY

PLAINTIFF/

RESPONDENT

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS/

APPELLANTS

BETWEEN

BRIAN SPIERIN

PLAINTIFF/

RESPONDENT

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS/

APPELLANTS

BETWEEN

BRIAN O'REILLY

PLAINTIFF/

RESPONDENT

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS/

APPELLANTS

BETWEEN

EDWARD SHEEHAN AND EVELYN SHEEHAN

PLAINTIFFS/

RESPONDENTS

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS/

APPELLANTS

JUDGMENT of Ms. Justice Baker delivered on the 18th day of July, 2019

1. These appeals arise from a decision of Haughton J. delivered on 28 April 2017, *Cantrell v. AIB* [2017] IEHC 254, and order made on 25 May 2017 by which he determined the preliminary issue regarding the Statute of Limitations 1957, as amended, ("the Statute of Limitations") to the claims of the plaintiffs, investors in a number of property investment schemes of which Allied Irish Banks plc ("AIB plc") acted as promoter and placing agency. The investment schemes were undertaken through a number of investment vehicles each bearing the name "Belfry", of which the second, fourth, and sixth defendants are the relevant companies for the present appeals. For convenience, I will refer to the investment vehicles collectively as "Belfry", and to the plaintiffs, the respondents to these appeals, who were jointly represented by counsel at the hearing of the appeals, as "the Investors", save where the context otherwise requires.

2. The defendants, the appellants in these appeals, who are separately represented, can conveniently be grouped as follows:

(a) AIB plc, which filed a notice of appeal on 9 June 2017;

(b) John Rockett and John Roger Wilkinson, who filed a notice of appeal on 8 June 2017;

(c) William Ledwidge, who filed a notice of appeal on 8 June 2017;

(d) Tony Kilduff, who filed a notice of appeal on 9 June 2017.

I will refer to the appellants (b), (c), and (d) collectively as "the Directors".

3. The appeals raise a question of law regarding the running of time in claims for financial loss in tort. The question of the accrual of a cause of action in tort has given rise to two recent decisions of the Supreme Court, the second of which, *Brandley v. Deane* [2017] IESC 83 delivered by McKechnie J. on 15 November 2017, postdates the decision of Haughton J. the subject of these appeals. The question is difficult as is apparent from the depth of analysis and length of the judgment of the High Court, the lengthy analysis in *Gallagher v. ACC Bank* [2012] IESC 35, [2012] 2 IR 620 and *Brandley v. Deane* and recent decisions of the superior courts of England and Wales, the analysis in some of which has not readily found favour with the Irish Supreme Court.

4. The question was determined by way of trial of a preliminary issue on motion of the defendants of 1 February 2016, the hearing whereof took place over seven days in April and May 2016. The defendants appealed part of the finding, and there is no cross-appeal. The sole question for determination in these appeals, therefore, is whether Haughton J. erred in making a distinction between three categories of claim, and in his overall finding that the Investors were not statute barred in their claims of misrepresentation and negligent statements arising from the existence, and pleaded non-disclosure, of loan to value covenants (the "LTV covenants") in the borrowings negotiated on behalf of the Belfry investment vehicles by the director defendants.

5. Haughton J. found it unnecessary to determine whether the investors were entitled to rely on s. 71(1)(b) of the Statute of Limitations in relation to the pleaded non-disclosure of the LTV covenants.

Factual Background

6. The Investors invested in a number of Belfry funds, the material ones for present purposes being Belfry 2, Belfry 3, Belfry 4, and Belfry 5, the corporate vehicle supporting each fund being named as defendants in the proceedings. The investments were promoted by AIB plc and each Belfry company was established as a special purpose vehicle to invest in UK commercial properties. The Directors were directors of the different Belfry companies.

7. The Investors invested various sums of money ranging from €100,000 to €400,000 between 2002 and 2006. In addition to the proceedings heard before Haughton J. it appears that more than three hundred other High Court proceedings have been commenced by other investors in the Belfry funds and served on some or all of the defendants in these proceedings.

8. The Investors claim that, based upon negligent representations contained in marketing and other material, primarily in the form of prospectuses, they entered into the investments and, as a result of the entire failure of the funds, they lost all of the monies invested. The Investors commenced proceedings seeking damages for breach of contract, negligence, breach of duty, negligent misstatement, and misrepresentation. The eight proceedings in which the preliminary issue was heard by Haughton J. were chosen from a large number of related cases as "pathway cases", although they are not test cases in the formal sense.

9. The trial of the preliminary issue was based primarily on the pleadings and submissions made by the Investors and by the defendants who were separately represented as identified above. There was also before Haughton J. some affidavit evidence, the particular affidavit of importance being the affidavit sworn on 14 March 2016 by Mr Conal Regan, manager at AIB plc, where he exhibited financial statements and updates of the Belfry companies from inception up to 2015.

10. Many of the facts are disputed and Haughton J. approached the trial of the preliminary issue in the light of the guidance from the Supreme Court judgment in *McCabe v. Ireland* [1999] 4 IR 151 on the assumption that the facts pleaded by the plaintiffs will be proven and that the case of the plaintiffs was to be taken at its height.

11. The facts are set out in some detail in the judgment of Haughton J. and for present purposes, I will outline only those facts material to the appeals. The relevant Belfry companies were incorporated between 2 April 2002 and 9 March 2005. AIB plc acted as investment promoter and placing agents and the Belfry funds were managed by the directors of the relevant Belfry special purpose corporate vehicle. The Investors in each case made their investment between June 2002 and November 2006, one of the Investors made three separate investments in three separate funds but the other Investors made one investment in one identified fund.

12. The Belfry companies purchased commercial properties in secondary locations in the UK, supported by secured borrowings negotiated by the relevant Belfry directors. At the dates of investment, the Belfry companies had not yet purchased the real property investment assets, and the stated intention was to "finance the proposed property investments from a combination of equity and bank debt" (Sample quote from prospectus, Belfry 5, para. 6.1). The borrowings were to be secured on the real property and without recourse to the Investors. The prospectus said that the Group Belfry directors had commenced "non-binding discussions with a number of U.K. and European financial intuitions to fund circa 80% of the purchase price of each of the Properties on competitive terms".

13. The borrowings negotiated by the Directors were subject to LTV covenants by which, if the value of any property purchased by a fund fell below the borrowings by 80% of the value, there would be deemed an automatic default and crystallisation of the floating charge, thus entitling the lender to dispose of the charged assets.

14. It is central to the claims that the Investors plead that they were not made aware of the LTV covenants nor were the possible negative impact on their investments explained to them in the prospectus or otherwise.

15. In most cases the investments were successful, and in some cases very successful, in the first few years of the operation of the funds and by early 2008, although approximately half of the relevant investments had fallen somewhat in value, the investments had maintained a value at or close to the original amount invested, and some had maintained a substantial profit.

16. Correspondence in broadly similar terms sent to each of the Investors in 2008 showed for the first time concern on the part of the Directors regarding the performance of the funds. I summarise here one thread of that correspondence, and although the dates of the substantially similar correspondence with the other Investors and the figures regarding values are different, the broad thrust and legal effect is the same.

17. On 5 August 2008 a letter was written to the Investors in Belfry 2, which said that the overall value of the property portfolio in that fund had shown a decrease, as of 31 March 2008, of 11.7%. The letter showed the net asset value of the investment as of 31 March 2007 and 31 March 2008, and showed a decline of almost 100% between the two years, although the investment was still substantially in profit.

18. The letter said that the loss of value reflected current market conditions in the UK and that the Directors had noted in particular that the loan to value percentage following the revaluation of the property stood at 77% and that:

> "We are now in year six of this timeframe and the Directors continue to monitor the prevailing market conditions with a view to disposing of the property portfolio at the optimal time. From a value perspective, it is important that the Company chooses the timing of asset disposals and does not find itself in the position of a forced seller.
>
> Given current market conditions, it is likely that the investment will run to at least its full term, i.e. 2010 and it may be in the best interest of the Investors to extend beyond this date, if considered necessary. We will keep you informed of developments in this regard."

19. Some months later, information contained in a letter of 19 March 2009, showed that the value of the property portfolio in February 2009 represented a 31.1% decline in the overall value of the property portfolio since March 2008 and that, as a result of that reduced value, "all equity within the fund would be eroded". The letter said that the original loan had been purchased by GE Real Estate Finance Limited ("GE") and that it had written to the Belfry Group requesting that the breach of the LTV covenants be remedied by 20 March 2009 and that:

> "in the event this is not achieved, it will be open to GE to declare an Event of Default under the loan agreement as a result of which GE could appoint a receiver to the group or its properties individually, as permitted under the loan agreements".

20. The letter said that the Belfry group was engaged in ongoing talks with another financial institution to obtain a new facility, and thereby remedy the breach of the LTV covenants, but in the event this did not prove possible. While the loan facility was extended, this was done on terms and ultimately, by letter of 7 September 2009, the relevant Investor was informed that the revaluation of the portfolio, and notwithstanding a revised facility agreement, "the value of your investment is being written down to nil".

21. The correspondence continued over the following years during which annual property reports were sent to the Investors. It was apparent that, by mid-2012, the attempt to further restructure the terms of the loan facility had failed and that "a nervous investment environment coupled with an uncertain outlook for future property values" had led to the lender requiring that the outstanding debt would be repaid through "an agreed disposal programme". This was notified by letter of 11 July 2013 and the Investors informed that, once the sales were completed, the company would be liquidated and that:

> "your investment in the Company will cease to exist".

22. The disposal of the properties continued for the following years and the final disposal was notified by letter on 23 December 2014.

The proceedings

23. Proceedings commenced by plenary summons issued on 6 August 2014. In that context, the letter expressing concern regarding the property values of 5 August 2008, deemed to be received two days later, on 7 August 2008, was key to the argument regarding the running of time, and the Investors, in broadly similar terms, pleaded that it was not until then, or later when they received in September 2009 the consolidated financial statements for the year ending 31 March 2009, that they knew of the LTV covenants, and the particular loss they suffered by reason of the power contained in the covenants by which the lender could force a sale.

24. The Investors claim that the LTV covenants were not disclosed to them prior to making the investments, whether in the prospectus or otherwise, that the prospectus did not explain how this particularly disadvantageous gearing could mean that their investment would be entirely wiped out if property values fell and if the lender chose to activate its powers under the covenants.

25. It is argued that the cause of action did not accrue until 7 August 2009 at the earliest, when they first became aware of the LTV covenants.

The pleaded claims

26. The claims of the Investors are pleaded in very lengthy and substantially similar statements of claim. The trial judge considered that the claims were not barred by statute in regard to part of the negligence pleaded, and he summarised these as the pleaded alleged failure to "specify, refer to or explain the LTV covenants or the possible consequences of such covenants prior to the investment of Belfry funds in the UK properties".

27. The statement of claim has been recast on a number of occasions and the final statement of claim was delivered on the 23 May 2018 pursuant to the direction of Haughton J. given on 16 May 2018, after judgment was delivered. The material claims can be summarised as follows:

> (a) the Bank and the director defendants were aware or ought to have been aware of the inclusion of the LTV covenants in the investment structures and the adverse implications this had for the Investors;
>
> (b) the existence of the LTV covenant had the potential to, and did in fact, cause loss after the date of the investments

when property valuations declined, because the LTV covenants handed “effective control to the Lender” (defined as the UK commercial bank which had advanced the borrowings) and removed discretion from the manager of the funds;

(c) the skill of the property managers was a key selling point, but the existence of an LTV covenant meant that the funds “could not be managed through any market volatility” as the Lender was in a dominant position and the interest of the Lender and the Investors would be different;

(d) the failure to inform the plaintiff of the existence of an LTV covenant at the date of investment as, had the Investors been informed of the existence of such a covenant, the investment would not have been made;

(e) negligence arising from the omission from the prospectus of the investment structure and the LTV covenant in the borrowings.

28. Those elements are pleaded to amount to representations including representations by omission but for which “the plaintiff would not have made the said investment”. There are pleas that there was a negligent failure to advise the investors of the existence of the LTV covenants or of the effect or likely effect in certain market conditions. There is an express plea that, but for the wrongful statement or omission, the investments would not have been made.

29. Paragraph 40 alleges representations that the investments were suitable, that the investors would be advised with regard to the debt structure and the LTV covenants and that the Bank and the director defendants understood that the plaintiff wished to invest in a low to medium risk investment.

30. Of note also is para 43(d) by which it is pleaded that the Bank and the director defendants “failed to ensure that the investment was appropriate for the plaintiff in the prevailing economic climate and/or in the event that there was a downturn in the economy, they did not recommend to her unsuitable investments bearing in mind her personal and/or financial circumstances and her resources, investment objectives, attitude to risk investment experience and her own investment strategy.”

31. Paragraph 45 pleads the existence of the LTV covenant:

> “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.”

32. 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.

33. Also of note is the plea at para. 46 that the skill of the property managers was a “key selling point” and that:

> “the consequence of the existence of an LTV covenant irrespective of whether or not it was in fact triggered, was that the funds could not be managed to any market volatility, as only one movement downwards in property values immediately placed the Lender in a dominant position, leading to the loss of the assets.”

34. Finally, para. 47 pleads a failure to inform the plaintiff of the existence of an LTV covenant and that that omission was decisive. That is a plea broadly akin to the plea in *Gallagher v. ACC Bank*, that the existence of the LTV covenants and the failure to notify the plaintiff of its existence and effect made the investment intrinsically unsuitable from the outset, to borrow the language of Fennelly J. in *Gallagher v. ACC Bank*. These pleas are materially identical to those pleas which were central to the conclusions of Fennelly J. in *Gallagher v. ACC Bank*, but, as will appear later in this judgment, the answer to the question of the running of time in the present cases may not be as readily apparent as in that judgment.

Summary of the decision of Haughton J.

35. Haughton J. concluded the claims in contract were statute barred by s. 11(1)(a) of the Statute of Limitations, and that finding is not appealed.

36. With regard to the pleas in negligence, Haughton J. formed the view that the pleas fell into three categories and whether Haughton J. was correct to make the distinction in regard to the different factors present in the claims is one ground of appeal.

37. The three categories were identified by Haughton J. at para. 19:

> “(1) Claims of negligence *simpliciter*, negligent misstatement and/or negligent misrepresentation and breach of duty under the Companies Act arising from alleged shortcomings in the prospectuses and advice given in relation to the level of financial risk in the investments and the suitability of the investments for particular investors.
>
> (2) Pleas of negligent misstatement/misrepresentation, the alleged failure to specify, refer to or explain the LTV covenants or the possible consequences of such covenants prior to undertaking the investment of Belfry funds in UK properties.
>
> (3) Claims of negligence and breach of fiduciary duty in the management of the investments – in the choice of the investments, and the level of rotation of properties (the 'churning' claim) and the generation of excessive fees – in short the mis-management claims.”

38. The claims identified at (1) and (2) were held not be to statute barred in respect of the different Belfry investments, and I do not propose to repeat here the differential analysis of the claims in the separate funds. It is sufficient for present purposes to say that Haughton J. held that the claims concerning the existence of, and failure to identify or explain the possible effect of, the convents were not statute barred.

39. The appellants argue that the cause of action in respect of all of the claims in negligence were statute barred when the Investors

entered into the investments but the Investors argued that the torts were not complete until they suffered loss and when the value of their shares in the various Belfry funds dropped to zero.

40. The appellants had argued before the High Court, and argue again now before this Court on appeal based on the long line of authority starting with the decision of the Supreme Court in *Hegarty v. O'Loughran* [1990] 1 IR 148, that the claims in each case derived from the Investors having suffered financial loss as a result of entering into the investments, whether that was as a result of alleged negligent advice or misrepresentation, and that the cause of action arose at a time they purchased the shares representing the investments. The appellants make the argument that the position for which the Investors contend is, in essence, an argument that the cause of action does not accrue until the investors had discovered the loss, a claim they say is inconsistent with the decision of the Supreme Court in *Gallagher v. ACC Bank plc*, and *Brandley v. Deane* and the long established principle that there is no "discoverability" element to the running of time in Irish law, save as provided in regard to claims for personal injuries by reason of the saver provisions in the Statute of Limitations (Amendment) Act 1991.

41. By way of a separate argument, the appellants argue that Haughton J. was wrong to make a distinction between a claim in tort and one in contract, having regard to the fact that the claims arose from the same set of facts, and they argue that he erred in making the distinction between the classes of claims made in the pleadings.

Reasoning of the trial judge

42. The particular difficulty in the ascertainment of the date of accrual is that the investments performed well in the first years and the Investors might therefore not have been readily able to show any loss of the market value of their shares until after 2009. The focus of the reasoning of the trial judge with regard to the issues material to this appeal was the proposition found in the Irish authorities, and stated in stark terms by Fennelly J. in *Gallagher v. ACC Bank*, that the cause of action does not accrue at a point of time at which there is no more than a "mere possibility of loss".

43. Haughton J., having considered in some detail the judgment of Fennelly J. in *Gallagher v. ACC Bank* and the decision of Binchy J. in *Lyons v. Delaney* [2015] IEHC 685, identified a number of material differences between the facts of the present cases and those in *Hegarty v. O'Loughran* and Gallagher v. ACC Bank, and came to the following conclusions, at para. 28.4:

> "[T]he plaintiffs did not suffer actual loss on entering into investments. They underwent risk – more, they say, than they bargained for - but that is not to be equated with damage. Their investments, unlike in Gallagher, were capable of making a profit."

44. He then came to the conclusion, having noted that the funds performed well and had almost doubled in value by 2006/2007, that:

> "[a]ccordingly at the date of investment there was only the possibility of loss, contingent on a downturn in the property/rental market."

45. On that analysis, at para. 28.5, he held that the mere existence in the loan contracts of the LTV covenants did not constitute a loss as there was:

> "[…] therefore only a possibility, at the time of investment, that the LTV covenants would have an impact, and that was conditional on a significant decrease in the value of the property. The existence of this possibility of loss from the operation of the LTV covenants did not amount to "actual loss"."

46. Haughton J. concluded, (conclusion 2, at p. 94) that the cause of action in tort did not accrue at the date of entry into the investment as there was "a mere possibility of loss" but no actual loss.

47. Haughton J. went on to consider the effect of the furnishing to the investors of property updates and consolidated annual financial statements prepared in March of each year. He noted that the first time the funds were shown to had actually fallen in value was in the property updates of March 2009 and that, as no loss had occurred until that time, no cause of action could be said to have accrued and went on to say, at para 28.24 of his judgment (by reference to Ms Cantrell) that:

> "no loss at all on her original investment had crystalized or was 'provable', on the basis of the audited accounts establishing the value of her shareholding in Belfry 2 as of the 7th July, 2008. The accounts and shareholder fund revaluation are such to have raised serious concerns for the future of the investment but there was no evidence of actual loss."

48. He considered that the same considerations applied to the investors in Belfry 3 and that there was "no measurable, actual or provable loss and the investor benefit exceeded the burden" at that point in time. This led to his conclusion 4 and 5, at pp. 102 and 103:

> "Conclusion 4:
>
> It must therefore be concluded that there is no evidence that Ms. Cantrell suffered any actual or provable loss in respect of her Belfry 2 investment more than 6 years before her Plenary Summons issued on 6th August, 2014. Her claims in tort in relation to Belfry 2, whether based on negligent advice (category (1)) or based on the LTV covenant (category (2)), are not statute barred as the alleged torts were not complete and time did not start running until some date later than 6th August, 2008.
>
> Conclusion 5:
>
> Similarly, it must be concluded that there is no evidence that Mr. Tierney, Ms. Bernadette Goodwin or Ms. Mary Honohan suffered any actual or provable loss in respect of their Belfry 3 investments more than 6 years before their Plenary Summonses were issued on 6th August, 2014. The alleged torts, whether based on negligent advice or based on the LTV covenant, were not complete and their claims, which relate only to Belfry 3, are not statute barred."

49. The decision of Haughton J. regarding the LTV covenants, his category 2, gave rise to most arguments in the course of the High Court hearing and on the appeals. He described this category of claim as a plea of negligent mistake and misrepresentation arising from an alleged failure to specify, refer to, or explain the LTV covenants or the possible consequence of such covenants prior to the making of the investment. He noted that the question whether the claim regarding the LTV covenants was a separate category of claim had been controversial, as the defendants contended that the LTV covenants were pleaded merely as an aspect of the claim

that the investments were unsuitable or that the Belfry funds were mis-sold. He accepted that the plaintiffs had not articulated the LTV covenants as a separate cause of action, but found that the covenants were the subject of specific and detailed pleas in each statement of claim, albeit they were not the only claim. He described, at para. 30.2, the pleas as "prominent and recurring, and on plain reading stand out, and may fairly be described as core to the plaintiffs' claims."

50. Central to the reasoning of the trail judge was the fact that the prospectuses did not identify the precise form of borrowing of which the Belfry companies would avail to part fund the purchase of the real properties, and all that was said regarding the form of borrowings in the prospectus was that the Belfry Group "had commenced non-binding discussions with a number of UK and European Financial institutions" with a view to obtaining funding for the purchases. As Haughton J. noted, there was no evidence before him as to whether LTV covenants were part of those discussions or whether they were even in contemplation at the time that the plaintiffs paid over their money. He operated on a working assumption, an approach which I consider to be correct for the determination of the preliminary issue, that the borrowing negotiations concluded some time after the Investors had handed over the money and that the LTV covenant claims arise from borrowing arrangements that post-date the investments.

51. He considered therefore that the claims arising from the LTV covenants were capable of being separated from the claims regarding the investments and that they could not be "pigeon holed" as a mis-selling claim generally.

52. That part of the claims related to the existence of, or failure to notify or explain, the LTV covenants was held therefore not to be statute barred.

53. I propose first setting out in some detail the current material state of Irish law. For reason that will become apparent, I do not propose dealing with the second question in these appeals regarding whether Haughton J. was correct in his approach to the various forms of relief and whether the claims could be categorised in the manner he proposed.

The Statute of Limitations: Relevant provisions
54. Section 11(2) of the Statute of Limitations provides as follows:

> "2 (a) Subject to paragraph (c) of this subsection and to section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, 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."

55. The starting point to the analysis of the approach of the Irish courts to s. 11(2)(a) of the Statute of Limitations is the judgment of the Supreme Court in *Hegarty v. O'Loughran*. This decision was analysed in some detail by McKechnie J. in *Brandley v Deane*.

56. The judgment of Finlay C.J. is still an authoritative analysis of when a tort can be said to be complete. He pointed out, at p. 153, that the subsection introduced "a wholly different concept for the commencement of the running of the time limit, namely the accrual of a cause of action", and said that:

> "it must necessarily follow that a cause of action in tort has not accrued until at least such time as the two necessary component parts of the tort have occurred, namely, the wrong and the damage."

57. *Hegarty v O'Loughran* is authority for the proposition that time accrues in an action for tort when damage is manifest, happens, occurs, or comes into existence. That general proposition has been affirmed in the two recent decisions of the Supreme Court to which I will refer in greater detail later in this judgment.

Manifestation
58. The language of "manifest defect" or the identification of a start date based on "manifestation" is found in *Brandley v. Deane*, in the judgment of Fennelly J. in *Gallagher v. ACC Bank*, and in a number of older cases including in *Hegarty v. O'Loughran* itself, in the judgment of Geoghegan J. in *Irish Equine Foundation Limited v. Robinson* [1999] 2 IR 442, at 447 et seq., and in that of Herbert J. in *O'Donnell v. Kilsaran Concrete Ltd*. [2001] 4 IR 183 and Birmingham J. in *Hegarty v. D & S Flanagan Bros*. [2013] IEHC 263.

59. Both McKechnie J. in *Brandley v. Deane* and Fennelly J. in *Gallagher v. ACC Bank* quoted with approval the observation of Esher M.R. in *Read v. Brown* (1888) 22 QBD 128 at p. 131 as follows:

> "What is the real meaning of the phrase "a cause of action arising in the City?" It has been defined in *Cooke v. Gill* Law Rep. 8 C.P. 107 to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

60. McKechnie J. drew a distinction between the date of an alleged breach of duty, the wrongful act, and the date the damage occurs, and that the candidate dates for the accrual of the cause of action could be when the damage is *manifest*, when it is *discoverable* or when it is *actually discovered*. It is his conclusion that the relevant date is the date that the damage is manifest, i.e. the date in which the damage was capable of being discovered and capable of being proved, even if there was "no reasonable or realistic prospect of that being so", at para. 3. This is the test identified in Hegarty v. O'Loughran.

61. Damage can happen or occur without it being apparent to any person. The difficulty with the word "manifestation" is that it readily admits of a common meaning which imports a subjective element of knowledge, so that one asks to whom has the damage become manifest or to whom ought the damage have been manifest. The word is not used in that substantive sense in the authorities. In that context, I note that in *Brandley v. Deane*, at para. 2, McKechnie J. said that the language and terms used in the cases have led to a lack of clarity and to some confusion.

Can Gallagher v. ACC Bank be safely distinguished?
62. Haughton J. gave his judgment in the light of the decision then recently delivered of the Supreme Court in *Gallagher v. ACC Bank* which was argued by the appellants to be dispositive of the defences that the claims were statute barred.

63. The pleadings in *Gallagher v. ACC Bank* alleged negligence on the basis that the bank had induced Mr Gallagher to acquire a financial product which was "totally unsuitable for him" as he would have to out-perform the market if he was to get a return above the interest on the money he had borrowed to make the investment. At para. 118, Fennelly J. concluded that it was "inescapable" that the plaintiff's claim was that he had suffered damage by reason of the very fact of entering into the transaction borrowing the money and purchasing the bond.

64. The decision of Fennelly J. was expressly made in the light of the pleaded claim, and the trial judge did not approach the judgment in *Gallagher v. ACC Bank* by a mere analysis of the pleadings. Instead, he identified substantive distinctions between the investment in *Gallagher v. ACC Bank* and the Belfry investments, and came to the view that *Gallagher v. ACC Bank* could therefore be distinguished on account of some or all of those material differences. It is useful to analyse these, set out in his judgment at para. 23.

The first difference: Borrowing to invest
65. The claim in *Gallagher v. ACC Bank* was not made because the investor had borrowed but because the product was unsuitable for him because he had borrowed.

66. The Belfry investors do not rely on the fact that some of them borrowed. I am not convinced that the fact that Mr Gallagher had borrowed is a material element in the Gallagher claim, save with regard to the quantification of the loss. The fact of borrowing did not of itself make that investment unsuitable, rather the claim was that the advice given to Mr Gallagher was negligent because he had borrowed.

67. For that reason, I do not consider that this distinction sought to be drawn by the trial judge to be a useful distinction in the present appeals.

The second difference: Fixed term bond
68. The Gallagher investment in the Solid World Bond was tied into a six-year investment from which he could not exit. The Belfry investments were structured as a medium to long-term investment with an "expected timeframe of eight years". There was no option to exit before that time. In my view, the illiquid nature of the investments is sufficiently similar to not form a basis on which the decision of the Supreme Court in *Gallagher v. ACC Bank* may usefully be distinguished.

The third difference: Management
69. The basket of shares purchased by Mr Gallagher could not be changed over the life of the bond and there was no fund to be actually managed. The Belfry funds were invested and actively managed and could change over time. That is a material distinction between the facts in *Gallagher v. ACC Bank* and the present cases, but insofar as there is, in the present cases, a claim of mismanagement, that claim was not considered to have been brought within time, and the factors relevant to the present appeals are not the alleged mismanagement but rather, the inclusion of and the failure to identify and/or to explain the LTV covenants.

70. This is not a useful distinction, in my view, for the purpose of the present appeals.

The fourth difference: Bound to fail
71. Haughton J. regarded the most significant difference was that Mr Gallagher's investment was "bound to fail from the outset" and that the Belfry investments could have risen or fallen, they might have achieved greater or less profits or they might have failed entirely.

72. Thus, Haughton J. considered, and this was central to his analysis, that the judgment of Fennelly J. in *Gallagher v. ACC Bank* could be distinguished primarily because, as he put it:

> "the pre-selected basket of shares tracked by the Solid World Bond were from the outset incapable of making sufficient profit to pay back the interest that Mr Gallagher would have to pay on the loan".

73. He considered that as Mr Gallagher's investment was bound to fail "from the outset" as he suffered immediate loss by the making of the investment. He concluded, at para. 23.3, that the Belfry investments were not materially similar.

74. The conclusion at para 28.4 of the judgement of the trial judge is central to his thinking:

> "On this basis the plaintiffs did not suffer actual loss on entering into investments. They underwent risk – more, they say, than they bargained for - but that is not to be equated with damage. Their investments, unlike in Gallagher, were capable of making a profit. They did admittedly pay over money (in some cases borrowed) but they obtained value for their investments, namely shares in the Belfry funds representative of the property held by the relevant fund. It could not be said – as AIB sought to argue – that the mere fact of handing over money caused actual loss because they were deprived of the use of their money for the anticipated term of the investment. Indeed, as acknowledged in the Statements of Claim, initially the funds performed well. The Property Updates show that many of the underlying investments had almost doubled in value by 2006/2007. Accordingly, at the date of investment there was only the possibility of loss, contingent on a downturn in the property/rental market."

75. The central factor identified by the trial judge in that paragraph was that the Investors did not suffer a loss at the date of the investment but only what he described as "the possibility of loss". It should be borne in mind, as I noted above, that the plaintiffs plead in the early recitals in the statement of claim that the investments were sold as medium to high risk, and the investments in themselves contained the possibility of loss. It is not that factor which is pleaded as being negligent, but rather that the LTV covenants increased the risk. The claim is not founded on the loss of value of the underlying investments, as that loss was caused by the market or market forces, but the fact that the LTV covenants meant that there was no available option to the Investors to trade out of the property crash, and the failure to identify the existence of these clauses, and to explain the risk, is the pleaded negligence.

76. The expression that a product or building was "doomed from the start" has played a part in the analysis of the courts of England and Wales in regard to the running of time in property claims and it is useful to examine this analysis.

77. In *Pirelli General Cable Works Limited v. Oscar Faber & Partner* [1983] 2 AC 1 Fraser L.J. made a distinction between a latent defect in the foundation of a building and damage caused thereby. He said that, at p. 16:

> "There may perhaps be cases where the defect is so gross that the building is doomed from the start, and where the owner's cause of action will accrue as soon as it is built, but it seems unlikely that such a defect would not be discovered within the limitation period. Such cases, if they exist, would be exceptional."

78. The use of the phrase "doomed from the start" in this context seems to have its origin in the judgment of Megaw L. J. in *Batty v. Metropolitan Property Realisations Ltd*. [1978] QB 554 and its history was discussed by the Court of Appeal for England and Wales in London *Congregational Union Inc. v. Harriss & Harriss* [1988] 1 All ER 15, where that Court considered that the concept that a house

might be "doomed from the start" was no more than a "cautionary dictum so as to leave for future consideration problems which might arise in exceptional cases".

79. Ralph Gibson L.J. noted that a number of cases had come before the courts since *Pirelli General Cable Works Limited v. Oscar Faber & Partner* where it had been argued that a building was "doomed from the start" and that time had run from the date of construction, and that the arguments had become obtuse and strained. The Court did not regard a test of whether a building is doomed from the start to be a separate test confined to exceptional cases of "gross defects", and that the law remained that as explained in *Pirelli General Cable Works Limited v. Oscar Faber & Partner*, namely that time does not commence to run when a defect is present in a building, but rather when damage from that defect is manifest. That solution to the problem of latent defects has been recognised in a series of Irish cases.

80. Indeed, at para. 27, Fennelly J. quotes from the judgment of the High Court in *Gallagher v. ACC Bank* [2011] IEHC 367 where Charleton J. pointed out that "there might be a loss in the future but equally there might be a gain". The investment product purchased by Mr Gallagher was particularly unsuitable for an investor who borrowed and was subject to interest payments if the investment was not structured in a way to at least guarantee a return sufficient to cover the interest. The present cases are not made on that basis.

81. It seems to me that the trial judge was incorrect and that *Gallagher v. ACC Bank* may be safely distinguished on the basis that Mr Gallagher's investment was bound to fail from the outset. The correct analysis is that of Binchy J. in *Lyons v. Delaney*, at para. 39, where he said that the core of the claim of the plaintiff in Gallagher v. ACC Bank:

> "was that the product was not a suitable product to borrow money to invest in and it was most unlikely it would deliver any return sufficient to offset the cost of the loan transaction."

82. For those reasons, I consider that *Gallagher v. ACC Bank* may not be distinguished on the grounds identified by the trial judge at para. 23 of his judgment but the core question remains that identified by Fennelly J. in para 111 of his judgment and where he accepted the dicta in *Wardley Australia Ltd. v. Western Australia* [1992] 175 CLR 514 that it was only when the burdens in the investments struck an adverse balance and resulted in ascertainable loss and damage that the claim crystallised or accrued.

83. Accordingly, I do not consider the analysis of the trial judge of *Gallagher v. ACC Bank* that the investment of Mr. Gallagher was bound to fail to be helpful. I agree with counsel for the appellants that no such conclusion or inevitability was part of the reasoning of Fennelly J. in *Gallagher v. ACC Bank* which fell to be decided on the case as pleaded and having regard to the causative connection asserted between the negligent advice and the purchase of the investment.

Komady v. Ulster Bank

84. The trial judge also distinguished the decision of Peart J. in *Komady Ltd v. Ulster Bank* [2014] IEHC 325, in which Peart J. gave detailed consideration in *Gallagher v. ACC Bank*. The plaintiffs were customers of the bank and brought a claim for negligent mis-selling arising from "swap" agreements. The plaintiff argued that the investment was unsuitable, the unsuitability was concealed from him, and that it was not until he sought and was given advice from separate legal and financial experts that the damage became manifest or apparent. The analysis of Peart J. is simple but clear: The plaintiffs were negligently advised and induced to purchase financial instruments which were unsuitable for their conservative financial objections. It was at the date they entered into the investment that the negligent mis-selling caused them the loss.

85. The trial judge considered that *Komady v. Ulster Bank* could be distinguished and at para. 26.2 of his judgment he considered that the facts in *Komady v. Ulster Bank* and "the timing of actual loss, more closely resembled the position in *Gallagher v. ACC Bank* than the facts as pleaded in the present case".

86. Costello J., in her first judgment in *European Property Fund Plc v. Ulster Bank Ireland Ltd* [2015] IEHC 425, in reliance on *Komady v. Ulster Bank* and the Supreme Court decision in *Gallagher v. ACC Bank*, held that the claim in tort on the grounds of an alleged mis-selling of an unsuitable financial product accrued on the date of the entry into the transaction.

87. I accept the distinction made by the trial judge and *Komady v. Ulster Bank* does not provide an answer.

88. Before dealing further with the reasoning of the trial judge it is helpful to consider the recent decision of the Supreme Court in *Brandley v. Deane*.

The Supreme Court decision in Brandley v. Deane

89. The judgment of Haughton J. was delivered before the recent and illuminating judgment of the Supreme Court in *Brandley v. Deane* where McKechnie J. carried out an extensive review of all the authorities on the running of time in tort. The Investors rely on that judgment as offering full support for the proposition that time did not begin to run in the present actions until the date at which the investments lost value, as they assert that on that date the damage or loss from which they suffered was manifest and capable of being discovered.

90. *Brandley v. Deane* involved a building contract for the construction of two houses, part of a small terrace of three houses constructed on one common foundation. The plaintiffs sued as a result of cracks that appeared some eighteen months after the foundations were completed, and approximately a year (the exact date of completion was the subject of debate at trial) after the houses were completed. The question was whether time began to run when the foundation was laid, when the engineer issued the certificate of compliance with planning permission and Building Regulations some months later, or, as was contended by the plaintiff, when the cracks were observed to have appeared in each of the houses.

91. The Supreme Court was hearing an appeal from the Court of Appeal, *Brandley v. Deane* [2016] 9 IECA 54, where Ryan P. had allowed the appeal from the *ex tempore* judgment of Kearns P. delivered on 16 April 2015, when he had dismissed the plaintiff's claim as statute barred. Ryan P., giving the judgment of the Court of Appeal, considered that Kearns P. was in error as the plaintiff had not suffered damage when the foundations were installed, as even if the foundations were defective, no damage occurred until the cracks appeared, and the defect in the foundations could not be said to have caused the cracks until that time.

The test is when damage, not a defect, becomes manifest

92. The core question for consideration by the Supreme Court was "what constitutes actionable 'damage' for the purposes of law of the tort of negligence", as for the purposes of the law of tort, it is apparent that the occurrence of a wrongful act does not of itself constitute a cause of action as there must be damage or loss, harm or injury, as negligence is not actionable *per se*. This factor was

considered by McKechnie J. to preclude a conclusion that the date of the wrongful act must always be the date when a cause of action in tort accrued. Indeed, as he correctly said at para. 66, in *Hegarty v. O'Loughran* all three judges agreed with that proposition and he discounted the argument that the judgment of McCarthy J. had indicated otherwise.

93. The Supreme Court also rejected the date of discoverability as the accrual date, although McKechnie J. stated that he had "never been convinced" by the reasoning of Finlay C.J. in *Hegarty v. O'Loughran* which had relied on the argument that such a test would render redundant sections 31 and 48. McKechnie J. concluded that the case law contains a firm rejection of the "vexed question" of a discoverability test, to borrow the words of Herbert J. in *O'Donnell v. Kilsaran Concrete Ltd.*, at p. 191, and McKechnie J. had no difficulty in coming to a conclusion that discoverability is not the test in property damage claims. McKechnie J. answered the question emphatically and quoted from the judgment of Birmingham J. in *Hegarty v. D & S Flanagan Bros.* as follows:

> "The time-limit on negligence actions begins to accrue on the date on which the damage manifests itself, and not from the date on which the damage is discovered"

94. As explained by McKechnie J., at paras. 79 *et. seq.*, a test based on discoverability assesses the accrual of the cause of action from the date when a plaintiff becomes aware or could reasonably have become aware of the cause of action, the material facts relating to the action and, sometimes, the evidence necessary to support a claim. These elements are mostly "subjectively orientated, with some objective elements".

95. McKechnie J. preferred the test that ascertained the date of accrual by reference to when damage was manifest and at para. 88 *et. seq*. he analysed the distinction between the date of the occurrence of damage and that of the manifestation of damage. Again, *Hegarty v. O'Loughran* was the starting point. He took as a working definition of "manifest" the proposition that the "damage must have been *capable of being discovered and capable of being proved* by a plaintiff" (Emphasis in original).

96. As McKechnie J. said at para. 89:

> "As will become apparent, it is not the defect which needs to be capable of discovery: it is the subsequent physical damage caused by that defect. I believe that this interpretation is consistent with the wording of the section in question. It is important to be clear that whilst the 'discoverability' test above discussed imports an element of reasonableness to the plaintiff's ability to discover the injury, such is absent in the case of a 'manifest' test and this is one of the facts which differentiates the two: a manifest injury or manifest damage need only be *capable* of being discovered, meaning that it must be provable."

97. The judgment of the Supreme Court was relied upon by Meenan J. in *Smith v. Cunningham* [2018] IEHC 600, which was a claim for damages arising out of the purchase of land and the construction of a dwelling thereon with the benefit of planning permission. The relevant claim for the purposes of the judgment was the claim in negligence against the fourth named defendant, the solicitors who acted in the purchase of the lands. It was not until the plaintiffs came to sell the dwelling some years later that they became aware of an alleged defect in title and they asserted that the cause of action arose when the proposed purchasers rescinded the contract as a result of this alleged defect in title.

98. Meenan J. considered that, while the defect in title might have occurred as a result of negligent certification in July 2006, the damage to the plaintiffs did not occur until the proposed sale fell through in October 2008. He considered that the tort was not complete until the alleged defect in title caused the plaintiffs to suffer the rescission of their proposed sale, and the claim was therefore not statute barred.

Is *Brandley v. Deane* limited in scope?

99. It might seem tempting to conclude that the decision of the Supreme Court in *Brandley v. Deane* is to be confined to property damage claims, and to flow from the decision in *Hegarty v. O'Loughran* and from the judgment of the Court of Appeal for England and Wales in *Pirelli General Cable Works Limited v. Oscar Faber & Partner*, which involved physical damage to property from a latent defect. McKechnie J., whilst he accepted that there might be some difference in nature between personal injuries and property damage, was not convinced that such difference would "warrant a separate or discrete test in respective of those two classes of action", at para. 104. That proposition must, it seems to me, equally apply to a mis-selling claim and no difference in nature between a mis-selling claim and a property damage claim has been argued that might suggest a basis to distinguish the classes of claim. It is of importance in my view that McKechnie J. said expressly that "the 1957 Act should be construed accordingly":

> "In my view, time begins to run from the date of manifestation of damage, which means it runs from the time that the damage was capable of being discovered and capable of being proved by the plaintiff. This was the conclusion reached in respect of personal injuries claims in *Hegarty v. O'Loughran*. The case law since then is ambiguous as to whether such a commencement date should or indeed has been transposed to property damage claims. However, for the reasons articulated up to this point of the judgment, I am satisfied that the date of manifestation of damage is also the appropriate start point in property damage claims, and the 1957 Act should be construed accordingly."

100. In *Gallagher v. ACC Bank*, Fennelly J. recognised that the principle regarding the running of time must be the same where the damage takes the form of personal injury, property damage or financial loss although he noted that the claim for financial loss "presents special difficulties", at para. 107. He considered that the same test must apply and that time runs from when a plaintiff has suffered actual damage.

101. The difficulty in assessing damages in financial loss cases is because it is often the market that causes the loss and not the negligent act sued upon, and the task for the court is to assess the causal connection between the alleged negligent act and the loss said to flow therefrom. The focus is in ascertaining the date on which the negligent act causes the plaintiff to get what to him is worth less than bargained for. Causation is central to the analysis and may be particularly difficult to identify in financial loss cases.

102. The position is arguably more straightforward, at least in the abstract, in the case of physical damage to property. Equally, and apart from the change in the law brought about by the amending legislation in 1991, in the case of a personal injuries claim, some physical injury or damage to the person has to be apparent for a cause of action to accrue.

103. Economic loss or financial loss claims are more difficult at the level of principle.

Mere possibility of loss

104. The more difficult proposition is that explained by Fennelly J. in *Gallagher v. ACC Bank* and by the judgment of Brennan J. for the High Court for Australia in *Wardley Australia Limited v. Western Australia* that "mere possibility" of loss will not be sufficient and some

level of probability will be necessary. That proposition is central to the reasoning of Haughton J. in the decision under appeal.

105. The case law has suggested some distinction may usefully be drawn between claims where a plaintiff can be said to have suffered loss on entering into a particular transaction, from those where all that can be said to exist at that point in time is a "contingent liability", or "contingent risk", and actual damage occurs only when real or ascertainable loss has occurred.

106. The case law in which this concept has evolved concerned insurance or indemnity contracts where a guarantor or an insurer has, as yet, no more than a risk contingent on the happening of certain events. The most readily understood examples are those concerning professional negligence against solicitors as in the case of *Forster v. Outred* & Co. [1982] 1 WLR 86. That was a professional negligence action against solicitors by a plaintiff who had mortgaged a property as security for a loan made to her son. The son defaulted, and the mortgagees called in the loan. The plaintiff claimed that the tort was not complete until a formal demand for payment was made by the mortgagees and that up to that time there was only a contingent risk that her son would default. The defendants argued that the plaintiff had suffered an immediate economic loss by entering into the mortgage and that at that time her interest in the property had become encumbered by the charge.

107. The court considered that actual damage for the purposes of determining when a cause of action and negligence occurred when any "detriment, liability or loss capable of assessment in money terms", and that the encumbrance on the house was such a detriment.

108. A similar decision was reached in *Pegasus Management Holdings SCA v. Ernst & Young* [2010] EWCA Civ 18. A claimant sued for negligent advice in the purchase of shares where he had not gained an anticipated tax relief. The Court of Appeal for England and Wales held the damage was incurred immediately upon the purchase of the shares.

109. In *Gallagher v. ACC Bank*, Fennelly J. analysed at some length the decisions of the courts of England and Wales and did not favour the approach in *Shore v. Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2009] Bus LR 42 and the distinction drawn by Dyson L.J. between a "pure contingent liability", such as might arise in an insurance case where it was unclear whether an insurance policy would ever be called upon, and a case of "contingent risk". There, the plaintiff had obtained financial advice in regard to the transfer of his pension entitlements from an occupational pension scheme to a more risky personal plan. Some years later, he discovered that the benefits under the new scheme were substantially less than he expected. The claim was held to be statute barred as the cause of action had accrued when the negligent advice had been acted upon, not at the date at which the plaintiff had acquired knowledge of the relevant facts regarding his options of remaining in the occupational scheme. Fennelly J., at paras. 109 and 110 of his judgment, was not prepared to accept this analysis:

> "[109] I do not think that the mere possibility of loss, at least in terms of Shore v. Sedgwick Financial Services Ltd. [2008] EWCA Civ 863, [2009] Bus L.R. 42, is enough. Dyson L.J. applied a type of pure logic in saying that Mr. Shore had got a risky product, which he did not want. However, it was clear that, at the date of the transfer from the occupational pension scheme to the personal income withdrawal plan, he got what was then full market value. It would not have been possible then to show that Mr. Shore was at a loss. He, like many others, had the bad luck to encounter a downturn in the markets. But the logic should apply even in better market conditions. I do not think it was just or fair to apply such relentless logic to an uncertain situation. Some account has to be taken of probability. That is not, of course, necessarily decisive. It is true that damages can be recovered for the possibility of loss in certain types of case (see Philp v. Ryan [2004] IESC 105, [2004] 4 I.R. 241). Normally that arises, as in possibility of future arthritis, epilepsy and so on, where some primary damage has been proved.
>
> [110] The possible situations vary infinitely. Where a person has been led by what he alleges to be negligent advice or other negligent action, such as, for example, negligent valuation of an asset, to enter into a transaction, I do not think the cause of action accrues when there is a mere possibility of loss. To hold otherwise would be doubly unfair to the plaintiff. If he sues early, he may be unable to quantify his loss. The defendant may be able to point to imponderables and uncertainties and argue reasonably that the plaintiff is unable to prove on the balance of probabilities that he has suffered any actual damage. If, on the other hand, the plaintiff waits until his loss materialises, his claim will be held to be statute barred, if mere possibility of loss is the test."

110. *Law Society v. Sephton & Co*. [2006] UKHL 22, [2006] 2 AC 543 is one of the few leading cases in which the "relentless logic" did not result in the claim being statute barred. The House of Lords dismissed an appeal from the Court of Appeal in regard to the running of time in an action by the Law Society against a firm of accountants who had negligently certified accounts for a number of firms of solicitors. The candidate dates were the date when the solicitor misappropriated the monies, which could at that time have been made good by the solicitors, or when clients who had suffered loss made claims under the Compensation Fund of the Society. Hoffman L.J. noted the approach of the High Court for Australia in *Wardley Australia Limited v. Western Australia* that a contingent liability was not damage until the contingent event occurred, that no loss or damage was suffered until the claim had actually been made. He made the following observation:

> "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 Foster…or it may mean that a party to a bi-lateral 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", at p. 30.

111. In *Wardley Australia Limited v. Western Australia*, considered by McKechnie J. in *Bradley v. Deane.*, Brennan J. did not favour the approach to contingent damage claims which has evolved in the courts of England and Wales. In that case, a client had, in reliance on a representation by the defendant, entered into a deed of indemnity with the bank against default of a borrower. The question was when loss had been suffered, and the two candidate dates were the date of the execution of the deed of Indemnity, or the date when the bank called upon the claimant for payment on default of the borrower. The court held that the assumption of an executory and contingent liability was not recognisable loss.

> "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", at page 258.

112. The distinction made was between a person who had sustained immediate actual loss by encumbering the equity in a property by a mortgage and the entering into an indemnity which in itself did not cause a loss. Time does not run in the second case on the date of the indemnity.

113. It is easy to see how this phraseology came to play a part in arguments before the Courts of England and Wales particularly in professional negligence cases concerning, for example, a covenant in a lease which may never come to be called upon, or a mortgagor who may not default whose loan is guaranteed by a third party. Those cases are dealing with liability or loss which might never occur and it could be said that those claims are peculiarly located within insurance type claims or those where an indemnity or guarantee is at their core.

114. I will now examine whether this analysis can offer any assistance in the understanding of the dicta of Fennelly J. in *Gallagher v. ACC Bank* that "mere possibility of loss" is not enough to start time running

Discussion on possible/contingent loss
115. The date on which there is no more than a possibility of loss therefore has been excluded as the correct date for accrual by the Supreme Court in *Gallagher v. ACC Bank* and in Brandley v. Deane. Fennelly J. preferred the analysis of Brennan J. in *Wardley Australia Limited v. Western Australia* that:

> "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 these events occur […]".

116. That approach found favour too with McKechnie J. in *Brandley v. Deane*.

117. This approach is of particular importance in the present case as had the Investors moved in the early days of the Belfry investments, it might be said that they could not have proven damage as the investments had performed well. It was that point that convinced Haughton J. that the probability of loss did not occur until a later point, which he fixed as the date on which the Investors became aware of the contents of the financial statements. I do not believe that Haughton J. relied on a discoverability test, and he would have clearly, on the authorities, been wrong to do so, but rather that his focus was on the element of the test identified in *Gallagher v. ACC Bank* that some level of provable loss is necessary before a tort is complete and before a plaintiff can be expected to sue. Haughton J. noted that the plaintiffs in *Komady Ltd v. Ulster Bank Ireland Ltd* had not sought to argue that the "mere possibility of loss arising from misrepresentation was not sufficient to complete the tort, and the tort was not complete until actual loss occurred".

118. The claim by a disappointed investor who claims damage was suffered on account of either negligent advice or mismanagement does not readily fit into the category of contingent liability claims, as such claims are that the investor does not get what he or she bargained for, or finds himself or herself exposed to the market in a way which is unanticipated. It is not so much that the happening of loss is contingent on the market, as this can be said of most investment products of this type, but rather that, assuming for the purposes of the present cases that the Investors will be in a position to show a causative connection between the existence of the LTV covenants and the loss they actually incurred, the loss suffered as a result of the impact of the financial crises and market conditions was greater and of a different nature than that which would have been suffered absent the negligent act.

119. The adjective "contingent" does not add anything to the meaning or understanding of risk. The risk is not contingent but actual, albeit there is a risk that certain contingencies may or may not happen. A financial product is more or less risky depending on the degree of exposure to market forces whether protections are in place to insulate the investments from these risks. But it is not useful to speak of the risks being contingent. Contingent liability is a genuine contingency, where there is no present liability, rather one that may come to exist on the happening of a future event.

120. A pure contingent liability is, to borrow the language of Hoffman L.J. in *Law Society v. Sephton & Co*. "not as such damage until the contingency occurs", but the plaintiffs in the present case allegedly suffered damage by reason of the existence of the LTV covenants which may or may not have resulted in loss to them, or more properly, may have resulted in more or less loss to them, the quantum of which might depend on the market and other factors. Lord Hoffman described the matter in simple terms as follows:

> "but I would prefer to put my decision on the simple basis that the possibility of an obligation to pay money in the future is not in itself damage"

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

122. For that reason, I do not find the decisions of the courts of England and Wales regarding contingent liability claims useful for the purposes of the present analysis.

123. The approach in *Wardley Australia Limited v. Western Australia* which was favoured by the Irish Supreme Court in the two recent authoritative decisions on the point was that time did not begin to run in those kind of cases until the contingency had become an actual liability. It seems to me that it is wrong as a matter of principle to adopt an analysis of when a contingent liability becomes actual to a claim for financial loss by a disappointed investor, by merely replacing the language of "contingent liability" with that of a possible and, as yet, not real loss of value in the investment. The Investors in the present cases purchased an investment product and their claim is that the inclusion of a LTV covenant in the borrowing arrangements made thereafter exposed them to an increased risk, as stated by Haughton J., a risk which was "more than they bargained for". The risk is not contingent but an actual risk that market force might impact in a manner to which they could not offer resistance or, to put it another way, they claim to have been negligently and without their knowledge fixed with a risk that left them exposed to market forces even if those forces in the early days had a positive effect.

Application to the facts:
124. I turn now to examine the nature of damage alleged by the Investors to have been suffered by them as a result of the pleaded negligence of the appellants.

125. That part of the claims held by the trial judge not to be statute barred is the asserted causative link between the existence of, or failure to, advise, reading, or explain the LTV covenants and the damage caused by the collapse in the market value of the properties. The claim is that the existence of the LTV covenant in the lending arrangements negotiated by the Directors and the lending institutions were capable of, and did in the events, result in the Lenders having "all the cards" and being in a position to, and

ultimately choosing to, call in the loans when the covenant was breached.

126. It is possible to characterise the claims regarding the LTV covenants as being a claim that the Investors were sold unsuitable financial products and/or were not informed of the risks involved at the time of purchase. If things are so characterised, then, the claim is broadly one which is similar to that of Mr Gallagher in *Gallagher v. ACC Bank* and which the Supreme Court regarded as being statute barred because the damage alleged had been suffered as a result of the very fact of entering into the investment.

127. By way of example, para. 47 of the third recast statement of claim reads as follows:

> "the failure to inform the plaintiff of the certain existence of an LTV covenant whether it is formalised at the date of her investment or otherwise was a decisive omission, and the plaintiff would not have invested had she been made aware of same."

128. The claim so pleaded is materially similar to the claim held by Fennelly J. to be statute barred in *Gallagher v. ACC Bank*.

129. But I accept that the present claims are not identical to those of Mr Gallagher. Taken in the round in the light of the conclusions of Haughton J. the claims are made on the basis that the LTV covenants were wrongly included in the lending arrangements, and that there was a failure to inform the Investors of the LTV covenants, or to advise of the risks posed by their inclusion in the lending structures.

130. The proximate cause of the loss of value in the investments was the market and the catastrophic property value collapse recited in the pleadings. A financial mis-selling claim could not succeed merely on a pleaded basis that an investment failed if the sole cause of the loss are market forces. A plaintiff could variously claim that an investment product was intended, or agreed, or represented to be one that would not suffer a loss as a result of market forces, and such a claim is, at least at the level of principle, one that would be arguable. By way of example, a claim on that basis could be made by a cautious investor whose caution and risk aversion was an element of the contractual nexus or the representations regarding risk made at that time of the contract.

131. That is not the basis of the present claims.

132. Haughton J. concluded that damage or loss was manifest or capable of being proved by the Investors only when a loss actually occurred, when the Belfry's accounts showed the loss, and when the investors were at a risk that the LTV covenants would be triggered. It was at time that the damage was capable of being discovered and capable of being proved, and before that point in time there was no more than a possibility of loss which did not start time running.

133. However, it seems to me that Haughton J. was incorrect in his conclusion. If the cause of action is that the lending arrangements wrongly, or negligently, or in breach of representations, contained the LTV covenants, the Investors had a provable loss far earlier than the date at which Haughton J. considered the damage had accrued. If the causative connection between the alleged negligence and the damage is that between the existence of the LTV covenants and the ultimate loss of value of the investment, with the consequence that the lending institutions ultimately forced a sale, it is the inclusion of the LTV covenants in the borrowing arrangements that is the damage suffered by the Investors. It is true that the investments did well for a number of years, but when the borrowings were made and the LTV covenants agreed, there was a defect which was not latent but one capable of being discovered on enquiry. The loss claimed to have been caused by the actions of entering into the LTV covenants as part of the borrowings was manifest at that time.

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

135. But can it be said that the existence of the LTV covenants, just as the defective foundations in *Brandley v. Deane*, did not produce any damaging effects until much later?

136. Having determined that the effect of the LTV covenants at the time of investment or at the time of the borrowings was, at most, to "increase the risk or possibility of loss in the event that market forces drove down on drawing investment property values", at para 30.04, and having noted that there was no evidence before him, whether agreed or disputed, that actual loss resulted from the *existence* of the LTV covenants, at para 30.05, and noting that what he was hearing was a preliminary application on a point of law and that the correct approach was to assume that the plaintiffs would succeed in establishing that the LTV covenants were a causative factor in respect of the loss, Haughton J. came to the conclusion that the cause of action accrued when the investments were written down to nil as it was only at that time that there was a "provable actual loss" in the context of the claims related to the LTV covenants, at para 30.12, conclusion 7(a). 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.

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

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

138. Insofar as there was an actual loss, it was the actual loss caused by the existence of misrepresentations or omissions or incomplete information regarding the LTV covenants, and had the Investors sued after the borrowings had been agreed they would have had a stateable and provable cause of action, the one they, in fact, plead in the present cases, that the investment they bought was different from the one represented to them, or that a material element was omitted from the pre-contract information on which they relied. The assessment or measurement of the loss might be difficult, but there was still loss which could be ascertained. It may be difficult to isolate market forces in financial loss claims from those causative elements which are alleged to be linked to the negligent act, and this may well be a matter which gives more difficulty in the abstract and on the level of principle than it does in the individual case. The loss may have increased with the fall in property prices, but there was a manifest and existing loss once the covenants were entered into, the measurement of which would be done following expert evidence on the relevant state of the market at that time.

139. The plaintiffs' claim is that the Directors and AIB plc failed to perform their duty, exposed the Investors to a risk they would not have assumed had they known. The damages will be measured, depending on the context, either by a straight calculation of the market value at the time of the investment or by ascertainment of a different market value as a result of the LTV covenants. All claims in tort give rise to difficulties in the measurement of damages and many, if not all, cases will involve the complex question of ascertaining damages in the light of the principles of remoteness and causation. The quantum of damages may not be ascertainable at the time the proceedings are instituted, or at the time when damage is manifest.

140. In my view, the essence of the claim made by the Investors is that the investments were more risky than they bargained for (to use the language of Haughton J.) and that they were, as a result of the alleged negligence, less valuable than was represented. The claims are, for that reason, ones that accrued when the LTV covenants were entered into and I am not persuaded that time began to run when the investments were purchased. The cause of action did, in my view, accrue when the borrowings were entered into some time later, but outside the limitation period.

141. The present claim is that the Investors were exposed immediately upon the inclusion in the borrowings of the LTV covenants to additional risk such that the exposure to the market is greater or that less protection than had been anticipated was available against market forces.

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

143. The more difficult case is one where the transaction may originally have been advantageous and this was the position in the *Nykredit Mortgage Bank Plc v. Edward Erdman Group Ltd* (No 2) [1997] 1 WLR 1627, and was analysed by Arden L.J. in *Axa Insurance Limited v. Akther & Derby*. The question is when was the plaintiff in a worse position as a result of entering into the transaction, and it seems to me that these plaintiffs were in a worse position, and assuming of course that they will persuade the trial court that there was a causative connection between the LTV covenants and the loss, when the LTV covenants were entered into.

144. The cause of action is that sometime after the investments were made, the Directors, in the exercise of the powers vested in them and mentioned in the prospectus, negligently and without informing the Investors, negotiated terms of lending which made the risk greater than that which existed at the date of the investments as the Investors had fewer buffers against market forces than they had contracted for, and the risk was greater than that which they understood had been assumed.

145. As a consequence, it seems to me that the damage became manifest once the LTV covenants were entered into by the directors and, at that stage, the Investors had less chance of surviving a catastrophic loss of property values.

146. I would allow the appeal on that basis. It was at the time when the LTV covenants were negotiated that AIB plc had that particular "card", to use the language of counsel for the Investors, and that was a card which, in the events, is argued to have led to the loss.

147. Certain other matters arise in the appeals to which I now turn.

Discoverability

148. The conclusion by the trial judge was that the cause of action in tort accrued on the date on which the audited accounts for each of the relevant Belfry companies signed off by the Directors demonstrated actual loss. This could be seen as an acceptance of the discoverability test, as Haughton J.'s conclusion is, in essence, that the cause of action accrued when the plaintiffs became aware of the loss. He noted and carefully analysed the discoverability test at para. 27.6 of his judgment and correctly concluded that it was not the correct basis on which to assess the accrual of the cause of action. In the light, in particular, of the judgment of McKechnie J. in *Brandley v. Deane* there can be no doubt that this observation is correct.

149. It is true that Haughton J. referred to the fact that the audited accounts "demonstrated" actual loss (conclusion 6 of his judgment), and did not expressly say that time began to run when the Investors discovered that actual loss had happened. His reference to the fact that the consolidated financial statements contain "evidence of loss" is not a conclusion that imports a discoverability or state of knowledge test, and I reject the argument in particular of counsel for Mr Kilduff in this regard. However, it seems to me nonetheless that the trial judge did fall into error. This is primarily because, while Haughton J. was correct to identify the relevant question as being when the loss "crystallised", or when damage was caused, he was wrong to conclude that damage was caused or the loss crystallised only when the accounts showed or "demonstrated", to use his word, that the investment values had fallen below the value of the initial investment.

150. However, Haughton J. took the view that it was only at the time when the investments were written down to nil that there was a "provable actual loss" in the context of the pleaded claims of negligent misstatement and misrepresentation relating to the LTV covenants (conclusion 7(a). There, it seems to me, the trial judge fell into the error of equating the evidence that might be necessary to prove a claim with the accrual of the cause of action. The Investors claim to have entered into an investment on the basis of incomplete or incorrect representations which induced them to do so.

Charges imposed at time of investment

151. In *First National Commercial Bank v. Humberts* [1995] 2 All ER 673, the Court of Appeal for England and Wales, *per* Saville L.J., rejected the argument that the claimants had suffered immediate loss at the time of a loan because they suffered legal and administrative costs in entering into the loan transaction as it would "be wrong simply to take the debit side of the deal and to describe it as a loss or damage flowing from the breach of duty without taking into account the credit side of the deal", at p. 677.

152. I find this reasoning persuasive and I am not convinced by the arguments made by each of the defendants, albeit with somewhat different emphasis, that the fact that some of the Investors suffered an immediate loss arising from the payment of 2% commission, or the incurring of interest costs where the investment funds were borrowed, meant that the loss had been suffered immediately. This is not a particularly helpful approach to the question as the cases pleaded could at least at a level of principle have meant that the Investors could have sought rescission on account of the misrepresentation, as well as the return of the deposit or any interest paid, and, insofar as it was quantifiable, a measured sum for the loss likely to be suffered for the duration of the investment on account of its inherent risky nature.

General considerations

153. There is an understandable reluctance on the part of the courts to come to the conclusion that time begins to run for limitation

purposes even before a plaintiff knew, or could have known, that he had any reason to bring proceedings. McCarthy J., in *Hegarty v. O'Loughran*, recognised the "unfairness, the harshness, the obscurantism that underlies this rule", and the Oireachtas has since made special provision for a form of discoverability in the Statute of Limitations (Amendment) Act 1991 in regard to personal injuries claims. He noted also that the Law Reform Commission recommended such an approach in its report in 1987.

154. It was for that reason that the Oireachtas chose to make significant alterations to the law on limitation in personal injuries actions. No such amendment has been made in regard to other types of damage, including financial loss claims. The UK has introduced legislation in the form of the Latent Damage Act 1986 which gives a plaintiff an extended limitation period where facts relevant to the cause of action were objectively speaking not known at the date when the cause of action accrued. That legislation also provides a longstop or backstop period of fifteen years.

155. In *Gallagher v. ACC Bank*, Fennelly J. conducted an exhaustive survey of the case law of the Courts of England and Wales and the difficulties in reconciling some of those decisions with one another. He notes the complexities in the case law and the fact that most of the recent authorities show:

> "little concern for the striking of a just balance between the rights of plaintiffs and defendants."

156. He noted, at para. 99, that some of the cases:

> "contain endless prognostication and fine distinctions"

157. He was not prepared to adopt a proposition that the policy of the law should be to advance rather that retire the accrual of the cause of action, but equally he was not prepared to support the contrary proposition, and noted the difficulty inherent in the courts adopting any principle of interpretation from policy grounds.

158. Financial loss claims present particular difficulties and the cause of action does not always accrue when the wrong was committed, as actual damage is necessary to complete the tort. In many claims in negligence against financial advisors the measure of loss is, as Fennelly J. stated:

> "Then the measure of loss *prima facie* will be the difference between the plaintiff's position as it is after entering into the transaction and what it would have been without it. In many cases, particularly the cases of professional negligence, the loss is measured by reference to what the situation would have been if the defendant had not been negligent as against the plaintiff's actual position."

159. The present claim is based on the proposition that the Investors are worse off as a result of the LTV covenants, and the cause of action cannot therefore be said to obviously accrue at the date the Investors paid their money. It is equally clear, however, that it is not a matter of waiting to see "how things work out" to borrow a phrase from Fennelly J. The cause of action in the present case is linked to the existence of the LTV covenants.

160. It is true, as was stated by Fennelly J. in *Gallagher v. ACC Bank* and, more recently, by McKechnie J. in *Brandley v. Deane*, that a consequence which offends one's sense of justice could exist on account of the fact that had these plaintiffs sued during the early years of the investments, they would not have had any provable loss as the investments were performing well. But, at that time the investments were purchased at market value and parted with their money they obtained an investment product which was worth what they paid. In *Gallagher v. ACC Bank* Fennelly J., having identified the complexity of the principles, found the case relatively straightforward to decide as the plaintiff's pleaded case was that he would not have entered into the contract of investment had he been properly advised, and Fennelly J. considered in those circumstances that there was an immediate loss in entering in to the transaction and that that was the basis of the claim. The plaintiff, in *Gallagher v. ACC Bank*, did not get what he paid for.

161. The present cases are more complex. Insofar as the Investors suffered a loss, the loss is claimed to have been caused by the negligent act of entering into the LTV covenants and thereby exposing the Belfry companies to a risk of foreclosure. In my view, the Investors suffered a loss when the LTV covenants were entered into for the purpose of securing the borrowings.

162. The question gives rise, of course, to an issue of fact and that, in itself, causes some difficulty in the correct approach to the trial of a preliminary issue regarding the limitations question. The point from the authorities seems to be this: At what point in time can it be said that the risks the Investors took was greater than or materially different from the risk they understood they had assumed?

163. The question comes down in all cases to an ascertainment of what cause of action is claimed by a plaintiff. It is not a mere matter of pleadings, as has sometimes been said with regard to *Gallagher v. ACC Bank*, but the task of the court is to understand what loss is said to have been suffered by a plaintiff to be caused by the identified negligent act. The claim in the present case is that the Investors are worse off as a result of the negotiation by the Directors after the investments had been made. For the present purpose, and having regard to the principles that guide the exercise of the jurisdiction of the court to determine the preliminary issue, it was the existence of the LTV covenants and not market forces that caused the Investors to lose their money. Whether that causative connection will be established at trial is not a matter for consideration at this stage. But nonetheless, it seems to me, that the case made by the Investors is that there was a possibility the market could fall, that their investments were risky, but that, as a result of the actions of the Directors, the investments became more risky and it was that factor which led to the loss of their money, or that factor was a material element in the loss of their money.

164. The matter then to a large extent has to be looked at through the prism of causation and for the purposes of the exercise now being conducted, the causative connection on which the plaintiffs rely is the connection between the existence of the LTV covenants and the actions of the lenders following the collapse in the property markets which resulted in the reconstitution of the loans and ultimately of the loss of all the equity.

165. In *Gallagher v. ACC Bank*, Fennelly J. made it clear that it was probably not possible to lay down a rule capable of easy application in all cases of financial loss, and that there are cases where there is immediate loss "even if there are difficulties of quantification and there are uncertainties and contingencies." Uncertainties of themselves do not prevent the earlier accrual of a cause of action provided there is some actual loss that can be identified.

166. The formula of Brennan J. in *Wardley Australia Limited v. Western Australia* has been accepted by the two judgments of the Supreme Court and that leads to the following conclusion: The cause of action accrues when the plaintiffs were in a worse position than they would otherwise have been. That happened at some stage after the investments were made and before commercial

property was purchased with the assistance of secured loans which contained a LTV covenant. The precise date on which this happened in each of the relevant Belfry funds is unclear but, on the facts, whatever that date is, it is well outside the six-year time limit and, in my view, these claims are therefore statute barred.

Misrepresentation
167. The Investors plead that they would not have entered into the contract but for the negligent omission or misrepresentation. The claims are squarely ones which fall within the classic claim of negligent misstatement or negligent representation by omission, and the defendants' reliance on what might be an *obiter* statement in *Murphy v. O'Toole & Sons Ltd* [2014] IEHC 486 is correct for that reason. That judgment concluded that the machine purchased by the plaintiff was unsuitable when it was bought, and also because the case centred on a breach of contract and breach of implied term under the Sale of Goods Act 1893, as amended.

168. The Investors rely also on an argument that it is only representations made which induced a plaintiff to enter into a contract which are actionable as negligent misrepresentations and, in that regard, rely on my judgment in *Murphy v. O'Toole & Sons Ltd*.

169. Because the appeals may be disposed of by the analysis made earlier in this judgment, I do not propose further considering this ground of appeal.

Conclusion
170. For the reasons stated I would allow the appeal. In the circumstances it is not necessary for me to consider whether the trial judge was correct in the manner in which he characterised different aspects of the claim.

171. The trial judge made no determination of fact regarding the provisions of s. 71(1)(b) of the Statute of Limitations. It is not appropriate that an appellate court would embark on a consideration of this point, which is to be returned to the High Court.