[2017] IEHC 808

THE HIGH COURT

Record No. 2013 7703 P

BETWEEN

ANTHONY ELLIOTT AND ANNE ELLIOTT

PLAINTIFFS

AND

ACC BANK PLC, PATRICK CONDON AND JAMES J. HALLEY

DEFENDANTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 16th day of November, 2017

Issues dealt with in this judgment

1. This judgment deals with two issues:

> (1) whether the plaintiffs' claim against the second and third defendants is statute-barred by reason of a time lapse of more than six years between the accrual of the cause of the action and the commencement of proceedings, and
>
> (2) whether the plaintiffs' claim against the third defendant should be dismissed, struck out, or otherwise not permitted to proceed having regard to the pleadings and to the evidence given by the plaintiff to date.

These issues arise in the context of proceedings commenced in 2013 by the plaintiffs (a husband and wife) against the second named defendant, an accountant, and the third named defendant, a solicitor, in relation to professional advice given and/or an alleged failure to give advice regarding an endowment mortgage which the plaintiffs entered into with ACC bank, the first defendant, in 2002. The plaintiffs' claim against the first defendant, ACC bank, had been struck out before the matter came before me, as will be described below. The mortgage in question was entered into in 2002 and the proceedings were commenced in 2013, more than six years after the entry into the contract with ACC bank. The plaintiff gave evidence that he did not know he had entered into an endowment mortgage until 2008. It is contended on his behalf that the cause of action in tort did not accrue until 2011, when the policy was "cashed out". The defendants contend that the date of accrual of the cause of action in tort (if there is one, which is denied) must have been 2002, or 2004, at the latest, when the plaintiff entered into the financial arrangement in question. A key issue is therefore precisely when the cause of action in tort accrued.

2. An unusual feature of the case is that there was a discrepancy as between the *factual* case pleaded by the plaintiffs in the statement of claim, and the case presented by the first plaintiff in his sworn evidence on the preliminary issue. The case as pleaded was essentially that the plaintiff thought in 2002 that he was getting an endowment policy but discovered in 2008 that he actually got a home savings plan; whereas the case presented in his sworn evidence was that he asked for a simple loan (not a mortgage of any kind), and instead got an endowment mortgage. This discrepancy and its effect on the case will be discussed further below. The second plaintiff did not take any part in the proceedings before the Court. There may be a degree of slippage as between the terminology 'plaintiff' and 'plaintiffs', which is not of any significance for present purposes.

3. For the most part of this case's history, the plaintiffs had no formal legal representation. They do appear to have had legal representation for a period of 6 or 7 months from July, 2015 to the 25th January, 2016. They also secured legal representation one week before the hearing, although this legal team did not appear in court until the actual date fixed for hearing, the 12th October, 2017. The plaintiff told the Court that he had no assistance with the drafting of the statement(s) of claim, the contents of which are discussed below, notwithstanding there was quite an amount of legal terminology therein.

The History of The Plaintiff's Claim

4. The proceedings were commenced by plenary summons issued on the 24th July, 2013. The claim was for damages for "breach of contract, breach of trust, breach of duty including statutory duty, negligence, negligent misstatement and misrepresentation." Aggravated damages were sought in relation to the second defendant for an alleged failure to disclose a conflict of interest, failure to disclose a profit from an unsuitable financial structure arranged for the plaintiffs, and failure to account for rents which he converted to his own use and benefit which he knew were to be paid to the first named defendant pursuant to an agreement made with the first named defendant.

5. The question of how the case was pleaded is relevant to a number of issues arising and, for that reason, I propose to set out the pleadings in some detail. Separate statements of claim were initially delivered on behalf of the plaintiffs as against each defendant. In one of these statements of claim, the plaintiff pleaded that on or about the 14th June, 2002, "on the trusted professional advice" of the three defendants, he entered into a financial agreement to purchase a shop and was "erroneously advised to enter into a financial situation that did not meet his requirements and the terms of which were misrepresented to him". He pleaded that in March 2008, he received a letter from Friends First "regarding what he thought was his endowment policy" and that he contacted the second defendant who told him to disregard the letter. He continues that he "then discovered that it was not in fact an endowment policy he had obtained but that of a home savings plan that was not a suitable vehicle through which to purchase a business". He pleads that "This policy was not geared to pay off the cost of the business the plaintiff had purchased and subsequently the plaintiff had this property repossessed by the first defendant through no fault of his own" and that "this in turn led to the disintegration of the plaintiff's business". In another of the individual statements of claim, he pleaded that "on the trusted professional advice of his accountant and the third named defendant", he entered into a financial agreement to purchase the shop and was "erroneously advised to enter into a financial situation that did not meet his requirements and the terms of which were misrepresented to him". He describes contacting his accountant, the second defendant, regarding the purchase of the business; that he was advised to take a mortgage with Bank of Scotland; but that this was "revised" and he was advised to enter an endowment agreement with Friends First/ACC bank. He pleads that he received a letter in 2008 from Friends First concerning what "he thought was his endowment policy", and that he then "discovered that it was not in fact an endowment policy he had obtained", but a home savings plan. He continues: "At no point did the third named defendant raise any issues with the commencement of this policy even though he was au fait with the requirements, instructions and wishes of the plaintiff".

6. It seems that at some stage the plaintiff was directed by the Court to serve a consolidated statement of claim. This version of the statement of claim was served on the 8th May, 2015. In this version, it is pleaded that the plaintiffs engaged the services of the second defendant to arrange the finances required for the purchase of the shop, that the second defendant introduced the plaintiffs

to the third defendant, and that on the advice of the second defendant, the plaintiffs retained the third defendant to act on their behalf in the purchase of the business. It is pleaded that the second defendant ultimately organised the finance for the purchase of this business with the first defendant. It goes on to plead that due to the negligence, breach of duty, breach of fiduciary duty, and breach of contract of each of the defendants, the plaintiffs "were induced to enter into a financial agreement that was wholly unfit for their requirements and the terms of which were misrepresented to them". It is pleaded that the second defendant originally advised the plaintiff to take out a mortgage with Bank of Scotland but then revised this advice and advised him to enter into an endowment agreement with the first defendant. It is pleaded that the third defendant was fully aware of the precise nature of the agreement and failed to disclose the ramifications to the plaintiffs. It goes on to plead that the plaintiffs received the March 2008 letter from Friends First regarding "what they understood to be their endowment policy", and that they "then discovered that they had been induced by the second named defendant to enter into a home savings plan rather than an endowment policy". It is pleaded that the third defendant was fully aware of the true nature of the agreement between the plaintiffs and ACC bank, and that he failed in his professional obligations to advise them as to the true nature of the agreement in circumstances where he knew or ought to have known the instructions and requirements of the plaintiffs.

7. While of course the *legal* claim is based upon an assertion that the product that the plaintiffs actually received was entirely unsuitable as to what they needed and requested; each of these three different versions of the statement of claim makes it clear that the *factual* nature of the claim was based upon the essential point that the plaintiffs thought in 2002 that they were getting an endowment policy, but in fact got a home savings plan. The statements of claim do not set out the difference between these two concepts, nor do they explain why it would be negligent not to advise the plaintiff of the difference (if any) between them.

8. The defence delivered on behalf of the second defendant, Mr. Condon, raises a preliminary issue that the case was statute-barred. By way of substantive defence, it is denied, *inter alia*, that the second defendant advised the plaintiff to enter into an agreement to purchase the shop, or that he induced the plaintiffs into entering the financial arrangement entered into. It is also denied that he ever told them to disregard any letters sent by Friends First. In relation to the claim of organising the financing for the purchase of the business, it is pleaded that his role as an employee of the accountancy firm was limited to "arranging mortgages, life assurances, and endowment policies", and to "identify and seek to arrange suitable financial products for clients by approaching a number of financial institutions". It is pleaded that in this regard he identified three such institutions and discussed three different types of mortgaging arrangements with the plaintiffs, and that the plaintiffs selected the endowment mortgage arrangement as their preferred option for financing the purchase. It is pleaded that the different options for mortgaging the property (including the chosen endowment policy) were fully explained to them, including the chance of a reward and the risk of a shortfall inherent to the policy.

9. The defence on behalf of the third defendant also pleaded by way of preliminary issue that the plaintiffs' claim was statute barred. It was denied that Mr. Halley was introduced to the plaintiffs by Mr. Condon. It was denied that Mr. Halley had in any way induced the Elliotts to enter the financial agreement, that Mr. Halley was in any way involved in any financial agreement or in organising any agreement, or that Mr. Halley had advised them in any way or discussed the nature of the financial agreement with the plaintiffs. Mr. Halley pleaded that he was retained as a solicitor solely, and with the sole purpose of giving legal effect to the completion of a number of financial transactions, which the plaintiffs had entered into with the other parties in the case. Mr. Halley pleaded that there was no proximity as between him and the plaintiffs and that the plaintiffs relied solely upon the advice of the second named defendant. Mr. Halley denied that at any point he made any representations to the plaintiffs in relation to the home savings plan or the endowment policy. It is denied that Mr. Halley was aware of the nature of the financial agreement the plaintiffs entered into, or that he failed in any alleged professional obligation to advise them about the nature of this transaction, or that he knew or ought to have known about this agreement.

10. I do not deal here with the aspects of the defences which concern causation i.e. whether or not any alleged wrong by the defendants caused the ultimate financial collapse of the plaintiff and/or sale of his shop, as this issue does not seem to me to be relevant to the preliminary issue relating to the Statute of Limitations.

11. Two motions were subsequently issued on behalf of the first and third defendants, seeking to have the proceedings struck out as being frivolous and vexatious, and as amounting to an abuse of process. These motions came on for hearing before the High Court (Murphy J.). By order dated the 1st February, 2016, she struck out the proceedings against the first defendant, ACC Bank, but did not grant this relief to the third defendant, by judgment dated 1st July, 2016.

Applications to the Court on the 12th October, 2017

12. The matter first came before me on the 12th October, 2017. The Court was informed that this was a trial date which had been fixed some considerable time before. The Court was also informed that the case had been called over the previous week, at which point the plaintiff, who appeared personally, had informed Noonan J. that the plaintiff had now instructed a legal team and that he was seeking discovery, and that he wished an adjournment of the trial date which had been fixed for the 12th October, 2017, in order to facilitate both the discovery process and the procurement of an expert on behalf of the plaintiff. The Court was also told that Noonan J. declined to vacate the trial date, but allowed the motion for discovery to be issued with a return date for the same date as the hearing date.

13. On the 12th October itself, counsel for the plaintiff, who was appearing for the first time on behalf of the plaintiff and had only very recently been instructed, sought an adjournment of the trial, and sought to pursue a discovery motion. Counsel for the both the second and third defendants strongly resisted any adjournment of the trial and indicated that, in their view, the Court should proceed to hear the case but should deal with the Statute of Limitations defence as a preliminary issue. Counsel on behalf of the second named defendant also made an oral application that the plaintiff's claim against his client should be dismissed as being an abuse of process, relying on the Supreme Court decision in *Cooke v Cronin* [1999] IESC 54 for the proposition that the commencement of a professional negligence action without an expert report was an abuse of process. There was no formal motion before the Court seeking that the proceedings be struck out for an abuse of process. The Court took the papers to read them overnight and ruled in relation to these various applications the next day.

14. In relation to discovery, I ruled that because of the lateness of the motion and the lack of relevance of the categories sought to the Statute of Limitations issue, I would not accede to the application for discovery at this stage. In relation to the application for a strike out for abuse of process due to the absence of expert report on behalf of the plaintiff, I ruled against the second defendant on the basis that no motion was properly before the Court. I ruled, further, that I should proceed to deal with the preliminary issue relating to the Statute of Limitations. Notwithstanding the decision in *McCabe v Ireland* [1999] 4 I.R 151, I ruled that since it had been indicated to the Court that it would have been unlikely that the facts could be agreed with the plaintiff, the simplest way of proceeding expeditiously on the preliminary issue was to hear evidence from the plaintiff on factual matters relevant to that issue only. The matter was then listed for hearing of the preliminary issue only on the 18th October, 2017, in order to give the plaintiff's legal team time to prepare for this hearing.

The evidence of the plaintiff on the preliminary issue

Evidence in chief

15. The plaintiff, a haulier by occupation, gave evidence that in 2002, he and his wife had decided that they would like to purchase a local corner shop with a view to running it until his retirement at the age of 65, some 15 years later. He said that he rang the second defendant, Mr. Condon, who was his accountant, told him about his interest in buying the shop, and asked if Mr. Condon would look into the financing aspect. The plaintiff said that Mr. Condon was a regular visitor to the house and that he knew him well and considered him a friend. He said that his wife emphasised to Mr. Condon at a meeting in their house that they would be willing to take out a loan, provided their house was not used as security. He says that Mr. Condon then arranged a meeting with a Bank of Scotland official; on foot of that meeting he and his wife were offered a loan for 15 years, and that they were not required to put forward their home as security.

16. According to the plaintiff, Mr. Condon then came to their house some days later and said he had a better deal. Mr. Elliott emphasised Mr. Condon's status as a personal friend and said that he would have accepted anything he told him. He said that Mr. Condon told him that this new deal had better tax breaks and that the plaintiffs would get €15,000 at the end of the term. He said that Mr. Condon never spoke about any risks associated with the deal. Ms. Elliott asked "Would you recommend this loan?", and Mr. Condon said that he would. The plaintiff said that Mr. Condon at one point asked Mrs. Elliott if she understood what was being offered, and she said: "Does that mean we put money into one bank and they put it into a second bank, and that pays the loan?", and he answered, "That's near enough". Mr. Elliott was keen to emphasise that he and his wife had an aversion to gambling or risk-taking of any kind, and that they would never had taken any risk with their own house. He said the meeting lasted approximately 25 minutes and that no risks were mentioned.

17. The plaintiff's own counsel asked him to explain the discrepancy between his statement of claim, insofar as his statement of claim asserted that he was induced into taking out a home savings policy rather than an endowment mortgage, but what he had sworn was that he never wanted an endowment policy at all. He replied that his pleadings were badly written and that he made a mistake. He said that he had simply asked for a loan.

18. In relation to the letter of a loan offer dated the 13th May, 2002, from ACC bank, which clearly set out the terms of the financial arrangement between him and ACC bank (which was an endowment policy), the plaintiff said that that he and his wife were never shown the front of any documents, and that they just signed where they were told to sign. In relation to the third defendant, Mr. Halley, the plaintiff said that he was never in Mr. Halley's office and that the only time they spoke to Mr. Halley at the time of the shop purchase, was on day they got the keys to the shop.

19. The plaintiff went on to say that in 2004, he and his wife decided to develop the shop and to look for a further loan and again contacted Mr. Condon in this regard. He said that most of the paperwork at this stage was brought by Mr. Halley, the third defendant, to the plaintiff and his wife in the shop for them to sign. He says that this was during working hours when they were very busy and that they had to alternately sign documents and deal with customers. According to Mr. Elliott, at one stage Mrs Elliott asked Mr. Halley "Am I signing my life away?" and he replied, "Just keep signing." The plaintiff stated that he signed the assignment of the life policy in the shop on this occasion.

20. The plaintiff then described receiving a letter in 2008 from Friends First, some four years later, which advised him to ring his financial adviser. He said that he then rang Mr. Condon, who told him to throw the letter in the bin and that he (Mr. Condon) would "look after it". He said that he repeatedly raised the issue with Mr. Condon at intervals thereafter, but received no further information and was effectively stonewalled. He says that at some point in 2008, he rang Friends First, who told him that he did not have an endowment policy, but rather a home savings plan. The plaintiff said at this point he and his wife became seriously worried when they were told this, and that around this time, he stopped making payments to ACC. The plaintiff then described certain meetings in 2010 with ACC bank officials, at which Mr. Condon was present, during which he was told that his money "was gone on the New York Stock Exchange."

21. Mr. Elliott said that his expectation was that at the end of the loan policy, he would own the shop and that the loan would have been repaid. He said did not expect a €15,000 bonus.

The application on behalf of the third defendant at the conclusion of the plaintiff's evidence in chief

22. At the conclusion of the evidence in chief of the plaintiff, counsel on behalf the third defendant made an application that the proceedings should not be permitted to continue against his client. It was submitted that it had not been suggested that Mr. Halley had given any advice at all in relation to the financial arrangement entered into by the plaintiff with ACC bank, and that in those circumstances, no matter whether one approached the matter through the lens of the case as pleaded, or the case as sworn to by the plaintiff, the case should not be permitted to proceed.

23. The Court had some concerns as to the precise nature of the application in circumstances where the evidence being given by the plaintiff related to the preliminary issue only, and where an inconsistency between the pleadings and the sworn evidence were also being relied upon. The Court decided to defer a ruling on this matter and to allow cross-examination to proceed, and to give a judgment in relation to both matters simultaneously (the third defendant's application, and the Statute of Limitations issue), with the cross-examination to be disregarded in the Court's consideration of the application to dismiss which it would carry out in due course. This slightly unorthodox approach seemed to the Court the best way of moving forward a case which involved a degree of confusion arising out of the fact that it was essentially a "lay litigant" case with counsel having been instructed at the last minute.

Cross-examination of the plaintiff on the preliminary issue

24. The plaintiff was duly cross-examined on behalf of both the second and third defendants. In cross examination, the plaintiff accepted that the documents he had signed clearly showed that what he had taken out was an endowment mortgage, that his family home was the security, and that the term was one of 20 years and not 15 years; however he insisted that he had no understanding in 2002 as what an endowment policy was, that he had not realised the nature of the financial arrangement he had entered into, and that he did not know where the €15,000 end of term potential payment, mentioned by Mr. Condon, would come from. He insisted that he had never read the documents in their entirety at that time and only signed where he was told to sign, and assumed he was signing for a "simple loan".

25. It was put to the plaintiff that in fact he had in 1997 (five years earlier) taken out an endowment mortgage with his family home as security, in order to purchase a house for his mother-in-law, and therefore must have known what an endowment mortgage was. He said that he had only recently learned of this, and that he did not know it at the time or that his house had been used as security. He was asked if he was aware that he had made a profit on that transaction, and he said that he did not know and that his accountant, Mr. Condon, dealt with all his "paperwork". He also accepted that he had purchased other properties, for rental, in order

to make a profit, but continued to maintain that he would never have been chosen to involve himself in risky transactions and that his wife was adamant that they should never put their family home at risk.

26. The plaintiff accepted that he had received letters from ACC at least from 2007 in connection with his policy, showing that it was on a downward trend. He accepted that the letter in 2008, which his counsel had put before the Court, and which showed a loss being incurred, was not the first such letter. He said, in essence, that he did not understand what these letters meant and did not understand from them that he had an endowment mortgage. He also accepted that he knew he was paying over €750 per month into the policy, but said that this did not alert him in any way to the possibility that this did not amount to repayments in respect of a simple loan.

27. When pressed on the divergence between the case pleaded and the case sworn to in his evidence, the plaintiff repeatedly referred to his lack of legal knowledge at the time of drafting the pleadings, his confusion about matters, and his being under a lot of pressure.

28. When asked about his complaint against the third defendant, Mr. Halley, Mr. Elliott acknowledged that Mr. Halley was not his financial advisor but that he would expect his solicitor to advise him on documents he was signing and to be advised in relation to any potential pitfalls.

Legal Analysis of the Issues

When did the plaintiff's cause of action in tort accrue?
29. The issue in this regard relates to the date of accrual of the cause of action in negligence. It was accepted on behalf of the plaintiff that the limitation period in respect of the cause of action in contract had expired, and that the plaintiff would be time-barred unless the Court held that the cause of action in tort did not accrue until a date within a period of six years from the date of the commencement of proceedings and/or that s.71 of the Statute of Limitations applied.

30. The question of when the cause of action accrues in a tort action relating to financial loss has been discussed in a number of important Irish authorities. The leading case in this regard is the Supreme Court decision in *Gallagher v. ACC Bank Plc* [2012] 2 I.R. 620. In *Gallagher*, the Supreme Court considered the date of accrual of the cause of action in the context of proceedings for damages for negligence against ACC bank. The plaintiff had invested €500,000 in a financial product provided by the defendant bank, whereby he had purchased an investment bond from the defendant, with a lump sum borrowed from the defendant. The defendant guaranteed the return of the amount invested and 80% of any net increase in the value of specified shares which the bond would passively track. The term of the investment and the loan was five years and eleven months. The bond could not be encashed during the term and no withdrawals were permitted prior to maturity. The marketing documentation for the product emphasised the high quality of the shares being tracked and included a table showing high returns in the past. However, it cautioned that past performance might not be a reliable guide to future performance. More than six years after the investment, the plaintiff instituted proceedings claiming damages for negligence, breach of contract, breach of statutory and fiduciary duties, and negligent misstatement. The core of the plaintiff's claim as pleaded was that the product was not a suitable product to borrow money to invest in and that it was unlikely that the bond would ever deliver any return sufficient to offset the cost of the loan transaction. On the expiry of the term, the performance of the shares had been insufficient to offset any of the interest payments the plaintiff had made on the loan. The plaintiff claimed that, taking into account the borrowing costs and the tax he would have had to pay on any gains, the bond would have had to far outperform the markets view of the likely performance of the shares in order for him to make any or any significant gain. The defendant sought a preliminary determination as to whether the claim in tort was statute barred. The High Court (Charleton J.) held that it was not, but the Supreme Court allowed the appeal. It held that in a claim for financial loss based in tort, depending on the facts, the cause of action accrued (a) in the case of immediate loss to the plaintiff, when the wrong was committed, or (b) in the case of a wrong which initiated a cause of action that later resulted in a loss, at the date on which the plaintiff suffered actual loss. It was held that there might be immediate loss even though there were difficulties of quantification and other uncertainties and contingencies. Uncertainties did not in themselves prevent the early accrual of a cause of action, subject to the proviso that the plaintiff had suffered actual loss at the time the wrong was committed. In a case where a plaintiff claimed that he had suffered damage by the very fact of entering into a transaction which was wholly unsuitable for him, the cause of action accrued on the date of entry into the transaction.

31. In the course of his judgment, Fennelly J. examined a large number of English cases in relation to accrual of causes of action in financial loss cases. Having conducted this examination, Fennelly J. said that the English cases demonstrated that cases of financial loss presented particular difficulties, and continued: -

> "[105] Some attempts have been made to establish classifications. I will assume that, as in this case, the cause of action is in negligence. In some cases, the claim is that the plaintiff would not have entered into the transaction but for the negligence of the defendant. Then the measure of loss will *prima facie* be the difference between the plaintiff's position as it is after entering into the transaction and what it would have been without it. In many cases, particularly 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. These cases include negligence alleged against solicitors, valuers, insurance brokers and financial advisers. These cases approximate the measure of loss to what it would be in contract. In some of the English cases (for example by Lord Hoffmann in *Law Society v. Sephton* [2006] UKHL 22, [2006] 2 A.C. 543) it is suggested that it may be easier to assume loss from the moment of entry into the transaction, whereas in "no transaction" cases, there may be no loss or it may be necessary to wait and see how things turn out. I do not see this distinction as providing a basis for a rule.... In either case, there may be immediate damage or it may not be possible to say that there will be damage until a later date.
>
> [106] Fortunately, it is not necessary for us to choose between the differing approaches considered in the English cases.
>
> [107] I return to the language of Finlay C.J. in *Hegarty v. O'Loughran* [1990] 1 I.R. 148. That was a personal injury case, so he spoke of a "provable personal injury". In *Read v. Brown* (1888) 22 Q.B.D. 128, to which Finlay C.J. referred, Lord Esher suggested a test of accrual in terms that: "… 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". The principle must be the same whether the damage takes the form of personal injury, damage to physical property or financial loss, recognising, as one must, that the last category presents special difficulties. The cause of action accrues in the case of financial loss when the plaintiff has suffered actual damage. The problem is that actual financial loss may take many forms. I doubt whether it is going to be possible to lay down a rule capable of easy application in every case…
>
> [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….

> [113] However, there will be cases where there is immediate loss, even if there are difficulties of quantification and there are uncertainties and contingencies. The analogy with personal injury claims can be helpful. A claim for damages will include amounts for immediate compensation and estimations, often based on a combination of medical and actuarial expertise, of future loss of earnings and of other costs. In other words, uncertainties do not in themselves prevent the early accrual of the cause of action, subject to the proviso that the plaintiff has suffered actual loss at the time of entry into the transaction."

32. Fennelly J. then turned to the facts as pleaded in the case before him. He said that the key complaint of the plaintiff was that he had been induced by the negligence of the defendant to invest in the Solid World Bond, a "borrow to invest" product, which was "wholly unsuitable for the plaintiff or indeed any investor". Put otherwise, the product was not a "suitable product to borrow money to invest in and that it was most unlikely that the bond would deliver any return sufficient to offset the cost of the loan transaction." The complaint, therefore, was that he would not have entered into the transaction were it not for the negligence and misrepresentations of the defendant. The plaintiff did not make any complaint about the quality of management of the investment in the Solid World Bond. There was no fund to be managed and the basket of shares was designated at the start and could not be changed. The complaint, as pleaded, was that the defendant had caused the plaintiff to enter into the transaction, and the loss claimed was the amount of interest paid by him on the loan transaction. Fennelly J. said that it was inescapable that the claim as pleaded was that he had suffered damage by the very fact of entering the transaction and purchasing the bond, and therefore the cause of action accrued at that time. Fennelly J. pointed out that the only possible alternative date of accrual would be at the end of the period of five years eleven months. If this were so, the logic would apply no matter what the length of the bond, which would mean that in the case of a bond of ten, fifteen or even thirty years, the defendant could say that no damage had been caused. While that approach might be the correct one in the case of a different kind of investment, especially where obligations of management and investment were undertaken, the implication in a case such as the present one would be that the cause of action in tort would not even have accrued even though the six-year limitation period for any claim in contract would have almost expired, as the maturity date of the bond was five years and eleven months. On the pleaded facts of the present case, the damage accrued on entry into the bond, when the plaintiff was sold a bond which was "wholly unsuitable" for him. Fennelly J. considered that the case was therefore, on its own particular pleaded facts, a clear case in which the cause of action accrued when the plaintiff purchased the bond and, accordingly, his claim was statute barred.

33. O'Donnell J. agreed with the judgment of Fennelly J., and in particular, that the Irish courts should approach the jurisprudence of the English court with considerable caution. He agreed that in the absence of any clear principle, the cases were best dealt with on "an incremental basis closely related to the fact of the individual case". There was one difference between Fennelly J. and O'Donnell J. in relation to the specific issue of whether the court should seek to reduce the differences in limitation periods where the proceedings involve causes of action in tort and in contract which arise out of the same set of facts. Fennelly J., who delivered the majority judgment of the court, took the view that the court should not adopt such a general policy of interpretation of the statute, whereas O'Donnell J. took the view that the policy of the law should be to minimise, rather than expand, the disparity between the running of time in contract and tort cases, at least where the wrongdoing alleged was identical.

34. The second and third defendants in the present case sought to rely on the *Gallagher* case as authority for the proposition that the cause of action accrued in the present case in 2002, when the plaintiff entered into a transaction which he now alleges was wholly unsuitable to his needs and which was different to what he had requested. It was submitted that the essence of the plaintiff's claim was that he had been induced in 2002 to enter into a transaction which was different to what he had asked for, and that this fell within the parameters of the *Gallagher* decision. It was submitted that, at the latest, the cause of action accrued in 2004, when the documents in respect of the refinancing were signed, which was also outside the six year time limit.

35. The plaintiff, in contrast, relies upon the decision in *Cantrell & Ors v. AIB plc* [2014] IEHC 254, to argue that the cause of action did not accrue until a date within the six years preceding the commencement of proceedings. It is argued that the facts of the present case are closer to those in *Cantrell* than those in *Gallagher*. In *Cantrell*, the High Court (Haughton J.) dealt with the issue of the accrual of a cause of action in connection with what were known as "the Belfry investments". These were property investment schemes in respect of which AIB acted as promoter and placing agent and in respect of which the plaintiffs had invested monies. The property investment schemes were undertaken by a number of companies called Belfry Properties and in each case the monies of the plaintiffs were invested through trustee/nominee companies. The plaintiffs claimed that they had invested sums ranging from €75,000 to €440,000 which were resourced variously from savings, pension funds or loans secured by mortgages. A trial of a preliminary issue in relation to the Statute of Limitations was held.

36. Haughton J. identified the following differences as between the facts of the *Gallagher* case and the case before him: -

> (1) the key complaint of Mr. Gallagher was that he was induced to invest in the Solid World Bond, which was wholly unsuitable for the plaintiff or any investor because it was most unlikely that the bond would deliver any return sufficient to offset the cost of the loan transaction. In contrast, although some of the Belfry investors borrowed to invest, it was not core to their cases that there was negligence by inducing investment in funds which were "borrow to invest" and on that ground alone unsuitable for the plaintiffs;
>
> (2) 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;
>
> (3) the basket of shares could not be changed over the life of the Bond – there was no fund to be actively managed and Mr. Gallagher could not and did not complain about the quality of management of the tracked shares. In contrast the properties in which the Belfry funds were invested were not preselected, were actively managed and could change over time;
>
> (4) as the Bond offered investors a 100% guarantee of the return of the amount invested, so Mr. Gallagher's claim could only relate to the interest which he had to pay on his loan. Interest started accruing the moment the investment was entered into, and therefore his loss was immediate and continuing. The interest could be accurately ascertained up to the date of trial. As Fennelly J. reasoned, uncertainty in relation to assessing the quantum of the claim did not logically justify

delaying the accrual of the cause of action;

(5) Mr. Gallagher's investment was for a certain period of five years and eleven months, whereas the Belfry funds were structured as medium to long-term, with eight years only being indicative.

37. Haughton J. said that perhaps the most significant difference was that, whereas Mr. Gallagher's investment was bound to fail from the outset, and he was bound to suffer loss of interest, the same could not be said of the plaintiffs' investments in the Belfry funds. The investments could have risen or fallen; it could not be predicted at the outset whether they would go up or down in value, or that they might fail entirely.

38. At para. 27.1 of this judgment, Haughton J. summarised the guidelines and principles which he considered to emerge from the *Hegarty* and the *Gallagher* cases as follows: -

"(1) in financial loss cases, in the absence of clear principle, the question of when the cause of action accrues and time starts running must be decided on the individual facts of each case;

(2) the court must judge on the facts when the tort was complete;

(3) the cause of action in negligence is not complete until there is a wrong and actual damage;

(4) this applies equally to financial loss cases. As Fennelly J. stated in *Gallagher* at p.656: 'The cause of action accrues in the case of financial loss when the plaintiff has suffered actual damage';

(5) actual damage is damage provable by evidence which arises from the wrong and is capable of attracting compensation;

(6) absent fraud or fraudulent concealment, the date of accrual in financial loss cases (in contrast to personal injury or defective product actions where a test of discoverability has been introduced by statute) is not determined or affected by the date upon which the plaintiff discovered or could reasonably have discovered the existence of the cause of action; and

(7) the mere possibility of loss arising from advice given or the entry upon a transaction is not enough to constitute actual loss at that point in time. There must be some probability of loss."

39. With regard to the last-mentioned point, Haughton J. said that in his view, this was consonant with the ordinary standard of proof in civil cases. Applying these principles to the case before him, he held that the cause of action in tort did not accrue at the date of entry into the investments as there was at that stage a mere possibility of loss but no actual loss.

40. I was also referred, inter alia, to the decision in *Murphy v O'Toole & Sons Ltd and Bank of Scotland (Ireland) Ltd* [2014] IEHC 486, where a Statute of Limitations issue arose in the context of a hire-purchase scheme. In 2002, the plaintiff had contracted to buy from the first defendant some farming equipment to be attached to his tractor, and received financing for this transaction from the second named defendant. It subsequently transpired that it would have been contrary to road traffic legislation for the plaintiff to drive the tractor on a public road with the equipment attached. In July 2008, he claimed damages for breach of contract, negligence, and negligent misstatement against the first named defendant. The first defendant pleaded that the claim in contract was statute-barred, stating that the breach of contract dated from the formation of the contract (April 2002). The plaintiff claimed that the claim in contract stemmed either from the date of the contract formation (which he stated was in fact October 2002, for reasons that are not relevant here), or the date of delivery of the equipment. In relation to the negligence claim, the plaintiff argued that the date of damage was either the date of the finance agreement or the date of delivery. In relation to the action in negligence, the High Court (Baker J.) stated that the plaintiff's cause of action stemmed from an alleged misrepresentation as to the suitability of product. She referred to the *Gallaghe*r decision, where Fennelly J. accepted that there would be cases where there was immediate loss even if there are no difficulties of quantification, and equally that there are cases where the loss is not immediate. Accordingly, since the loss stemmed from the misrepresentations made to plaintiff and these induced him to enter the contract in April, 2002 his loss crystallised in April, 2002 and not when he assumed a liability to pay the second defendant (who provided the financing) in October, 2002.

41. Having regard to the above authorities, the question therefore arises as to where on the spectrum of cases involving an alleged tort causing financial loss the plaintiff's case falls. I am conscious of the warning of O'Donnell J., that cases are best approached on "an incremental basis closely related to the fact of the individual case". I am also conscious that the second and third defendants were an accountant and solicitor respectively, unlike the situation in *Gallagher* and *Cantrell*, where the defendants were banks who provided the product in question. It seems to me that (even if one assumes the plaintiff might have had a substantive case regarding advices given or not given) the relevant date for accrual of the cause of action must be when advice was either given by the second and third defendants, and/or when such advice was not given and could reasonably have been expected to have been given by them. This seems to me to be necessarily either 2002, when the endowment mortgage was first entered into, or, at the latest, 2004, when a refinancing was entered into. This logic appears to me to apply whether one considers the case from the point of view of the case as pleaded or the case as sworn to in the plaintiff's evidence. The case made in the sworn evidence of the plaintiff was that he wanted a simple loan to purchase a shop for a fifteen-year term and that he should have been warned of the risks of entering into an endowment policy. On this version of the plaintiff's case, the time for such advice would have been 2002 or 2004, at the latest. Alternatively, if one takes the case as pleaded, namely that the plaintiff thought he had received an endowment mortgage but was given a home savings plan, the risks of which he was not warned, again the time for such advice, if required, would have been 2002, or 2004, at the latest. Even leaving aside the question of whether advice would have been required to advise him of the differences between an endowment policy and a home savings policy, or whether, objectively, there is indeed any material difference between the two types of policy it seems to me to be clear that if any advice was required, it would have to have been given in 2002 or, at the latest, 2004. On either view of the case, whether as pleaded or as sworn to, in my view the cause of action accrued at the latest in 2004 and therefore the commencement of proceedings in 2013 was outside the six-year time limit.

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

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

Does s.71 of the Statute of Limitations Act apply?

44. In *Komady Limited v. Ulster Bank Ireland Limited* [2014] IEHC 325, the High Court (Peart J.) dealt with issues relating to the Statute of Limitations 1957, including the question of whether s. 71(1)(b) of the statute was applicable to the circumstances of the case. The case concerned "swap agreements", which were described by Peart J. as a form of derivative financial instrument by which a borrower can obtain interest rate hedging based on a cumulated notional liability to a bank. He explained it as follows: if interest rates rose above 3.9%, the plaintiffs stood to gain, whereas if interest rates fell below 3.9%, the plaintiffs would be liable to make a payment to the bank. Neither party could forecast with certainty whether interest rates would fall or rise during any particular quarter, and since the duration of the swaps was five years, either party could win or lose over the term of the swaps and, to that extent, each party takes a chance that by entering into the agreement there will be a benefit. Whether one party or the other has gained or lost under the swaps cannot be finally ascertained until the term of the agreement has expired. The commencement of each swap agreement was 18th July, 2006, but plaintiffs did not commence proceedings until 23rd November, 2012.

45. The plaintiff sought to avail of s. 71(1)(b) of the Statute of Limitations 1957, arguing that the misrepresentation to them as to the suitability of the swaps amounted to a concealment by fraud of the fact that these financial arrangements were unsuitable. The bank submitted that the cause of action had accrued in July 2006; and further, that the plaintiffs could not point to any fact that was revealed to them after July 2006 or of which they became aware, which was material to their ability to be aware of the existence of a cause of action as of 18th July, 2006. They said that the plaintiffs were, in effect, attempting to apply a discoverability test, which was not permitted except in relation to personal injury actions.

46. Peart J. held that as the plaintiffs had not commenced the proceedings within six years, which was 18th July, 2006, they were outside the period prescribed by s. 11 of the Act for tort actions. Even if one were to say that the date of accrual was the date in which they were first "out of the money" and had to make a payment to the bank under the swaps, that date was October, 2006 and they had not commenced their proceedings until 23rd November, 2012. He held, however, that the date of accrual was the date on which they entered into the swaps, this being the date on which they were mis-sold the swaps and the date in which they suffered damage. He went on to consider the question as to fraudulent concealment and s. 71(1)(b) of the Act, and at para. 54 of his judgment, said as follows: -

> "54. It is agreed by all sides that the ordinary concept of criminal fraud is not a necessary ingredient for the purpose of section 71(1)(b) of the Act, as otherwise section 71(1)(a) would be superfluous. The correct meaning for the purpose of sub-section (1)(b) has been expressed in different ways on different occasions both here and in the United Kingdom, but it certainly means, in the light of the authorities opened that where the facts necessary to found a cause of action have been concealed from a plaintiff by the defendant so that it would be unfair for that plaintiff to be held to have had knowledge of them, or to be expected to have made inquiry in that regard, and where it would be unconscionable for the defendant to be permitted to rely upon the plaintiff's delay in discovering those necessary facts, time will not be considered to have commenced for the purpose of the Statute until the facts became known. It is clear also that no moral turpitude is required on the part of the defendant. But, as Lord Denning stated *in Kitchen v. Royal Air Force Association* [1958] 1 WLR 563 it is 'clear that the phrase covers conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other'. [Counsel for the plaintiff] points to the assumed fact in the present case that there was a fiduciary relationship between the parties, and that the bank accordingly has a special responsibility to ensure, before these swaps were entered into, that the plaintiffs, who had no separate advice available to them at the time, fully understood the nature of the intended Swaps, and were advised accordingly that they may not be suitable for the financial objectives….
>
> 55 Much reliance is placed by the plaintiffs on the existence of the fiduciary relationship between the parties at the time these Swaps were entered into. I can agree that such a relationship could impose a greater obligation of disclosure upon the bank. But in my view, even given that relationship for the purpose of this preliminary issue, the fact remains that everything that the plaintiffs needed to know in order to get any advice on these Swaps was known to them by the 18th July, 2006. They had the Swap agreements they entered into. They knew what their conservative financial objectives were and that they had explained them to the bank. They knew also that the bank had not explained these Swaps to them. They knew that they thought that they were some sort of fixed rate interest agreement. By October 2006, if not sooner, they certainly knew that it was possible that they would have to pay money to the bank in circumstances where they were 'out of the money'. In my view if they had gone to a solicitor at any time after July 2006, and sought advice as to whether these Swaps met their conservative financial objectives, they would have been in a position to provide all the necessary information in order to get such advice, and to decide if the Swaps had been mis-sold.
>
> 56. The plaintiffs in my view are confusing the emergence of further facts during the course of an action, with facts sufficient for the accrual of a cause of action. They had ample facts at their disposal in order to commence an action for negligence/negligence mis-representation in relation to these Swaps."

47. Peart J. concluded that the acts and omissions alleged against the defendant were not capable of constituting concealment by fraud on the part of the defendant of the plaintiff's right of action in the sense of s. 71(1)(b) of the Act.

48. It seems to me that the application of the above principles leads to the same conclusion that s.71 cannot avail the plaintiff in the present proceedings. The plaintiff received documents from Friends First in 2008 and 2007 concerning his policy, and he accepted in evidence that he may have received similar documents earlier than that. It seems highly probable that he was receiving a written update at least annually from Friends First. His claim that s.71 applies, even taken at its height, is, in reality, based not on a suggestion that he learned of new facts in 2008 which had been concealed by the second and third defendants, but rather that he for the first time began to suspect from the document received in 2008 that he had not received the product he had asked for, notwithstanding that the documents with the relevant information had been sent to him all along. The acceptance of such an approach would reduce s.71 to an entirely subjective test dependent upon a plaintiff's claimed ability to understand the significance of facts manifestly available to him before the expiry of the six-year limitation period. It could not possibly be said that, using the

words of Peart J. in *Komady*, that "the facts necessary to found a cause of action have been concealed from a plaintiff by the defendant so that it would be unfair for that plaintiff to be held to have had knowledge of them, or to be expected to have made inquiry in that regard", in circumstances where he personally received documents during the limitation period clearly stating the relevant information about how the policy was performing.

49. Insofar as may be necessary for me to state the following view, lest I am wrong concerning the application of s.71(1)(b) to the plaintiff's case taken at its height, I am not persuaded in any event, on the balance of probabilities, that the plaintiff did not know until 2008 that he had entered into an endowment mortgage as distinct from a simple loan. His case, indeed, went further than claiming that he did not know that he had an endowment mortgage; he claimed that he did not even know he had taken out an 'ordinary' mortgage with his family home as security. I have taken into consideration, of course, that the plaintiff was a haulier by occupation and would not be expected to be familiar with legal or banking concepts or terminology. However, I base my conclusion that this is not credible on the basis of the following:

> (1) the discrepancy between the factual case as pleaded in at least three different documents when compared with the sworn evidence given to the Court; in this regard, I am not persuaded that the absence of legal expertise would have led him to misstate the fundamental facts of the case (as distinct from its legal characterisation) in the pleadings;
>
> (2) the fact that he previously had an endowment policy relating to the purchase of his mother-in-law's house; in this regard, I am not persuaded that:
>
> > (a) he did not know his own home was being used as security for that mortgage; or
> >
> > (b) that he did not know that he made any profit and simply left "paperwork" to his accountant; I find such a claimed level of naivety regarding fundamental matters such as the security of his house and whether he made a substantial profit from that other endowment policy not credible;
>
> (3) the fact that he was fully aware of the level of monthly payments he was making in order to service the policy he had entered into in 2002;
>
> (4) the fact that he was receiving written annual updates on the policy;
>
> (5) the fact that he accepted in evidence he was told that he might make a profit of €15,000 at the conclusion of the term, which is entirely inconsistent with the concept of a "simple loan", together with his evidence concerning the exchange (described above) between his wife and Mr. Condon about the two banks being involved ;
>
> (6) the fact that the documents he signed clearly showed that he had received an endowment mortgage and other details such as the fact that his home was security and that the term was 20 years; and
>
> (7) the unlikelihood that any bank would give a loan of this order of magnitude for the purchase of a shop and for a term of 20 years in the absence of any property as security, and that he must have known this. The cumulative effect of these matters is, in my view, indicative that he did in fact know that he had an endowment mortgage long before the six-year time limit expired and, most probably, at the time of entry into the contract. I have seen the plaintiff give evidence and he did not appear to me to be a foolish, naïve person but rather an intelligent, articulate man. If I am correct in my conclusion that he knew he had an endowment policy within the six-year limitation period, s.71(1)(b) has no application to the facts of the case.

Is There a Prima Facie case against the third named defendant/Should the case be struck out/dismissed/non-suited?

50. As noted earlier, following the evidence in chief of the plaintiff, counsel on behalf of the third defendant made an application that the proceedings should not be permitted to continue against his client. It was argued that it had not been suggested that Mr. Halley had given any advice at all in relation to the financial arrangement entered into by the plaintiff with ACC bank and that in those circumstances, no matter whether one approached the matter through the lens of the case as pleaded, or the case as sworn to by the plaintiff, the case should not be permitted to proceed because it was not alleged that he had given any advice in relation to the merits of the transaction at all. The third defendant's central point was that he was retained solely for the purpose of acting in relation to the conveyancing aspect of the transactions. It was argued that whether one took the case as pleaded, or the case as sworn to, there was no valid case against him in the circumstances described by the plaintiff. The Court is not entirely clear whether what was sought was a "non-suit" or an application for a direction. Indeed, it may have been both and/or in the alternative, in the sense that an application for a non-suit was being applied for in respect of the case as pleaded, and an application for a direction on the basis of the case as sworn to by the plaintiff. As has already been noted, there was a discrepancy between the case as pleaded and the case as sworn to by the plaintiff. The case pleaded was essentially that the plaintiff thought he was getting an endowment policy but actually got a home savings plan; whereas the case presented in his sworn evidence was that he asked for a simple loan and instead got an endowment policy. In the present context, the relevance of this discrepancy may have led to some blurring of the boundaries as to whether the appropriate application on behalf of the third defendant was an application to non-suit the plaintiff, on the one hand, or an application for a direction at the conclusion of the plaintiff's case on the other. This blurring of the lines may well also have been contributed to by the Court's own decision to hear evidence from the plaintiff on the preliminary issue rather than by insisting that the parties agree facts for the purpose of a preliminary issue. I do not in any way criticise counsel for the third defendant for any ambiguity as to what precise application was being made. It was an entirely reasonable application to make, and indeed counsel had strenuously objected to the plaintiff's evidence in chief on the basis that it was significantly different to the case as pleaded.

51. By way of reply to the third defendant's application, counsel on behalf of the plaintiff argued that a failure of a solicitor to give advice could amount to negligence in certain circumstances. The ourt was referred to certain authorities concerning the duties of solicitors. No Irish authority was cited to the Court in this regard. One of these authorities was *Pickersgill v. Riley* [2004] UKPC 14, where Lord Scott described the variable nature of the duty of care owed by a solicitor to his client in the following terms: -

> "It is plain that when a solicitor is instructed by a client to act in a transaction, a duty of care arises. But it is also plain that the scope of that duty of care is variable. It will depend first and foremost upon the content of the instructions given to the solicitor by the client. It will depend also on the particular circumstances of the case. It is a duty that it is

> not helpful to describe in the abstract. The scope of the duty may vary depending on the characteristics of the client, in so far as they are apparent to the solicitor. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes impertinence, for the solicitor to offer to an obviously experienced businessman."

52. Lord Scott also quoted with approval the following passage from *Jackson & Powell on Professional Negligence* (5th ed. 2002) at p. 434: -

> "In the ordinary way a solicitor is not obliged to travel outside his instructions and make investigations which are not expressly or impliedly requested by the client."

53. In *Gray & Anor v Buss Murton* (a firm) [1999] P.N.L.R 882, where a will did not achieve the testator's intended effect of bequeathing his home and his chattels to his partner, but instead gave her a life interest only, It was held that where advice is sought from a solicitor by a lay client in imprecise and non-legal terms, it was incumbent on the solicitor to clarify the nature and extent of the advice sought. Rougier J. also stated that the extent of the solicitor's retainer and his duty of care was determined by the extent and nature of the advice which the client actually wished to receive.

54. The Court was also referred to the text Flenley and Leech, *Solictors' Negligence and Liability,* 2nd Ed., (2008) in which there was a useful discussion with reference to English authorities, as to when a solicitor might be under a duty to go beyond his strict instructions and warn a client of potential risks in a course of action. For example, in *Credit Lyonnaise SA v Russell Jones & Walker* [2002] EWHC 1310 (Ch.), it was stated as follows:-

> "If a dentist is asked to treat a patient's tooth and on looking into the latter's mouth he notices an adjacent tooth is in need if treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume that the client may not be aware, the lawyer must warn him."

55. If those principles were to be followed in Ireland, it seems to me that the Court would be required to consider a variety of matters, including: the precise terms of any retainer, any obvious risks in the transaction, and other circumstances, such as the experience of the client in matters of law, banking, or business.

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

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

Conclusion

58. In conclusion, it is my view that the cause of action accrued when the second and third defendants were acting for the plaintiff in 2002, at the time of entry into the endowment mortgage, or at the latest in 2004 at the time of the refinancing, these being the times when even taking the plaintiff's claim at its height, the professional advices warning him of the risks ought to have been given because the product being signed up to was a different product to that which he had requested (according to his claim). The cause of action having accrued more than six years before proceedings commenced, the preliminary point of defence based upon the Statute of Limitations therefore succeeds on behalf of both the second and third defendants and the plaintiff's claim must be dismissed.