THE HIGH COURT

[RECORD NO. 2017 11398 P]

BETWEEN

JOHN HEALY

APPLICANT

AND

IRISH LIFE STAFF BENEFITS SCHEME

AND

IRISH LIFE ASSURANCE PLC (No. 2)

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 25th day of July, 2018

Introduction

1. In an *ex tempore* judgment delivered on 26th January 2018, I dismissed the majority of the claims made by the plaintiff because the High Court had to recognise the opening of bankruptcy proceedings in relation to the plaintiff in the United Kingdom of Great Britain and Northern Ireland ("the UK"), by virtue of the provisions of Regulation (EU) 2015/848 of the European Parliament and of Council of 20th May 2015 on insolvency proceedings, and must not scrutinise those proceedings. I permitted the plaintiff, a lay litigant at the time, to redraft his remaining claims. These were claims for loss arising out of change in how his work related pension from his employment with the second named defendant was treated for bankruptcy purposes in the UK.

2. When the second named defendant became a publicly floated company, the plaintiff was transferred as a member of the original Irish Life staff pension scheme ("the old scheme") to a new scheme sanctioned by the High Court by Order dated 6th November 1990 ("the new scheme"). The plaintiff's claims arise from the fact that the old scheme, pursuant to UK law, was an approved scheme for the purpose of bankruptcy proceedings by the UK revenue authorities known as Her Majesty's Revenue Commissioners ("HMRC"). An approved scheme is excluded from consideration as an asset in UK bankruptcy proceedings. The new scheme is not so approved. It appears that to be an approved scheme, an application for approval must be made by the scheme.

3. The plaintiff, who had worked in Ireland for the second named defendant up until 2011, went to the UK in 2011 and was adjudicated bankrupt there in 2013. His pension is not excluded from the UK bankruptcy proceedings because the new scheme is not an approved scheme for that purpose.

The Motions before the Court

4. Both defendants sought orders, pursuant to the High Court's inherent jurisdiction, dismissing the proceedings on grounds that they are unsustainable, frivolous, vexatious, and bound to fail. These arguments were put forward on the basis of the documentation before the Court, and the interpretation of the relevant section of the Insurance Act, 1990 ("the Act of 1990"), especially as regards what constituted a benefit under the old and new schemes. It was also submitted that the claims of the plaintiff were statute barred.

5. The second defendant also submitted that a settlement agreement entered into by the plaintiff with the second defendant concerning the termination of his employment, precluded the plaintiff from taking any proceedings (including these proceedings) concerning his employment. The second defendant also submitted that for the plaintiff to establish it was an implied term of his employment contract that the second defendant was required to ensure that the new scheme was treated for UK bankruptcy law purposes as an approved pension, then the plaintiff had to show such a term was necessary. The plaintiff did not and could not establish that it was necessary and therefore any claim in law was bound to fail. The second named defendant also submitted that no cause of action could be established in tort.

6. In addition to the foregoing submissions, the first defendant separately submitted that, on the basis of the pleadings, the plaintiff's claim did not disclose any reasonable cause of action and that it was frivolous or vexatious and should be dismissed in accordance with O. 19, r. 28 of the Rules of the Superior Courts.

The statement of claim

7. As the reliefs sought by the defendants are based upon the case being made by the plaintiff, it is necessary to look at the statement of claim in a little detail. Paragraph 2 refers to the first defendant as follows:

> "The first Defendant is a pension scheme set up by the second Defendant to administer its staff pension scheme. Pursuant to his former employment with the second Defendant, the Plaintiff is a member of the pension scheme administered by the first Defendant."

8. Paragraph 4 refers to the plaintiff becoming an employee of the second defendant and states that pursuant to his contract of employment with the second defendant, the plaintiff was a member of the Irish Life staff pension scheme, i.e. the old scheme, and was entitled to the benefits of that scheme. It then states:

> "It was an express and/or implied term of the Plaintiff's contract of employment that:
>
> (a) The Plaintiff would be entitled to a pension scheme on terms no less favourable that (sic) the benefits and entitlements under the old scheme.
>
> (b) The second defendant would not reduce or in any way restrict the Plaintiff's entitlements and benefits under the Old Scheme."

9. Paragraph 5 refers to the fact that in the course of public flotation of the second defendant, the members, assets and liability of the old scheme were transferred to the new scheme (the first defendant). Paragraph 6 refers to the transfer being carried out pursuant to s. 6 of the Act of 1990.

10. Paragraph 7 refers to the transfer being given effect to by Order of the High Court made on the 6th November, 1990. Paragraph 7 also goes on to state that the members' liability and assets of the old scheme were thereafter transferred to the new scheme in terms which obliged the defendants to ensure that any benefit to which a member was entitled under the old scheme, including the plaintiff, would also be enjoyed by that member under the new scheme.

11. Paragraph 8 refers to the approval of the old scheme by HMRC. This meant that any member of the old scheme could petition for bankruptcy in the UK and that pension would not form part of the bankruptcy estate.

12. Paragraph 9 states:

> "Negligently, in breach of contract, in breach of duty, and in breach of statutory duty the second named Defendant did not ensure that the Plaintiff was entitled to the same benefits under the New Scheme as he was entitled to under the Old Scheme. Specifically, the New Scheme is not approved by HMRC and any pension under the New Scheme is subject to UK bankruptcy proceedings."

Thereafter, para 9 sets out particulars of negligence, breach of contract, breach of duty and breach of statutory duty.

13. Paragraph 10 refers to the plaintiff leaving the employment of the second defendant in May 2011 with an entitlement to a deferred pension under the new scheme. It is pleaded that he then moved to the UK in or about October 2011 and that at the time of moving to the UK, the plaintiff understood he would be entitled to his pension under the new scheme under terms not less favourable than the old scheme, and that included claiming his pension while resident in the UK.

14. Paragraph 11 refers to the petition for bankruptcy being made in April 2013 and the order of adjudication of bankruptcy in July 2013; in or about November 2013, a trustee in bankruptcy of the estate of the plaintiff in bankruptcy was appointed in the UK. The plaintiff was discharged from bankruptcy in or about July 2014.

15. Paragraph 12 recites that notwithstanding the discharge from bankruptcy, the plaintiff's assets remain vested in the trustee in bankruptcy who has claimed an entitlement to the plaintiff's rights and benefits under the new scheme.

16. In para. 13, the plaintiff pleads that he challenged the right of the trustee in bankruptcy to an entitlement to his rights and benefits under the new scheme in the courts in the UK and that he lost that application and the subsequent appeal to the Court of Appeal in the UK. Paragraph 14 recites that the plaintiff issued these proceedings by way of plenary summons and recites the history culminating in the *ex tempore* judgment of this Court determining that the UK was the appropriate forum for the plaintiff's bankruptcy proceedings.

17. In para. 15, the plaintiff recites that as a result of the court orders in the UK, he is now deprived of the benefits to which he was entitled under the new scheme. It then states that the plaintiff is not now entitled to a benefit under the new scheme which corresponds to a benefit under the old scheme and the benefits to which he is entitled are in terms less favourable than under the old scheme.

18. Paragraph 16 states as follows:

> "As a result of the foregoing, the first and/or second named defendants have have (*sic*) acted negligently, and in breach of duty, and in breach of statutory duty. As a result thereof, the plaintiff has suffered loss, injury, inconvenience, damage, and expense."

Thereafter in paragraph 16 the schedule of special damage is set out.

19. Finally, the statement of claim concludes with the recital "And the plaintiff claims:.." setting out his claim for damages for negligence, breach of contract, breach of duty and breach of statutory duty, as well as seeking a declaration that the benefits to which the plaintiff is entitled under the new scheme are less favourable than those to which the Plaintiff was entitled under the old scheme.

The inherent jurisdiction of the High Court

The nature of the jurisdiction

20. All parties relied upon the decision of the Supreme Court (Clarke J. as he then was) in *Keohane v. Hynes* [2014] IESC 66. Clarke J. (as he then was) stated at para. 6.5:

> "It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray J. in *Jodifern*, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in *Jodifern*, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis."

21. In *Barry v. Buckley* [1981] IR 306, with reference to the inherent jurisdiction of the High Court to dismiss proceedings which are frivolous, vexatious or bound to fail, Costello J. stated that "[t]his jurisdiction should be exercised sparingly and only in clear cases; . . .". *Barry v. Buckley* is also authority for the fact that the court, in order to avoid injustice particularly in cases whose outcome depends on the interpretation of documentation, can engage with the facts in an application to dismiss on the grounds of being bound to fail. Clarke J. (as he then was) confirmed in *Keohane v. Hynes* that:

> "In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be

other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

22. The High Court (Barton J.) in *O'Brien v. Revenue Commissioners* [2014} 1 IR 455 held that:

> "in addition to the interpretation of a contract or agreed correspondence referred to by Costello J. in *Barry v. Buckley* the inherent jurisdiction of the court can also be exercised in a case where the outcome depends on the interpretation of a statutory provision. That this is so in this case is not a matter of controversy between the parties."

This too, was not a matter of controversy in the present case.

Approval of HMRCH not a benefit or term of the contract

23. Both defendants submitted that the plaintiff's case was, in essence, that he had a contractual right to have the benefits under the old scheme replicated in the new scheme. The defendants' argument was that the plaintiff was claiming that s. 6 of the Act of 1990 meant that the benefits of the old scheme had to be replicated in the new scheme. The defendants' submitted that the main consideration was whether the benefit that the plaintiff pleaded, namely approval by HMRC, is actually a benefit under the old scheme and subsequently the new scheme. The defendants submitted that the Court was entitled to consider both the statutory provision itself and the documents before it in reaching a decision. They submitted that there was virtually no dispute as to the facts of the case and that the Court could make a determination on the basis of the information made available, that the approval of the old scheme by HMRC was not a benefit under the Act of 1990.

24. S. 6(2) of the Act of 1990 provides:

> "Every person who is a member of or entitled to benefit under a pension or superannuation scheme of the Original Company shall, with effect from the transfer date, become a member of or be entitled to the corresponding benefit under a corresponding pension or superannuation scheme established in respect of the New Company on terms not less favourable than those under the first mentioned scheme."

25. Counsel for the first defendant, whose submissions were adopted by the second defendant, placed emphasis on the phrase "entitled to benefit under a pension or superannuation scheme" and "entitled to the corresponding benefit under a corresponding pension or superannuation scheme." Counsel submitted that the benefit claimed by the plaintiff was not truly a benefit under the pension or superannuation scheme. It was not at issue between the parties that the documents setting up the old scheme and the documents setting up the new scheme (and subsequent deed of variation of that scheme) referred to "benefits" and that none of those "benefits" made reference to approval by HMRC or indeed approval by any other revenue authority. Counsel's submission was that registration, approval, or status in another jurisdiction, is not a benefit under the pension or superannuation scheme within the meaning of s. 6 of the Act of 1990.

26. Counsel on behalf of the plaintiff stressed that the test for the Court is whether it is clear that the case is bound to fail. He submitted that the reality was that approval by HMRC was a benefit enjoyed by members of the old scheme. If the plaintiff had been declared bankrupt under the old scheme, he would have been entitled to approval, but he was not so entitled under the new scheme. He also referred to the phrase "on terms not less favourable than those under the first mentioned scheme" and submitted that the lack of approval of the pension by HMRC were terms less favourable.

Decision

27. In interpreting s. 6(2) of the Act of 1990, it is necessary to consider s. 6(7) of the Act of 1990 which defines "benefit" as meaning "any pension, annuity, lump sum, gratuity or other like payment given on retirement or payable after retirement in respect of past service or on or in connection with death during service or after retirement". The pension superannuation scheme of the original company is defined under the same subsection as meaning "a scheme, arrangement or fund established in connection with the business of the Original Company for the provision of benefit for the employees of the Original Company or their dependants on their retirement or death."

28. If the only matter that the Court had to consider was whether the approval by HMRC of the old scheme pension was a benefit, the solution would be clear. Given the interpretation of benefit provided by s. 6(7) as set out above, approval by HMRC cannot be a benefit. Section 6(2) however provides that a member of the old scheme shall "become *a member of* or be entitled to the corresponding benefit under a corresponding pension or superannuation scheme" under the new scheme "*on terms not less favourable*" than the old scheme (emphasis added). Therefore, in interpreting s. 6(2) of the Act of 1990, it is also important to focus on the concept of membership of the schemes and not merely on the phrase "benefit under a pension or a superannuation scheme." This is because of the disjunctive provisions in the sub-section illustrated by the use of the word "or" occurring after "member of" and before "be entitled to the corresponding benefit".

29. Therefore, by considering the plaintiff as a member of the old scheme who was entitled to become a member of the new scheme "on terms not less favourable" than the old scheme, the issue that the Court has to decide in this motion appears in much more stark relief. The issue is whether the plaintiff is a member of this new scheme on terms less favourable than the old scheme.

30. Framing the issue in this way raises the obvious question as to what is meant by "terms not less favourable". The plaintiff's approach is that this is a concept that must be understood by reference to reality: that is to say that approval by HMRC was a tangible "benefit" (not in the strict sense set out in s. 6(7)) he enjoyed under the old scheme. In other words, this was a practical advantage (or benefit) enjoyed by members of the old scheme, and the plaintiff was entitled to the same advantage under the new scheme. The defendants focused on the lack of contractual inclusion of such a term or benefit.

31. The question raises an issue of statutory interpretation. In *O'Brien v Revenue Commissioners*, it was held that such a determination was within the inherent jurisdiction of the court, exercisable on a motion, to dismiss on grounds that the proceedings are bound to fail. While that is a correct statement of the law, it must be read in the context of the *dicta* by Clarke J. (as he then was) in *Keoghane v Hynes*, that the jurisdiction is only to be exercised in a clear case and is not to be confused with a form of summary disposal. I am satisfied therefore that, where a plaintiff's case depends on a particular statutory interpretation, it is only where a contrary interpretation of the statute is so clear that no other credible interpretation can be advanced, that a plaintiff's case can be truly said to be bound to fail.

32. The Act of 1990 addressed matters which were connected with the public floatation of the second defendant. Included in that Act were provisions to safeguard the rights of employees. According to s. 6(1):

> "Every person who immediately before the transfer date was an employee of the Original Company shall, on the said date, become an employee of the New Company with the same rights and subject to the same obligations and incidents in the New Company as he was subject to or enjoyed in the Original Company."

When s.6(2) is read in the context of s. 6(1), it is possible that "terms" in the former can be understood as including all "rights" referred to in the former. The use of the word "rights" may possibly extend the use of the word "terms" beyond what may simply be understood as warranties or conditions in a contract. It, at the very least, appears arguable that the intention in the Act was that an employee of the Original Company would become an employee of the New Company without loss of entitlements or advantages that he or she held by virtue of their original employment.

33. In those circumstances, the statutory interpretation of "terms not less favourable" does not give rise to a clear-cut answer that would enable this Court to determine that his proceedings are bound to fail. This is not a comment on the strength of the plaintiff's case, that is not the purpose of this Court's adjudication on these motions. In circumstances where there is no unarguably singularly correct interpretation, I cannot give any definitive interpretation of s. 6(2) giving the scope of my jurisdiction on this motion and I do not do so. In the words of the plaintiff's counsel, the defendants have not cleared the high hurdle that is required before the High Court can dismiss the plaintiff's case.

34. It is acknowledged that the defendants' submissions were directed towards establishing that it was only contractual terms or benefits that were at issue. That submission does not take into account that the phrase "terms not less favourable" has to be considered in its statutory context. In my view, even though the word "benefits" had a specific statutory definition, this did not deprive the Court of the obligation to interpret the phrase "terms not less favourable" within its statutory context.

35. As to the argument as to whether in the present case approval by HMRC was a term under the new scheme, the Court notes that it is not uncommon, however, that terms not in written form in a contract may nevertheless form part of the contract, whether by way of terms set by law, by fact, by statute, or by custom. These are terms which are said to be implicitly part of the contract by virtue of pre-existing legal or factual elements arising out of the purpose of the contract in question. Certain terms of employment will be implied into the contract, and together with the express terms set out in the contract, form the contract of employment (see *Fitzgerald v South Eastern Health Board* [2002] 2 IR 674).

36. The second defendant in particular has argued that an implied term in a contract must be necessary. It seems to me that such an argument only applies when dealing with a contractual term implied by law. On the basis of the construction of s. 6(2) having regard to the provisions of s. 6(1), it is not clear cut that it cannot be implied into the contract that approval by HMRC will also be forthcoming (or at least applied for). I do not have to address the issue of whether the term can be implied into the new scheme due to the facts and circumstances, including the conduct of the parties.

37. A credible argument therefore exists that the word "terms" means all those entitlements which flowed as a result of membership of the old scheme, regardless of whether those had been set out expressly in the old scheme or not. Such an entitlement is arguably one which included a specific advantage that members of the old scheme had in any potential dealings that they might have with UK bankruptcy law. In circumstances where there is at the very least a credible argument that the lack of approval status by HMRC is a term less favourable, the plaintiff's case cannot be said to be bound to fail due to the interpretation of the Act of 1990 and the documentation setting up the old and new schemes.

Statute of Limitations

38. The plaintiff's claims against both defendants are framed in contract and tort. The relevant limitation periods are as follows:

> (i) Section 11(1)(a) of the Statute of Limitations (amendment) Act, 1957 ("the Act of 1957") lays down a limitation period of six years for the bringing of any action, *inter alia*, "founded on simple contract".
>
> (ii) Section 11(2) (a) of the Act of 1957, as amended by s. 3(2) of the Statute of Limitations (Amendment) Act, 1991 provides:
>
> > " (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."

There are exceptions to this six year limitation period for torts resulting in personal injury and for defective products liability. Those exceptions are irrelevant to these proceedings.

39. The defendants refer to the period of more than six years that has elapsed since 6th November, 1990, which was the date of authorisation of the transfer of members from the old scheme to the new scheme by the High Court. The defendants submit that this is the relevant date of accrual for both the claim in contract and the claim in tort and thus, they submit, the plaintiff's case is statute barred.

40. As the issue for the Court is whether the plaintiff's case is bound to fail, it follows that the Court can only dismiss the case where the date on which the cause of action accrued is indisputably clearly in excess of six years prior to the issue of proceedings. The Court must determine that on the uncontested facts as pleaded or agreed between the parties.

Contract

41. In his written submissions, the plaintiff addressed the defendants' arguments on the Statute of Limitations by reference to the decision of Irvine J. in *Darby v. Shanley Practising as Oliver Shanley & Company* [2009] IEHC 459. That case addressed the limitation period in an action in a tortious action for contingent loss. The plaintiff also relied upon the Supreme Court decision in *Gallagher v. ACC Bank Plc.* [2012] IESC 35 but distinguished that case on the facts. The *Gallagher* decision only concerned the issue of a claim in tort law. Indeed, in *Gallagher* a consent order had been made that the plaintiff's claim for breach of contract was statute barred.

42. In the present case, the pleadings make clear that the breach of contract is alleged to have occurred by virtue of the failure to ensure that the "benefit" of having the old scheme approved by HRMC was not transferred as a "benefit" to the new scheme. In those circumstances, where the date of such a breach of contract is more than six years prior to the date of the issue of proceedings, the claim under contract is statute barred.

Tort

43. In support of the defendants' submission that the case in tort was bound to fail as it was statute barred, counsel highlighted that the claim was one for economic loss. Counsel submitted that the proximity required to create the legal nexus between the plaintiff and the defendant is clearly and expressly pleaded in contract. In those circumstances, the defendants submitted that the six year limitation period runs from 6th November, 1990 because that was the date on which the plaintiff rests his case that the new scheme did not contain the terms or benefits equivalent to the old scheme.

44. The defendants also relied upon the case of *Gallagher v ACC Bank Plc*. In that case, the leading judgment of the Supreme Court was delivered by Fennelly J. Although O'Donnell J. agreed in principle with the decision of Fennelly J., he disagreed with him as to whether disparity between the statute of limitations in cases grounded under different legal entitlements was something that should be avoided as a matter of policy.

45. Insofar as the defendants submit that a disparity of approximately 28 years between a case founded on contract and a case founded on tort could not be the law insofar as the statute of limitations is concerned, this Court must reject such a proposition. Fennelly J., with whom the other judges of the Supreme Court concurred, rejected the proposition that the policy of the law should be advance rather than to retard the accrual of a case of action. He also did not accept that the courts should adopt a general policy of interpreting an Act of the Oireachtas so as to minimise rather than to expand the disparity between the running of time in cases of contract rather than tort. If there is to be a policy in that regard it must be brought in by Act of the Oireachtas.

46. Fennelly J., having reviewed in detail the Irish and English case law on the date of accrual in cases of financial loss, stated as follows:

> "This brings us back to the basic question of when the cause of action accrues in cases of financial loss where the cause of action is in tort. It does not accrue merely when the wrong is committed. Actual damage is necessary. The English cases demonstrate and the judges have repeatedly said that cases of financial loss present particular difficulties."

47. Fennelly J. went on to hold "[t]he 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 capably of easy application in every case".

48. Fennelly J. referred to the case of *Darby v. Shanley* [2010] 1 WLR 1662. In the context in which he made the reference, I consider that he did so approvingly. Darby v Shanley concerned a claim against solicitors for negligence in crafting a will. Irvine J. held that time did not begin to run until the disappointed party had compromised later proceedings; only then could it be said that the plaintiff "had sustained a loss arising from the negligence alleged against the defendants".

49. Fennelly J. expressly stated that he did not accept that mere possibility of loss was enough for the cause of action to accrue. He went on to observe that the possible situations would vary infinitely. Fennelly J. instanced the situation where, if a plaintiff sues early he may be unable to quantify his loss, thereby permitting a defendant to point to imponderables and uncertainties and to 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. Fennelly J. however also pointed to situations where even if there is uncertainty as to the actual damage that has been sustained, nonetheless, a cause of action will have accrued. He instanced the situation of a personal injury where it may be difficult to quantify the loss at an early stage, but nonetheless the plaintiff may have suffered actual loss at the time the act was done.

50. The defendants in the present proceedings submitted that this is a "no transaction" type of case and that it must come within the same period of limitation as a contract case. A similar argument was made in *Gallagher*, although it appears that the analogy of these facts to the facts in *Gallagher* is overstretched. In a "no transaction" case, the argument is that the plaintiff would not have entered into the transactions if correct representations were made. In the present case, the plaintiff did not enter into any transaction at all, as the transfer was carried out by virtue of the statutory provisions to deal with the floatation of the second defendant as a public company. Moreover, Fennelly J. did not see how the distinction being made between transaction or no transaction cases that had been made in some of the English cases "as providing a basis for a rule." Instead, he returned to the language of Finlay C.J. in *Hegarty v. O'Loughran* [1990] IR 148. It was in that context that he held that the cause of action accrues in the case of financial loss when the plaintiff has suffered actual damage.

51. The defendants in the present case also relied upon the finding in *Gallagher* that the claim was statute barred. In that case however, Fennelly J. held that it was "inescapable that the plaintiff's claim *as pleaded* is that he suffered damage by the very fact of entering the transaction and purchasing the Bond. The cause of action then accrued. That was also the date when he entered into a contractual relationship with the Bank" (emphasis added).

52. On a number of occasions in the course of his judgment, Fennelly J. stated that the case was decided on the facts as pleaded facts in that case. In the context of "its own particular pleaded facts", he concluded that the case was a clear one. In the present case, the facts as pleaded are different to those in *Gallagher*. The present plaintiff did not enter into any specific transaction with the defendants; the transfer of his pension entitlements and benefits from the old scheme to the new scheme was carried out in accordance with an Act of the Oireachtas. Furthermore, in his statement of claim, the plaintiff has expressly pleaded that as a result of court orders in the UK, he is "now deprived of the benefits to which he was entitled under the new scheme".

53. Therefore, in light of the case that he has pleaded, I must conclude that the plaintiff has at least made an arguable case that his loss only occurred pursuant to the orders of the UK courts starting from July, 2013 onwards. In the foregoing circumstances, it is therefore apparent that the plaintiff's case is not bound to fail because of the application of the statute of limitations.

The settlement agreement of 4th May, 2011

54. The second defendant also submitted that, by virtue of the terms of a settlement agreement entered between the plaintiff and the second defendant on 4th May, 2011, the plaintiff was precluded and estopped from pursing his cause of action against the second defendant in these proceedings for alleged breach of contract. The second defendant submitted that under the agreement, the plaintiff compromised proceedings on terms which were in settlement of all claims relating to his contract of employment.

55. The plaintiff's response to that is bound up in his contention that his cause of action only accrued in 2013. The plaintiff maintains that the settlement agreement could not possibly have included a cause of action that had not yet accrued. In my view, bearing in mind the high hurdle that the second defendant has to meet, it is at least arguable that without an express indication in the settlement agreement that even future causes of action that might accrue fell within it, the settlement agreement does not cover

this claim relating to his employment.

The plaintiff's cause of action in negligence
56. Under this heading, the second defendant claims that the duty of care contended for by the plaintiff is not only novel but untenable. The plaintiff claims that the High Court order of 6th November, 1990 amounts to an insurmountable obstacle facing the plaintiff. The second defendant submits that the High Court on that date made an order that the new scheme was in effect providing the same benefits as the old scheme. In those circumstances, it was submitted that this Court could not act as an appellate court from an earlier decision of the High Court.

57. It is a curious feature of the case that this Court was not provided with a copy of the High Court Order dated 6th November, 1990 The order is referred to in other documentation such as the deed of variation of the new scheme. It is uncontested however, that the High Court sanctioned the scheme pursuant to the provisions of s. 13(2) of the Assurance Companies Act, 1909 ("the Act of 1909"). One of the claims that the plaintiff makes is that the defendants acted in breach of the terms of the order made on 6th November, 1990 and also acted in breach of the deed transferring the members, liabilities and assets from the old scheme to the new scheme. In circumstances where the claim is referable, at least in part, to a failure to comply with that order, as well as a failure to comply with the provisions of s. 6 of the Act of 1990, it cannot be said that this is a case in which the High Court is being asked to overturn a previous order of the High Court.

58. The second point made by the second defendant under this heading is that the plaintiff's claim is untenable because the loss of which the plaintiff complains, being in the nature of pure economic loss, is one which has resulted solely from the conduct and/or inactions of the plaintiff since November, 2013. It was in or about that period when the plaintiff was notified for the first time that it was open to him under the provisions of the Welfare Reform and Pensions Act, 1999 (UK) to apply to the UK Court to have his pension excluded from the assets comprising his estate bankruptcy. It appears from the judgment of UK District Judge Obodai, at para. 46 thereof, that the trustee in bankruptcy had sent a letter to the plaintiff which read in part as follows:

> "as this pension is not EU approved it is not excluded from the bankruptcy invests in me in its entirety. However, I can confirm that I am willing to explore the possibility of you retaining some of the benefits of this pension to enable you to reach your reasonable domestic needs."

59. A further letter from the trustee in bankruptcy also stated that he must enter into a qualifying agreement in relation to the pension or, alternatively, the trustee in bankruptcy can realise the entire pension for the benefit of the bankruptcy estate.

60. In my view, those letters reveal that the trustee in bankruptcy was only informing the plaintiff of an entitlement to have part of the pension reduced. In so far as it is being asserted that the plaintiff's case was bound to fail as he caused the entirety of his own loss, it cannot be said that his case is bound to fail as the letters contradict that. Moreover, I am not satisfied that a claim of a failure to mitigate loss can ever lead to a determination that a case is bound to fail. The extent of failure to mitigate loss could only be calculated at the end of a hearing. For those reasons I reject the defendant's contention that the plaintiff's case is bound to fail.

61. The defendants also relied upon what they said was the claim for an extravagant duty of care as pleaded by the defendant. The first defendant submitted that it was impossible to imagine how the first defendant could ever properly carry out its functions as trustee if it was required to anticipate each and every jurisdiction in which a member may find themselves and each and every jurisdiction in which they may choose to administer their assets and bankruptcy, and then to incur the expense of ensuring that the scheme is registered or recognised in such a manner so as to ensure that it was excluded from bankruptcy in those jurisdictions. In my view, that is not consistent with the claim actually made in these proceedings; the claim made in these proceedings relates entirely to an equivalence of terms to which the plaintiff claims an entitlement. It is not, and was not, a question of the trustees ensuring that there was approval in every jurisdiction, rather it is a claim that the defendants should have ensured that there was approval in the UK for the new scheme where it is uncontested there was such approval under the old scheme.

62. In relation to the second defendant, it is submitted that it is such a wide and novel jurisdiction as to be extravagant. In my view, that is an argument suited to the trial of the action rather than to an argument that this case is bound to fail. Merely being novel or indeed being a case where a broad duty of care is being contended cannot of itself be identified as a claim which is bound to fail. If it is clear that there can be no duty of care in the circumstances as pleaded, then the Court must dismiss the claim. Such clarity is absent in the present case. In those circumstances, I reject the submission that the case is bound to fail as being a claim for damages based upon a duty of care which is too extravagant.

Order 19, rule 28
63. The first defendant relied upon O. 19 r. 28 which provides as follows:

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

64. Counsel for the first defendant submitted that her application focussed on the statement of claim, in which she submitted there was no pleaded legal wrong related to her client. In the absence of a pleaded legal wrong, she submitted there was no case against her client.

65. Counsel submitted that para. 4 of the statement of claim was particularly important as it referred to the contract of employment which was the legal nexus between the plaintiff and the defendants in these proceedings. She submitted that there was no duty of care set out in the statement of claim, no representation or misrepresentation set out, and no inducement set out. The nexus between the plaintiff and the defendants was presented in the statement of claim as the contract, and this was a contract to which the first defendant was not, and had never been, party. She submitted that it was pleaded that the second defendant would not reduce the plaintiff's entitlement and benefits under the old scheme.

66. In counsel's submission, the following paragraphs in the statement of claim simply set out a narrative of what had occurred. She acknowledges the plea in para. 7 that it was the defendants who were obliged to ensure that any benefit under the old scheme would also be enjoyed by that member under the new scheme but submits that this did not establish a cause of action.

67. Counsel submitted that para. 9 of the statement of claim was key to her point; this sets out that it is the second defendant's breach of duty and contract that is at issue in the pleadings. In her submission, the fact that this paragraph is silent about the first defendant makes it difficult to see how the plaintiff can possibly maintain a claim against them.

68. Counsel submitted that it was not enough to claim the reliefs against the party without identifying a legal wrong against that party. It was counsel's submission that there had to be a legal obligation and a legal wrong set out in the statement of claim and that was missing in the present one. In counsel's submission, the reference at para. 16 to the "foregoing" was insufficient because the "foregoing" did not identify a single legal wrong against the first defendant. Counsel submitted that the statement of claim should have set out that the first defendant ought to have done something and failed to do so. The case had clearly been pleaded primarily in contract and the contract was with the second defendant and not her client.

69. Counsel referred to the authority of *Croke v. Waterford Crystal* [2005] 2 I.R. 383. This case concerned an application to amend that plaintiff's statement of claim to include an express plea of fraud against both the first defendant, the employer and the second defendant who were the pension trustees. The Supreme Court differentiated the positions of the first and second defendants on the application. The Supreme Court held that while one could intimate a plea of something in the nature of fraud or deception against the first defendant, there was simply no indication that anything of that kind was to be alleged against the second defendant. It would therefore be wholly inappropriate to introduce a plea of fraud when none was intimated in the pleading as it first stood.

70. Counsel referred to the *dicta* of Geoghegan J. as follows:

> "It is trite law that a cause of action merely mentioned by name in the prayer does not and cannot in any sense constitute the pleading of such cause of action. It is, therefore, necessary to look at the main body of the statement of claim. It is important that I should do so separately in relation to each defendant."

71. In counsel's submission, it was therefore not enough to say there was an obligation and the obligation was breached, a plaintiff had to identify with specificity what the defendant had done wrong and what the defendant was obliged to do. The plaintiff's case must be set out at the beginning of the pleadings and it was not appropriate to force a defendant to draw out the claim against them by issuing a notice for particulars.

72. At para. 21 Geoghegan J. stated:

> "It would seem to me that from the beginning the statement of claim was alleging deliberate misbehaviour on the part of the first defendant but was merely alleging breaches of duty on the part of the second defendant. In both the plenary summons and the prayer in the statement of claim however the claims for deceit, fraud and/or fraudulent breach of trust and fraudulent misrepresentation are made against both defendants. As I have already observed that is irrelevant. No such case has actually been pleaded against the second defendant in the statement of claim."

73. Counsel submitted that while the present case is not identical on the facts, it had a very similar dynamic to the fact in *Croke v Waterford Crystal*. The cause of action must be set up in the body of the document and that has not been done in this case. In her submission, it is the nature of the plaintiff's case that logically does not fit the claim against her client as the plaintiff's claim is primarily based on contract which said contract was with the second defendant.

74. Counsel for the plaintiff submitted that the first named defendant was a scheme that administered the pension and therefore had an obligation to his client pursuant to s. 6 of the Act of 1990. Counsel relied on the statement of claim.

Decision

75. There is an important distinction between the statement of claim in the present proceedings and the deficiencies in the statement of claim in the *Croke v Waterford Crystal case.* In *Croke v Waterford Crystal*, the only implicit mention of the claim of fraud against the second defendant was contained in the prayer. This indicates that it was only at that point in the statement of claim where the prayer "and the plaintiff claims …" was made that the implied case of fraud was pleaded as against that second defendant for the first time. In the present case, although accepting that the drafting of the statement of claim may be more cryptic than would be ideal, the claims against this defendant are actually set out in the body of the statement of claim.

76. I so conclude because of a number of pleas made in the statement of claim. The statement of claim pleads that the members in the old scheme were transferred to the new scheme i.e. the first defendant. It is also clear that para. 7 makes the express plea that the transfer was in terms which obliged *the defendants* to ensure that any benefit to which a member was entitled under the old scheme would also be enjoyed by that member under the new scheme (emphasis added). The reference to "the defendants" refers to both defendants.

77. Then at para. 16, it is pleaded that *as a result of the foregoing*, both the first and second defendants had acted negligently and in breach of duty and statutory duty (emphasis added). The reference to the foregoing includes the plea that there was an obligation on the first defendant to ensure that the plaintiffs benefits under the old scheme would be enjoyed under the new scheme, and that approval by HMRC had been given to the old scheme. The plaintiff has pleaded that there is no HMRC approval to the new scheme and he sets out how the court orders in the UK mean that he is now deprived of the benefits to which he was entitled under the old scheme.

78. Paragraph 16 is therefore a plea in the body of the statement of claim which is not simply a prayer. It is a direct plea referable to a claim that the first defendant had an obligation to ensure that the plaintiff would enjoy the same benefits under the new scheme as the old scheme. In circumstances where the plaintiff claims that he suffered loss as a result of not having the new scheme approved by HMRC, the plaintiff is indicating that the failure (by both defendants) to act on that obligation was negligent and in breach of duty and a breach of statutory duty.

79. This is the legal wrong that the plaintiff claims as against the first and the second defendant. It is entirely different from the situation in *Croke V. Waterford Crystal* where no factual basis had been given to support the allegation of fraud. In this case, the factual allegation has been made, i.e. that the first defendant, as well as the second defendant, was obliged to ensure that the benefits the plaintiff was entitled to under the old scheme would also be enjoyed by him under the new scheme. It is against that background that the claim as against the second named defendant must be viewed.

80. In the circumstances, and despite para. 4 being pleaded in the manner in which it was, it is nonetheless the case that the statement of claim, when considered as a whole, does reveal a cause of action as against the first named defendant. Therefore, I must reject the first named defendant's claim under this heading.

Pleading point by the second defendant

81. The second defendant pointed to the difference in the claim as set out in the affidavit of the plaintiff at a time when he was representing himself. This had principally made claims as against the trustees for the trustees' failure to ensure that the new scheme

was approved by HMRC in the same way as the old scheme had been. In my view, in light of the *ex tempore* judgment I have already given, it was clear that there were general claims being made as against the first and second defendant which required to be amplified more fully in the statement of claim. The plaintiff has done so in the statement of claim and it is the statement of claim which represents the claim against the second defendant. I am of the view that the statement of claim sets out in a more specific way the general claims that the plaintiff made against the first defendants in his plenary summons.

Conclusion
82. For the reasons set out above, I refuse the relief sought by each of the defendants in their notices of motion.