[2017] IEHC 254

THE HIGH COURT

COMMERCIAL

[2014 No. 6901 P]

BETWEEN

GERALDINE CANTRELL

PLAINTIFF

AND

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

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2014 No. 6899 P]

BETWEEN

LAURENCE McMULLIN

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2014 No. 6898 P]

BETWEEN

BERNADETTE GOODWIN

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2014 No. 6913 P]

BETWEEN

MARY HONOHAN

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2014 No. 6812 P

BETWEEN

PETER TIERNEY

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2014 No. 6979 P

BETWEEN

BRIAN SPIERIN

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2015 No. 4218 P

BETWEEN

BRIAN O'REILLY

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2014 No. 7166 P

BETWEEN

EDWARD SHEEHAN AND EVELYN SHEEHAN

PLAINTIFFS

AND

ALLIED IRISH BANKS PLC AND OTHERS

DEFENDANTS

Judgment of Mr. Justice Robert Haughton delivered on the 28th day of April, 2017

Introduction

1.1 This judgment relates to preliminary issues as to whether the plaintiffs' claims are barred by the Statute of Limitations.

1.2 The claims made by the various plaintiffs in these related proceedings arise from investments in a number of property investment schemes in respect of which Allied Irish Banks Plc ("AIB") acted as promoter and placing agent. The property investment schemes were undertaken by the Second Belfry Properties (U.K.) Plc ("Belfry 2"), the Third Belfry Properties (U.K.) Plc ("Belfry 3"), the Fourth Belfry Properties (U.K.) Plc ("Belfry 4"), the Fifth Belfry Properties (U.K.) Plc ("Belfry 5"), and the Sixth Belfry Properties (U.K.) Plc ("Belfry 6"). In each case the plaintiffs' monies, together with monies of other investors, were invested through trustee/nominee companies. Thus investments in Belfry 2 by the first named plaintiff Mrs. Geraldine Cantrell were made through Tullamona Ltd as trustee/nominee, and that company held shares in Belfry 2 as her nominee. The investments relating to Belfry 3 were made through Selenga Ltd which held the shares as nominee for the investors. Investments in Belfry 4 were made through Leyally Ltd as nominee. In relation to Belfry 5 the investments were made through Monsal Ltd as nominee and in relation to Belfry 6 the investment of Mr. O'Reilly was made through Akshar Ltd as nominee.

1.3 The plaintiffs claim that, based upon representations and marketing material/prospectuses provided to them by the defendants, they invested sums ranging from €75,000 to €440,000 which were resourced variously from savings, pension funds or loans secured by mortgages.

1.4. The plaintiffs seek inter alia damages for breach of contract; damages for negligence and breach of duty including breach of statutory duty; damages for breach of fiduciary duty; damages for negligent misstatement, damages for misrepresentations; accounts and enquiries; interest pursuant to the Courts Act, 1981 and costs.

1.5 These eight sets of proceedings were chosen from a large number of related cases (in excess of 300) and are said to act as "pathway cases" for proceedings yet to come before the courts. They are not test cases in the formal sense that findings or conclusions of this court will automatically apply to proceedings in other cases, but it would seem that they will have precedent value and in effect will determine similar issues arising in cases with similar facts. The court was informed that they were selected to cover all the Belfry funds 2-6 inclusive (Belfry 1 did not give rise to proceedings), and to include plaintiffs who invested savings or pension monies, plaintiffs who borrowed to invest, and plaintiffs who were employees of AIB.

1.6 While there is one set of legal representation for the eight plaintiffs, there is separate legal representation for:-

(1) AIB.

(2) The defendants Sean Henneberry, Sean Rockett, and John Roger Wilkinson. Mr. Henneberry is a defendant in seven of the eight cases, but is not named as a defendant in Mr. O'Reilly's case.

(3) Mr. Kilduff.

(4) Mr. Ledgwidge.

These personal defendants, collectively called "the Director Defendants", were at all material times directors of Belfry 2 – Belfry 6 inclusive, save that (1) Mr. Hennebry is not now and was never a director of Belfry 6, and (2) Mr. Wilkinson only became a director of Belfry 2 and Belfry 3 after the issuance of the relevant Prospectuses. The proceedings against the named defendants "BDO (a firm)" and "Ann Blackmore" were on consent struck out by orders of the court made on 9th November, 2015 and 14th December, 2015 respectively.

1.7 In late 2015 applications were made by the various defendants seeking orders for the trial of preliminary issues concerning the applicability of the Statute of Limitations, and as to whether the plaintiffs have any entitlement to maintain any claim for damages or other relief by reference to loss suffered by the relevant Belfry companies having regard to the rule in "*Foss v. Harbottle*". By order dated 1st February, 2016, McGovern J. directed "the trial of a preliminary issue be on the Statute of Limitations only" and gave directions as to the filing of affidavits and written submissions.

1. Preliminary trial – Pleadings and Affidavit evidence
2.1 The preliminary issues in all eight cases were heard together before this court over seven days commencing on 26th April 2016 and ending on 27th May 2016. No oral evidence was heard. The trial of the issues was based primarily on the pleadings. However grounding affidavits on behalf of the defendants who were represented were before the court, and in addition there were replying affidavits from Mr. Peter Tierney sworn on 22nd February 2016, and Mr. Tom Casey, solicitor, also sworn on 22nd February 2016. Mr. Casey is solicitor for the plaintiffs and made his affidavit on behalf of the plaintiffs in all eight proceedings. While Mr. Tierney's affidavit contains matters that are specific to his investment in Belfry 3 it has some application to other plaintiffs namely Mrs. Goodwin and Ms. Honohan, who also invested in Belfry 3.

2.2 The court also considered supplemental/replying affidavits filed on behalf of the defendants, and in particular an affidavit sworn by Mr. Conal Regan, AIB Manager, on 14th March, 2016, wherein inter alia he exhibits copies of Property Updates and audited financial statements of each Belfry company from inception up to 2015 and all correspondence between the relevant Belfry company and the relevant plaintiff.

Mr. Regan's affidavit was sworn in response to the affidavits of Mr. Tierney and Mr. Casey, both of which he assumes are sworn "by reference to all the litigation and for each and every plaintiff". The court treats Mr. Regan's affidavit and exhibits as applying to all cases before the court.

2.3 The defences delivered disclose that many facts are disputed. The court therefore approaches the affidavit evidence with some caution. In the unanimous judgment of the Supreme Court in *McCabe v. Ireland* [1999] 4 I.R. 151, at p. 157, Lynch J. stated:-

> "A preliminary issue of law obviously cannot be tried in vacuo: it must be tried in the context of established or agreed facts. The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue. The facts must be agreed or the moving party must accept, for the purposes of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party."

2.4 Prima facie therefore the defendants must be taken to accept, for the purposes of the trial of the preliminary issue, the facts as asserted by the plaintiffs in their statements of claim and in particulars. The court must proceed on the assumption that the facts as pleaded will be proven, and take the plaintiffs' cases at their height.

2.5 This general position is subject to the following: there was a measure of agreement between the parties in relation to the documents exhibited for the purposes of the preliminary issues. These consist of:-

> (1) Prospectuses and application forms in relation to each of the Belfry investment funds.
>
> (2) Property Updates described as "Property Updates" prepared in respect of each Belfry fund as at 31st March in each relevant year, and containing details of the property portfolio, purchases and sales, and valuations. These Property Updates were sent to each investor and plaintiff with accounts for the relevant Belfry fund each year.
>
> (3) The "Directors' Report and Consolidated Financial Statements" in respect of each Belfry company to year end 31st March in each relevant year, which Reports and Accounts were sent to each plaintiff after approval by the board of each relevant company.
>
> (4) The correspondence sent by each Belfry company to each investor, whether enclosing Property Updates or company accounts or otherwise, post the initial investment.

2.6 In general therefore (and unless for good reason the contrary is stated) the court approaches these documents and their contents as being established facts for the purposes of determining the preliminary issue, with the following reservations. Insofar as the plaintiffs in their pleadings or on affidavit denied receipt of a particular document, or sought to contradict the contents of these documents, or disputed their meaning or the inferences that might be drawn from them, the court takes the case made on behalf of the plaintiff(s)' at its height. Conversely where the defendants in their pleadings or on affidavit seek to contradict the pleas set out in the plaintiffs' Statements of Claim and Particulars, and Replies, or the Plaintiffs' affidavit evidence, the court disregards those pleas and averments.

2. The limitations of trial of a preliminary issue

3.1 It has frequently been said that the purpose of a preliminary trial on an issue of law is to save time and costs, and that convenience is also a consideration "… in the light of what appears fair, proper and just in the circumstances" – see O' Higgins C.J. in *Tara Exploration and Development Ltd. v. Minister for Industry and Commerce* [1975] I.R. 242 at p. 256. However the process of a preliminary trial has limitations, and in delivering the unanimous judgment of the Supreme Court in *Campion and Others v. South Tipperary County Council* [2015] IESC 79, McKechnie J. urged the need for caution:-

> "30. The caution which I have urged as being appropriate, when deciding whether or not to adopt the preliminary issue process … stems from litigation experience which shows that it may be very difficult in some cases to predict in advance

of the hearing what facts might be critical in determining the issues which they potentially give rise to. The same problem may even exist as to what the established facts mean, either in a primary or secondary sense. Whilst the various procedural tools of pre-trial investigation are designed to eliminate differences in this regard and insofar as possible to eliminate them, nevertheless the evidence of witnesses, even that as anticipated, frequently gives rise to some variations even in the most thoroughly prepared of cases.

31. From another perspective, sometimes the reliefs claimed and the issues of law involved, when discussed at trial, may give rise to the necessity to further explore a factual context which previously might not have been considered as relevant. Hence, the necessity in order to avoid these difficulties, for fairly well established certainty on the factual situation before a point of law under the preliminary process can be safely dealt with. The most frequent example given of the type of issue which confidentially can be disposed of in this way is one arising under the Statue of Limitations …. Even then however such may be problematic, if for example, some controversy exists with regard to a person's date of knowledge. Whilst undoubtedly there are certain issues which appropriately can be disposed of in this way, nonetheless there will be many others which cannot be. Therefore careful consideration must be given to each such issue, as raised."

3.2 Further guidance on the trial of preliminary issues was given by the Supreme Court in *L.M. v The Commissioner of An Garda Síochána and others* [2015] IESC 81 in which the court allowed appeals from two decisions of the High Court dismissing claims after trial of a preliminary issue that the defendants did not owe a duty of care to the plaintiffs, and directed that the cases should proceed to full hearing in the High Court. O'Donnell J, delivering the judgment of the court, stated:

"32. It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried. A point should also raise a clear issue to which it is possible to give a clear answer. The more qualified and contingent the possible answers, the less likely that the court will be able to provide a clear and decisive disposition of the case and a clarification of the law…

preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the court to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case. Indeed, counsel for the defendants in these cases conceded that this could be done in an appropriate case, but I do not wish to rest this decision, particularly in the context of this case, on any such concession. In my view, a court retains power to refuse to determine a preliminary issue if, after careful analysis, it becomes apparent that some aspect of the issue was heavily fact dependent, or that a possible outcome would be so contingent or qualified as to require almost a form of advisory opinion.

35. The possibility of taking such a course may be particularly appropriate in cases where the rationale of seeking the determination of a preliminary issue is to produce a precedent which may determine many other cases. It could be wrong, and possibly dangerous, to offer hypothetical views in the absence of the facts of other cases and, indeed, the parties to them. If, then, it is possible to conceive of circumstances in which after full argument a court might decide that it should not, or could not, determine the preliminary issue, then in my view, the court is entitled to consider at the outset of an application whether, on the materials advanced, it appears that the case is an appropriate one to determine for disposal as a preliminary issue. This is particularly so when the point raised is a major issue of law likely to affect many other cases. Normally these issues will be teased out in the course of an application to fix the trial of a preliminary issue, but where that is not done, (and perhaps even when an order has been made after full argument) the court trying the preliminary issue can conclude that it is not possible to dispose of the issue in a definitive way in advance of trial. …"

3.3 In their written and oral submissions Counsel for the plaintiffs urged that the court should not determine the preliminary issue(s) on the basis that all relevant facts were not agreed or apparent, the issues concerned mixed matters of fact and law, that the discovery process has not been undertaken, and that the matters raised could not fairly be determined in favour of either the plaintiffs or defendants at this point in the proceedings.

3.4 The court has borne these matters in mind, particularly in considering the factual basis for the legal arguments raised by the defendants, and the plaintiffs' responses, on each aspect arising on foot of the broad preliminary issue of whether the plaintiffs' claims are statute barred. As the decision in L.M. makes clear, it is open to this Court, if finding that the matters raised cannot fairly be determined in favour of the plaintiffs or the defendants at this point in the proceedings, to decline to determine the preliminary issue in whole or in part.

4. Relevant Pleas and Background "Facts"

4.1 It is therefore necessary at this point to consider the relevant "facts" as pleaded or as they appear from the documentation listed above which it is agreed that the court should treat as accepted fact for the purposes of determining the preliminary issues.

4.2 The Belfry companies were incorporated as follows:-

- Belfry 2 was incorporated on 3rd April, 2002 and invested in the UK commercial property market through its subsidiary Brabazon Property Investment Ltd. ("Brabazon").

- Belfry 3 was incorporated on 11th March, 2003 and invested in UK property through its subsidiary Darby Property Investment Ltd. ("Darby").

- Belfry 4 was incorporated on 15th March, 2004 and invested in UK property through its subsidiary Forthright Property Investments Ltd. ("Forthright").

- Belfry 5 was incorporated on 9th March, 2005 and invested in a UK property through its subsidiary Kuig Property Investment Ltd. ("Kuig").

- Belfry 6 was incorporated on 20th October, 2006 to invest in the UK property market using the services of Cheval Luxemburg S.a.r.l. ("Cheval Lux").

4.3 As to AIB's involvement in Belfry companies, the bank was responsible for the "sale" of the Belfry companys' investment products, which included acting as investment promoter, as placing agents, as "Corporate Advisor" and as "Investment Relations Manager". The funds were managed by the directors of the Belfry companies, these being some or all of the defendants Mr. Henneberry, Mr. Kilduff, Mr. Ledgwidge, Mr. Rockett, Mr. Wilkinson and Ms. Blackmore.

5 Mrs. Bernadette Goodwin – Plaintiff 1

5.1 The plaintiff pleads that she and her late husband Mr. Charles Goodwin had sold the family home in Mullingar and had funds on deposit in the region of €1.6 million as of June 2003 arising from the sale proceeds of the property. They were approached by Ms. Teresa Oakes, a Wealth Regional Manager of AIB, in or around July, 2003 in relation to them investing in UK commercial property. Ms. Oakes attended at their home on one occasion arising from the fact that Mr. Goodwin was terminally ill and unable to leave their home. They were provided with investment updates for Belfry Properties (UK) plc. and the 2nd Belfry Properties (UK) plc. launched in 2001 and 2002 respectively. Ms. Oakes advised that while these two funds were closed, AIB had just launched a third fund which was modelled on the previous two funds and was a suitable investment for personal, company and particularly pension fund investors. Mrs. Goodwin further pleads that they were told that AIB expected demand for the fund to be strong and that it was being sold on a first come first served basis.

5.2 The plaintiff and Mr. Goodwin were furnished by Ms. Oakes with a waiver for signing so that they would not be required to go through the then new Central Bank of Ireland regulations to carry out a "Know Your Customer" procedure process and in order that they could invest on execution only basis.

5.3 The plaintiff asserts that throughout discussions with AIB, particularly Ms. Oakes, she and Mr. Goodwin informed the bank that they wished to invest in a safe and secure investment to provide for the plaintiff in her advancing years and in circumstances where Mr. Goodwin was terminally ill. AIB informed them that they should invest in Belfry 3.

5.4 It is further pleaded in the statement of claim that it would have been apparent to Ms. Oakes that Mr. Goodwin and the plaintiff were not fit to make an investment decision at the time of their decision to invest in Belfry 3 given Mr. Goodwin's ill health and their then personal circumstances as a result.

5.5 Following conversations with Ms. Oakes, the plaintiff and Mr. Goodwin agreed to invest in Belfry 3 and signed the application form attached to the Prospectus for same in respect of a sum of money of £150,000.00 on or around 3rd July, 2013.

6 Mr. Laurence McMullin – Plaintiff 2

6.1 This plaintiff was a long standing customer of AIB and his statement of claim states that he conducted all of his banking services through AIB and received investment advice from the bank. Furthermore, the statement of claim pleads that he received a telephone call from an AIB Financial Planning Consultant, Ms. Margaret McGeehin requesting that he attend at the bank for the purpose of reviewing his pension funds of which Mr. McMullin had several small personal schemes.

6.2 The plaintiff subsequently attended the bank with Ms. McGeehin and his local AIB branch manager, Mr. Barry Naughton. The plaintiff pleads that he was told that his pension funds were doing "okay" but not as well as they could and that there was a means of ensuring an improvement in their performance. The plaintiff was then advised of the Belfry 5 fund and his statement of claim further pleads that he was advised to amalgamate his funds into this investment of which it is said both Ms. McGeehin and Mr. Naughton spoke highly and that previous Belfry funds were up by 50% and 60% and that the return on the investment could be up to 80%.

6.3 The statement of claim further pleads that the plaintiff was encouraged to make a quick decision because "there were only a few days left to sign up". The plaintiff also pleads that he asked Mr. Naughton for advice to which Mr. Naughton is said to have responded that if he had money he would invest. He further claims that Ms. McGeehin indicated that while there was a risk of a drop in the value of the investment, as it was property based, the investment could not fall below 10% - 15% and as an architect the plaintiff would understand this.

6.4 The statement of claim asserts that it was upon these recommendations that this plaintiff proceeded with the investment and signed the documentation presented to him at the meeting, including documentation to transfer his then existing Bank of Ireland life personal pension funds into a personal fund with Goodbody Stockbrokers through which the investment was made. The plaintiff pleads that the high risk nature of the said investment, and that he could lose his entire investment, were not communicated to or apparent to the plaintiff at the time.

6.5 It should be noted in passing that AIB denies that the fund was selected by AIB for the plaintiff. Rather it pleads that the plaintiff decided to invest having applied his own experience and knowledge as an architect and being involved in property development to the information provided and formed his own view as to the suitability of the investment. AIB further denied that the high risk nature of the investment was not communicated to him.

6.6 Unique to Mr. McMullin's case is his plea that he never received a Prospectus.

6.7 The plaintiff then invested €217,000.00 in Belfry 5 in July 2005.

7 Ms. Geraldine Cantrell – Plaintiff 3

7.1 This plaintiff had inherited a sum of money and was contacted by AIB with a view to soliciting her investment in the Belfry 2 investment. At all material times, the plaintiff claims she informed the Bank that she wished to invest in an investment to provide for her long term future. Later AIB further suggested she invest in Belfry 4 and Belfry 5.

7.2 In her statement of claim this plaintiff disputes that she was aware of the "high risk" nature of the investments at the time they were made. She pleads that during discussions with AIB's sales agents, in particular Mr. John Phillips (Belfry 2) and Mr. Dermot Duffy (Belfry 4 and Belfry 5), the details contained in the individual Prospectus were not brought to her attention. Instead the plaintiff claims the sales agents repeatedly emphasised the success of the previous Belfry funds to the extent that after the discussions the plaintiff was left with a clear message that any risks involved in investing in the funds were remote, that the funds were secure and that the funds would be managed conservatively.

7.3 This plaintiff signed each application form and invested €200,000.00 in Belfry 2 on or about 9th June, 2002, €160,000.00 in Belfry 4 on or around 10th August, 2004, and finally €80,000.00 in Belfry 5 on or around 24th June, 2005.

8 Mr. Peter Tierney – Plaintiff 4

8.1 This plaintiff became an employee of AIB in November 1970 in its branch network, and then moved in 1999 to AIB personal finance services division as a personal financial manager. In or around 2002 this division was disbanded and the plaintiff took up a role as a private banking manager, in which role the plaintiff was engaged in the sale of AIB's investment products, including the Belfry investment funds.

8.2 This plaintiff pleads in his statement of claim that he was aware of AIB's expectation that he meet particular sale targets and he was strongly encouraged to invest in the Belfry funds by AIB and in particular by the head of private banking, the defendant Mr. John Rockett. The plaintiff claims that senior ranking personnel, including Mr. Rockett, indicated that he would be better able to encourage clients to make an investment if he himself had invested in the fund. The plaintiff pleads that he was informed by senior members of staff that arrangements were put in place to sanction staff loans for the purpose of investing in Belfry funds and that these would be repaid in full upon the maturity of the investment.

8.3 This plaintiff pleads that the bank offered a special incentive to him as a member of staff to invest in the Belfry 3 fund by offering to waive the 2% commission ordinarily payable by investors in the Belfry funds, contrary to its own policy governing investments by staff members.

8.4 Mr. Tierney further pleads that the defendants failed to carry out any factual assessment or enquiry as to the suitability of the Belfry 3 funds as an investment for him and his spouse, prior to their signing of the application form. At no stage was this plaintiff invited or advised to enter into any discussions with his manager in the private banking division or with the staff business division of the bank as regards the suitability of this Belfry investment or the suitability of the plaintiff taking out a loan from AIB in order to fund the investment.

8.5 In or about 18th July, 2003 AIB offered this plaintiff an interest only "Staff House Loan" to the value of €75,000.00 to fund his investment in Belfry 3 repayable over 8 years secured by an equitable mortgage of the title deeds on the plaintiff's family home, jointly owned by him and his wife. The plaintiff accepted the loan and signed the application form attached to the Prospectus for the Belfry 3 fund on or around 10th July, 2003, and this borrowed money was used to invest in Belfry 3. The loan was interest only.

9 Ms. Mary Honohan – Plaintiff 5

9.1 This plaintiff pleads in her statement of claim that she was put in contact with a Mr. John Slattery, branch manager of AIB, Western Road, Cork, by a former colleague as she wished to invest savings for her pension. In or around the middle of 2003, she pleads that she was contacted by AIB with a view to her investing in Belfry 3. She asserts that from her discussion with Mr. Slattery she understood that any risks involved investing in Belfry 3 were remote and that the fund would be managed conservatively.

9.2 Following her conversations with Mr. Slattery this plaintiff pleads that she agreed to invest in Belfry 3 and signed the application form attached to the Prospectus in respect of a sum of Stg£75,000.00 on or around 15th July, 2003.

10 Mr. Brian Spierin – Plaintiff 6

10.1 Mr. Spierin pleads that he was a long-standing customer of AIB and that he was approached on numerous occasions by bank staff to invest in its Belfry investment product. He pleads that in July 2005 while attending AIB's then branch in Smithfield, Dublin 7, Mr. Spierin was again approached, this time by the assistant manager of that branch, to invest in Belfry 5 fund as it was about to close. The plaintiff was then taken into an office and persuaded to invest in the fund.

10.2 In his statement of claim Mr. Spierin pleads that the assistant manager informed the plaintiff that the previous Belfry funds were "very well performing investments with excellent returns and were an opportunity too good to miss". It is also asserted that he was not told at the time that the fund was in fact a "high risk" investment product – it is pleaded that this only came to light subsequently. From this discussion this plaintiff pleads that he understood that there was some level of risk, that the investment would go up or down but no prospect of potentially losing all of his investment.

10.3 Following the conversation with the assistant manager in the Smithfield branch of AIB the plaintiff agreed to invest €100,000.00 in Belfry 5 and signed the application form in the Prospectus in or around 27th July, 2005.

11 Mr. Edward and Mrs. Evelyn Sheehan –Plaintiffs 7 & 8

11.1 These plaintiffs plead in their statement of claim that they were first contacted in or around the summer of 2004 in relation to investing in Belfry 4. Contact was made initially by a Ms. Marian Harris by telephone, a branch manager of AIB, Fermoy. Mr. Sheehan was requested to attend a presentation on the Belfry 4 investment which he so attended.

11.2 These plaintiffs assert that during conversations with AIB, particularly discussions with Ms. Harris and Mr. Lar Fant, who also acted on AIB's behalf, AIB informed the plaintiffs that the previous Belfry funds had performed extremely well with excellent returns and an opportunity to earn a return on the rising property market in the UK. They plead that AIB advised them to invest in Belfry 4 although they were not, they say, informed of the "high risk" nature of the fund at the time. By Letter of Sanction dated 24th July, 2004, AIB offered the plaintiffs a low interest rate loan in the sum of €153,000.00 to fund their investment in Belfry 4, secured by way of charge on the plaintiffs' family home at Kilmargner, Fermoy, Co. Cork. The plaintiffs accepted the loan and invested €150,000.00 of the funds in Belfry 4, signing the application form attached to the Belfry 4 Prospectus on or around 24th September, 2004.

12 Mr. Brian O'Reilly – Plaintiff 9

12.1 This plaintiff pleads that he became employed by AIB in 1997 and worked for AIB International Financial Services Ltd. which was, until December 2011, a subsidiary of AIB. In or around 2006 he pleads that he was contacted by AIB private banking division, soliciting his investment in Belfry 6. Following discussion with members of AIB's private banking division, in particular Ms. Mary Cummins, the plaintiff agreed to invest in Belfry 6. He pleads in his statement of claim that he was advised that the investment would be suitable for him as a replacement for his Special Saving Incentive Account, which was cash capital protected, and which was at maturity around that time. This plaintiff further claims that he was informed that arrangements had been put in place to sanction staff loans for the purpose of investing in the Belfry funds and that these would be repaid in full upon maturity of the investment.

12.2 This plaintiff pleads in his statement of claim that AIB offered a special incentive to the plaintiff as a member of staff to invest in the Belfry 6 fund by offering to waive the 2% commission ordinarily payable by investors in the Belfry fund, contrary to it's own policy governing investment by staff members.

12.3 By way of a Letter of Sanction dated 12th December, 2006, AIB offered the plaintiff an interest only mortgage loan in the sum of €101,000.00 to fund his investment in Belfry 6. It was to be repayable over seven years and secured on property at 21 Sandy Lane, Ballymoney, Co. Wexford jointly owned by the plaintiff and his wife. Mr. O'Reilly accepted the loan.

12.4 AIB issued an Information Memorandum to the plaintiff on 24th October, 2006 with a closing date of 15th December, 2006. The plaintiff pleads that this memorandum incorrectly stated that it was not a prospectus for the purposes of the Investment Funds Companies and Miscellaneous Provisions Act, 2005 or the Prospectus Directive 2003/71/EC Regulations, due to "the minimum subscription demand".

12.5 The plaintiff further pleads that he informed AIB and particularly Ms. Cummins during their discussions regarding the investment that he considered himself to be a low risk and conservative investor. Furthermore, in advance of this low risk and conservative profile the plaintiff pleads that he specifically requested that his investment "fact find" should explicitly include reference to his expectation of a minimal return of 10%, a requirement which indicated his clear expectations of the capital underlining such a return should at all times be preserved. This plaintiff further pleads that despite these expressed instructions, AIB informed him that he should invest in Belfry 6. He signed an application form on or around 8th December, 2006 and invested a sum of €101,000 in Belfry 6.

13 Pleas/"Facts" Common to the Plaintiffs' Claims

13.1 Apart from Mr. McMullin, the plaintiffs' claims accept that each received a Prospectus. The Prospectuses for each fund, while not identical, followed a similar pattern, and as a result there are broadly similar pleadings in each statement of claim in relation to the representations/misrepresentations or omissions relied upon, the duties of care/fiduciary duties claimed to be owed by the various defendants, the negligence/breach of duty alleged and the losses claimed to have resulted. There is a particular overlap where plaintiffs invested in the same funds – three of the plaintiffs invested in Belfry 3 and Belfry 5, and two of them in Belfry 4.

13.2 Each Prospectus for the respective Belfry funds contained an application form which required any potential investor to make out a cheque for the sum to be invested, which sum included commission (save where this was not required to be paid) of 2% payable to AIB.

13.3 Each Prospectus named the directors of the relevant Belfry company, and stated that they "accept responsibility for the information contained in this document" and that:-

> "To the best of the knowledge of the Directors (who have taken all reasonable care to ensure that such is the case) the information contained in this document is in accordance with the facts and does not omit anything likely to affect the import of such information".

13.4 The Prospectuses further advise that the investment is structured as a medium to long term investment, and they engage in some evaluation of the risk level/risk factors. Thus in Belfry 2 clause 1.7 headed "Risk Factors" advised that "investment in shares and in property is speculative, as values can fall as well as rise", and advised would-be investors to read Part I, Section 10 setting out "Risk Factors". Section 10 reads in part:-

> "Risk Factors
>
> Investment in the commercial property market in the UK is speculative and involves a degree of financial and commercial risk. The future value of the Group is dependent, in particular, on the value of the properties in which it will invest and the level of rents the properties will command during the expected term of the investment and the quality of the lessees.
>
> If you are in any doubt about the contents of this document you should consult your stockbroker, bank manager, accountant, solicitor or other independent professional advisor …"
>
> In setting out "the principal areas of risk for Investors" various matters are set out including that "the property market is cyclical and a loss could occur if the Properties were to be sold during a down-turn". It is also noted under "Financial" that "there is no guarantee the Group will be able to secure suitable borrowing facilities". The Prospectuses in relation to Belfry 5 and 6 differed from the earlier prospectuses in that under the heading "Risk Factors" the word "high" appears before the words "degree of financial and commercial and other risk".

13.5 Although the statements of claim assert that the Prospectuses were silent as to the nature and class of assets that it was intended to purchase, some indication is given under the heading "Investment Strategy". Thus in Belfry 2 at para. 5.3 it is stated "it is currently envisaged that a number of commercial properties will be acquired in cities and major towns throughout the UK" and that the intention is to acquire properties as part of a portfolio which will have, inter alia, "secure income from good covenant tenants in recognised commercial positions located in UK cities and larger regional towns". It is also indicated in this section that the property manager, Cheval Properties Ltd. ("Cheval") will adopt an active management strategy of renegotiating leases, improving lease length and tenant profile, physical improvements via service charges and working capital, maintaining constant dialogue with tenants and "disposal of Property when value has been optimised".

13.6 It is also a feature of each Prospectus that there would be "a placing commission of 2% of the investment" – payable to AIB. Thus in Belfry 2 it is stated - "This means that if the Investor is making the minimum investment of €75,000, an additional amount of €1,500 will be payable to the Placing Agent". The addition of this 2% Commission to the amount invested is illustrated at para. 7 of the Prospectus in respect of Belfry 2, and again illustrated at para. 13.2 as being a required initial investor payment over and above the amount to be invested.

13.7 The Prospectuses make it clear that the period of investment was not certain. In Belfry 2 the Prospectus at para. 6.4 stated:-

> "Investment Time Horizon/Exit
>
> An investment horizon of up to eight years is proposed in relation to the Company. The objective is to realise a gain, from a combination of surplus rental income and capital gain on the sale or liquidation of the Company. The likely timeframe to achieve this objective is up to eight years from the date of completion of the Placing. Any such gain will derive from active management of the Properties, appreciation in the value of Properties purchased, rental growth and retention of rental profits.
>
> Should circumstances arise in which the Directors form the opinion that the value of the Group's property portfolio has been maximised, or that it is otherwise opportune, a decision may be taken to sell the Properties or liquidate the Company at an earlier date. The Directors do not intend to pay dividends."

13.8 A central feature of the proposed investments was that they were to be "geared". Thus in respect of Belfry 5 the Prospectus at Section 6.1 indicated that the Company intended to raise "up to Stg£49,999,900" by the issue of up to 49,999,900 ordinary shares for cash at par by the placing, and then provided at Section 6.3:-

> "Bank Borrowings

The Group intends to finance the proposed Property investments from a combination of equity and bank debt. The proceeds of the Placing will provide the equity element. This will be combined with bank borrowings. The Group has commenced non-binding discussions with a number of UK and European financial institutions, including AIB, to fund circa. 80% of the purchase price of each of the Properties on competitive terms. Bank borrowings will be secured on Properties purchased without recourse to the Investors. All borrowings by the Group will be in Sterling in order to match the currency of the Group's assets and minimise currency exchange risk. To minimise interest rate risk the Group may, where it is considered appropriate, enter into fixed interest rate agreements and/or purchase interest rate hedging products."

13.9 In their pleadings the plaintiffs highlight a number of matters which they say were not raised with them in discussions or by the Prospectuses prior to the making of the investment. Notwithstanding the Prospectuses they plead that they were not aware that while a small portion of the investment fund of each Belfry company, roughly 20%, came from the equity of investors, the majority of investment funds were to be made up of debt funded by borrowings by the relevant investment company, giving a loan to equity ratio of approximately 80:20. Although very much contested, the court takes these pleas at face value.

13.10 Another factor that is raised prominently in the statements of claim, and emphasised by Counsel for the plaintiffs, is that the loans taken out by each respective Belfry company contained a covenant ("Loan to Value Covenant" or "LTV covenant") to the effect that where the value of the property purchased by the funds fell below the debt owing to the lender, or below a percentage of the purchase value of the property (typically 80%) on each loan, there would be automatic default and the lender's floating charge, which would have been provided as security for each loan, would crystallise and the lender would be entitled to dispose of the Belfry company's charged assets as it sought fit. The plaintiffs claim that the effect of such a covenant was as follows: where the value of property purchased by a particular fund fell below 80% of the purchase value, the value of the investor's 20% equity was at risk of being lost in its entirety because the lender could realise the assets in order to recover the debt due to them. The plaintiffs assert:-

(1) that the LTV covenant was not disclosed to them in the Prospectuses or at any time prior to the making of the investments.

(2) that the Prospectuses did not explain how the debt financing or gearing had the effect of magnifying the returns positively on the investment when asset values increased, and that an investor's capital would be at risk and/or could be wiped out when the values fell.

13.11 The manner in which this is pleaded is similar in each case. In her Statement of Claim, Mrs. Cantrell pleads as follows:-

"(32) Crucially, a number of key factors and conditions of the investment were not revealed either in the Prospectuses or discussed with the Plaintiff prior to her entering the investments. One such factor was that while a small proportion of the investment funds of the Belfry investment funds, roughly 20%, came from the equity of investors such as the Plaintiff, the majority of each [of] the investment funds was made up of debt. The Loan to Value ratio of the debt to equity portions of the investment was 80:20 ("the LTV ratio"). The loans to each of the Belfry funds contained a covenant to the effect that where the value of the assets owned by the relevant Belfry Company fell below the value of the debt owing to the Lender, the Lender's floating charge immediately crystallized and the Lender was granted the power to dispose of the Belfry Company's assets as it wished. This Loan to Value ("LTV") covenant was very significant as in effect, it meant that a variation of 20% in the value of UK commercial properties would result in 100% of investor's money being wiped out. In addition the variation leading to the covenant being invoked was in fact less, being 82:18 when the Bank's fees of 2% were calculated into the LTV ratio. The existence of a LTV covenant was not included in any of the Prospectuses, nor was it communicated to the plaintiff before she agreed to invest in the Belfry Funds. Furthermore the Prospectuses did not explain how the debt financing or gearing in these investments had the effect of magnifying the returns positively on the investment when assets values increase; and, importantly, that an investor's capital would be at risk and/or wiped out when the values fell."

13.12 In further references to these pleas the plaintiffs allege that in providing investment advice and management of the funds there were certain expressed and/or implied terms of the plaintiffs agreement with AIB, and/or that AIB and/or the director defendants took on certain obligations. These are set out in para. 36 of Mrs. Cantrell's statement of claim and include:-

"(a) v. making adequate disclosure of relevant material information including charges and commissions in its dealings with the plaintiff;"

and that AIB and/or the director defendants would -

"(b) xi. exercise all due care, skill, and diligence and would advise the Plaintiff in a manner that was fair, honest, and professionally in her best interests;

xviii. ensure that the investment was appropriate for the Plaintiff in the prevailing economic climate and/or in the event that there was a downturn in the economy;

xix. not recommend to her unsuitable investments bearing in mind her personal and/or financial circumstances and/or her resources, investment objectives, attitude or risk, investment experience, and/or investment strategies;

xx. make thorough and diligent enquiries in respect of all features including risks of the said investment and/or would advise the plaintiff thereof;

xxi. keep the plaintiff advised of the risks associated with the investments and/or investment strategy."

And -

"c. If the Bank and/or the Director Defendants were advising, recommending and/or allowing the Plaintiff to invest in high risk, highly geared and leveraged property funds, the Defendants would advise the Plaintiff regarding:-

xxx. the fact that the said investments were high risk and leveraged".

13.13 Mrs. Cantrell then alleges in para. 38 the following key pleas related to the LTV covenant:-

"38. The Bank and the Director Defendants failed to comply with their obligations under company law and particularly their statutory obligations under the Companies Act as set out above, by (inter alia):

> (i) Failing to specify or refer to the LTV covenant and instead merely stating that there was no guarantee that "the security granted will not be enforced in the event of a default by [the Subsidiary] with its obligation to repay its borrowings";
>
> (ii) Stating that investment in Belfry 2 and/or Belfry 4 "involves a degree of financial and commercial risk" when in fact the Defendants were aware that the risk involved was a high risk;
>
> (iii) Stating that investment in Belfry 5 "involves a high degree of financial and commercial risk" when in fact the Defendants were aware that the risk involved was a high risk;
>
> (iv) Failing to state or explain the LTV covenant, the relevant percentages applicable, or the significance of a breach of the said covenant to the equity portion of the Belfry funds;
>
> (v) Failing to state or illustrate the reduction in asset values that would trigger the LTV covenant, properly or at all;
>
> (vi) Failing to state or explain properly or at all that the fees charged by the Defendants resulted in a significant alteration in the ratio at which decreased asset value would trigger the said covenant, being reduced from circa 80:20 to circa 82:18 from the very outset of the investment;
>
> (vii) Failing to state that where there was a material reduction in asset values the first to be affected were equity investors such as the Plaintiff rather than the Lender;
>
> (viii) Failing to state that where there was a material reduction in value of the UK property assets the covenant operated such that a 100% loss for equity investors could occur should there be a relevant fall in property values;
>
> (ix) Failing to state that even a very modest downward variation in property values would trigger a breach of the LTV Covenant, thereby exposing the Belfry investments to the calling in of the Lender's loan and to the Plaintiff's investments being wiped out; …"

In para. 39 of her statement of claim Mrs. Cantrell pleads:–

> "Further – or in the alternative, and without prejudice to the foregoing, the Bank and the Director Defendants, their servants or agents represented expressly (or alternatively impliedly) each of the matters pleaded at paragraphs 37 and 38 above to the Plaintiff, and expressly and/or impliedly made the further representation to the plaintiff as follows …"

Thus it can be seen that the matters pleaded in para. 38 in relation to breach of obligations under company law and statutory obligations are repeated in para. 39 as the content of expressed or implied representations.

13.14 In para. 40 of her statement of claim Mrs. Cantrell pleads that:-

> "The said representations were made knowing that the Plaintiff would rely on the said representations and would be thereby induced to engage and/or further engage the Defendants for the purpose of making the proposed investments as set out below. In the premises, the Defendants, their servants or agents were under a duty to ensure that the said representations were true and accurate and would not be released from such representations in the event that they were wrong. Acting on the fact of the said representations and induced thereby, the Plaintiff invested in each of Belfry 2, Belfry 4 and Belfry 5."

It will be noted that the wording adopted asserts that the representations induced the plaintiffs to "further engage" in making the proposed investments, which would cover the period after the application forms were completed and the monies paid over up to the time of actual investment of the plaintiffs' monies and borrowings by the Belfry companies in the investment properties.

Similar pleas appear in each statement of claim.

13.15 The plaintiffs then go on to make further claims, related to alleged mismanagement of the relevant funds. Thus Mrs. Cantrell proceeds in para. 41 of her statement of claim:-

> "41. Further and/or in the alternative, and without prejudice to the foregoing, the Defendants acted in breach of duty, and in breach of fiduciary duty by failing to properly and/or adequately manage the investment in question, thereby causing the Plaintiff loss, inconvenience and expense. Each of Brabazon Property Investments Ltd. (a subsidiary of Belfry 2), Forthright Property Investments Ltd. (a subsidiary of Belfry 4), and Kuig Property Investment Ltd. (a subsidiary of Belfry 5) appointed Cheval Properties Ltd. ("Cheval") as the manager to provide certain property management services to the Defendants. Pursuant to agreements dated the 7th May, 2002 between Brabazon Property Investments Ltd. and Cheval, the 14th June, 2004 between Forthright Property Investments Ltd. and Cheval and the 9th May, 2005 between Kuig Property Investments Ltd. and Cheval (hereinafter collectively the "Management Agreements"), the terms thereof provided that Cheval was not entitled to take any significant steps, (identified at para. 3.2 of the Management Agreement thereof) without the prior written consent of the Group of companies specified therein, which included the Bank, and which included companies of which the Director Defendants herein were directors. In the premises, the Defendants retained full discretion and control in respect of, and therefore full responsibility for, all decisions taken by Cheval in respect of Belfry 2, Belfry 4 and/or Belfry 5."

Similar pleas are made by the other plaintiffs in their respective statements of claim, save that in respect of Belfry 6 the management agreement appears to have been with Cheval Lux. In their defences AIB denied that it had or retained any control or discretion over the investment/investment management – a fact that is disputed by the plaintiffs. The mismanagement claims pleaded are threefold:-

> (1) Cheval received a Base Fee of 1.25% of the gross asset value of the fund, an incentive fee equal to 20% value of the pre-tax gain of 10% compounded growth per annum at the end of the investment period and an agent's fee equal to 1% of the purchase price of each property on acquisition. It is pleaded that these fees "were very high".
>
> (2) It is pleaded that Cheval's already substantial fees were further maximised by inter alia … "the growth of the asset

base as much as possible (by the sale of the properties in the first five years of the funds)".

This was described in argument as the "churning claim". It is pleaded that these decisions were sanctioned by the defendant directors including Mr. Kilduff who is a director of Cheval and that they had a conflict of interest. At para. 52 of her statement of claim Mrs. Cantrell pleads that:-

> "The Funds' strategy involved the sale of assets and reinvesting the proceeds into new acquisitions. The level of rotation of properties was very significant indeed; this led to very significant fees being paid to Cheval and AIB. It was not in the best interests of the Plaintiff to implement such a strategy. It would have been more prudent for the Funds to stall any further acquisitions once the initial equity and debt raised had been fully invested. Because Cheval and the Bank were incentivised by the payment of significant fees to reinvest all of the proceeds into further acquisitions, this strategy of further continuous investment is what occurred. The Plaintiff contends this strategy was very high risk …"
>
> (3) The plaintiffs plead that the initial type of properties targeted by the Funds were "properties in small tertiary cities". Mrs. Cantrell pleads that at para. 48:-
>
> "These asset purchases were small as compared with typical purchases by institutional investors and indeed would have been off the radar of most investors due to the high risk involved in such purchases."

13.16 These mismanagement claims are pleaded "further and/or in the alternative" – in Mrs. Cantrell's statement of claim from para. 41 – 52. At para. 53 she pleads:-

> "By reason of the above, each of the Belfry 2, Belfry 4 and Belfry 5 investment products were not managed properly thereby causing loss to the Plaintiff. In breach of the Defendant's obligations the level of management which took place fell below the level which might reasonably be expected of an entity responsible for the management of property investments such as that offered to the Plaintiff."

It is notable that the claims based around the LTV ratio and LTV covenant are not included as part of the mismanagement claims.

13.17 Following these pleas each of the plaintiffs then pleads as Mrs. Cantrell does in para. 54 of her statement of claim:-

> "In purporting to provide the said services, the Bank and the Director Defendants and each of them, their servants or agents were guilty of breach of contract and were negligent and acted in breach of duty (including breach of statutory duty and/or breach of fiduciary duty) and were guilty of misrepresentation and/or negligence misstatement."

There follows lengthy particulars which it is not necessary to set out in any detail. Not surprisingly it is alleged that the investments undertaken were in fact "high risk" and the following pleas related to the LTV covenant appear at para. 54bb. in Mrs. Cantrell's statement of claim:-

> "bb. The Defendants failed to explain the Loan to Value covenant ("the LTV covenant"), the relevant percentages applicable, or the significance of a breach of the said covenant to the equity portion of the Belfry Funds;
>
> cc. The Defendants failed to advise or illustrate the reduction in asset values that would trigger the LTV covenant, properly or at all;
>
> dd. The Defendants failed to advise or explain properly or at all that the fees charged by the Defendants resulted in a significant alteration in the ratio at which decreased asset value would trigger the said covenant, being reduced from circa. 80:20 to circa. 82:18 from the very outset of the investment;
>
> ee. The Defendants failed to advise the plaintiff that where there was a material reduction in asset values the first to be affected were equity investors such as the Plaintiff rather than the Bank;
>
> ff. The Defendants failed to advise the Plaintiff that where there was a material reduction in the value of the UK property assets the covenant operated such that a 100% loss for equity investors could occur should there be a relevant fall in property values;
>
> gg. The Defendants failed to advise the Plaintiff that even a very modest downward variation in property values would trigger a breach of the LTV covenant, thereby exposing the Belfry investments to the calling in of the Lender's loan and to the Plaintiff's investments being wiped out;"

13.18 There is then an important plea in each claim which appears at para. 55 of Mrs. Cantrell's statement of claim:-

> "55. As a consequence of the foregoing, the Plaintiff suffered loss, inconvenience and expense. In particular, the Plaintiff has lost *all of the value* of the sums that she invested in Belfry 2, Belfry 4 and Belfry 5." [Emphasis added]

Particulars were raised in relation to the alleged loss and damage. Thus in a notice for particulars dated 7th December, 2015 in Mrs. Cantrell's case AIB's solicitors requested:-

> "47. Arising from paragraph 55 please furnish full and detailed Particulars of all loss and damage sustained by the Plaintiff."

The reply delivered on 21st December, 2015 was:-

> "47. The plaintiff lost all of the value of the sums that she invested in Belfry 2, 4 and 5."

13.19 Each fund prepared "Property Updates" which were sent to investors. After initial reports, these were prepared annually to 31st March, and sent to investors along with the consolidated Financial Statements of the relevant company as approved by it's directors, also made up to 31st March in the relevant year. The initial Property Updates for the various Belfry companies indicated that the type of properties targeted by the funds were generally retail properties in "tertiary" cities, although warehouse and office assets were also purchased by some of the funds. The report for Belfry 2 dated October 2003 recorded purchased assets costing Stg£14.22million. The report for Belfry 3 dated October 2003 stated that the fund had purchased twenty-four retail assets in the initial phase at a cost of Stg£91.8 million. The report for Belfry 4 dated March 2005 indicted that the fund had purchased five office warehouse or retail assets in the initial phase costing Stg£107,187,000.00. The report for Belfry 5 dated March 2006 stated that the fund had purchased twenty-eight retail assets at a cost of Stg£264,262,000.00. The report for Belfry 6 dated March 2007 showed that the fund had purchased ten retail properties costing Stg£95,980,000.00.

13.20 The Belfry funds performed well initially with many of the investments almost doubling in value by 2006 or 2007. However the Property Updates to 31st March, 2008, furnished in mid-2008, indicated that the investments had decreased in value. It is necessary to refer to this decrease in value, its recording, its effect on the Belfry funds and its notification to the plaintiffs in some more detail.

14 The Decrease in Value and Writing down to Nil
Belfry 2

14.1 In relation to Belfry 2 the Property Update prepared at 31st March, 2008 valued the portfolio at Stg£69,655,000.00, compared with an original property cost of Stg£70,275,000.00, and noted that "The diminutions in the value of the properties are a feature of the current UK commercial property market … [which] has seen an overall decline of All Property of 15.1% during the year ended 31st March, 2008 …".

14.2 By letter dated 5th August, 2008, Belfry 2 wrote to all of the investors, including Mrs. Cantrell, enclosing the Property Update and consolidated audited financial statements of the "Group" for the year ended 31st March, 2008. The letter noted the independent valuation carried out at 31st March, 2008 "which shows a decrease of 11.7% in the overall value of the property portfolio" and noted that that decrease had been incorporated into the financial statements indicating a significant reduction in the value of the shareholders funds at year end. In a paragraph headed "Net Asset Value" the letter set out that Mrs. Cantrell's original investment of €200,000.00 had a NAV at 31st March, 2007 of €491,100.00 and a NAV at 31st March, 2008 of €262,459.00 the letter went on to comment on "investment performance and overall strategy", two bullet points should be noted:-

• "The Group's properties were acquired using a combination of Shareholders' Funds and debt financing. Debt financing, or gearing, has the effect of magnifying returns on Shareholders' Funds positively when asset values increase and negatively when asset values decrease. From a Shareholder's perspective, the gearing utilised by the Group has magnified the impact of the 11.7% fall in the value of the property portfolio as the actual physical amount of the devaluation is effectively deducted from Shareholder's Funds."

• "Following the revaluation of the properties at year end the Group's loan to value percentage now stands at c. 77%;"

It should be noted that this letter did not make any reference to a LTV covenant in Belfry 2's agreement with its lenders.

14.3 Belfry 2 then wrote to its investors, including Mrs. Cantrell on 19th March, 2009 to update on "recent developments which have occurred in the Group since our last update to you on 5th August, 2008". The following appears on the first page:-

> "As highlighted in the Prospectus, which we issued in May 2002, and as you are aware, bank funding, in addition to equity, was used to acquire the Group's property portfolio. The original bank lenders to the Group were Bradford and Bingley p.l.c. ("B&B"). In November, 2007 this loan was purchased by GE Real Estate Finance Ltd. ("GE") as part of its acquisition of a number of B&B loans. The Group's total borrowings from GE are currently Stg£53.78m.
>
> As permitted under the loan agreement, GE recently called for an independent valuation, by CBRE of the Group's property portfolio. CBRE revalued the portfolio in February 2009 at Stg£47.977m, which represents a 31.1% decline in the overall value of the property portfolio since March 2008. At this reduced value, all equity within the fund would be eroded. This decline is primarily driven by the extremely difficult market conditions in the UK and the revised valuation has resulted in the Group now breaching its 80% Loan to Value (LTV) covenant in the loan agreement with GE. The directors have been advised that this breach of the LTV covenant is one of which numerous other property investment companies are also falling foul.
>
> Following the revaluation, GE wrote to the Group requesting that the breach of the LTV covenant be remedied by 20th March, 2009, in line with the terms of the loan agreement. In the event that this is not achieved, it would be opened to GE to declare an Event of Default under the loan agreement as a result of which GE could appoint a receiver to the Group or its properties individually, as permitted under the loan agreement.
>
> The directors of the Group immediately sought to obtain legal advice from its advisors in Ireland, the UK and Jersey in order to assess the implications of this request and to explore its alternative.
>
> The Group is engaged in ongoing talks with another financial institution in relation to obtaining a facility which, if approved, would be used to refinance a portion of the outstanding loan and met GE's requirement and thereby remedy the breach of the LTV covenant. The Group has informed GE of this and requested an extension of the 20th March, 2009 deadline to finalise these discussions.
>
> While the re-evaluation of the Groups property portfolio reflects the ongoing difficulty of property market conditions in the UK, the directors believe the following are important matters to note in relation to their portfolio:-
>
> • The Group continues to generate sufficient cash flow to meet all its current debt service obligations to GE and to satisfy all its other creditors.
>
> • The portfolio is a well diversified property portfolio both sectorally and geographically;
>
> • The portfolio benefits from sustainable long term rental income, with over 49% generated from leases with unexpired terms of 10 years or more;
>
> • The portfolio has not suffered from a significant level of property vacancy and has not incurred significant tenant defaults or rent arrears;
>
> • In order to insulate against increases in interest rates, the Group hedged a significant portion (in excess of 80%) of its loan funding. These hedging instruments are due to expire during 2010 and if current interest rates remain, the Group should benefit from a significant reduction in financing costs from 2010 onwards; and
>
> • The Group holds sufficient cash reserves for day-to-day operational purposes.

> The Group is doing it's upmost to remedy the LTV covenant breach which will satisfy GE. This should allow the Group to continue to trade through this difficult property market cycle and position shareholders to benefit from any future upside which may arise in the market. We will keep you informed of progress in this regard."

It is alleged by Mrs. Cantrell that this was the first time that there was specific mention of the LTV covenant in Belfry 2's loan agreement.

14.4 Belfry 2 next wrote to investors on 31st March, 2009 in canvassing opinion as to the willingness of investors to make a further subscription/investment, probably by way of transferable loan note, to enable the company to reduce its borrowings owed to GE. Belfry 2 wrote to investors again on 7th April, 2009 notifying them of the extension of its negotiating deadline with GE. On 22nd May, 2009 Belfry 2 wrote to investors advising that:-

> "Heads of Terms have now been agreed with GE which provide for amendments to the existing loan facility. The key elements include extension of the facility to June 2015, a waiver of the Loan to Value covenant till June 2013 and revised loan pricing. These amendments have been negotiated with the objective of providing the Group with the time required to allow the UK property market to recover."

In a further letter of 9th July, 2009 Belfry 2 confirmed completion of the negotiations, and the key elements are as just outlined above with a "revised interest cover covenant" and "increased interest margin, with further margin increases scheduled over the term of the facility".

14.5 By letter dated 7th September, 2009 Belfry 2 wrote to it's investors including Mrs. Cantrell enclosing copies of the consolidated audit financial statements of the company for the year ended 31st March, 2009, signed off by the directors on 20th July, 2009, and the Property Update prepared up to 31st March, 2009. The letter noted that the Property Update showed a decrease of 29% in the overall value of the property portfolio. Under the heading "Investment Valuation" Belfry 2 stated:-

> "The re-evaluation of the portfolio, together with the adverse movement in the Euro/Sterling exchange rate, has resulted in the value of your investment being *written down to nil*." [Emphasis added]

This was reflected in the accounts by Note 14 headed "Reconciliation of Shareholders Funds" showing shareholders funds at the beginning of the year at Stg£20,202,791.00 and at the end of the year at a negative minus Stg£5,227,409.00. Mrs. Cantrell's claim is that this letter was the first occasion on which she became aware that her investment had fallen in value to nil.

14.6 Subsequent correspondence and reports showed that there were no further acquisitions by Belfry 2, and that disposal of property took place year on year. In a letter of 30th June, 2010 Belfry 2 informed investors that certain detailed disposals had taken place and "the lender was insistent on the completion of the above sales before considering the use of part of the disposal proceeds to fund any asset management initiatives, in particular the opportunity at Bristol". The letter went on to state that "lender consent is required with regard to any expenditure on the portfolio, including expenditure on asset management initiatives."

14.7 From 2010 on, annual communications with Property Updates and audited financial statements of Belfry 2 continued to indicate that Mrs. Cantrell's investment was valued at nil. A letter of 11th July, 2013 from Belfry 2 to Mrs. Cantrell shows that Belfry 2 undertook further discussions with it's lender GE in 2012, but the lender required a detailed business plan for the remaining term of the facility and that:-

> "Having considered the details of the valuation report, and in the context of the Group's loan balance considerably exceeding the value of its assets, the Lender indicated that it favoured an arrangement whereby the outstanding debt would be repaid through an agreed disposal programme."

The letter added:-

> "As the Group's debt facilities are in breach of covenant, the Lender is also advised that the loan facility will be placed on demand during the disposal process. The Lender holds security over all assets of the Group and therefore the net proceeds from the sale of the properties, after disposal/windup costs and agreed operating costs, will be paid to the lender in reduction of the Group's debt."

Further correspondence from 23rd December, 2014 and 29th December, 2015, enclosing financial statements for the years ending 31st March, 2014 and 31st March, 2015 respectively, confirmed ongoing disposals to part discharge the lending and that investors would not have any liability in respect of the anticipated substantial shortfall

15. Writing down of Belfry 3,4, 5 and 6

15.1 Similar circumstances apply to Belfry 3, 4, 5 and 6 – but with some differences in relation to potentially relevant dates, and some further differences in relation to the net annual valuations for investors in Belfry 3 and 5 that will be mentioned.

15.2 As with Belfry 2, Belfry 3, 4, 5 and 6 investments increased in value as is evident from Property Updates and financial statements to year end 31st March, 2007. The first decrease in value is notified in letters sent to investors in each Fund dated 5th August, 2008. Belfry 3's letters to Mr. Tierney, Mrs. Goodwin and Mrs. Honohan dated 5th August, 2008 indicated that the overall value of the property portfolio in Belfry 3 had reduced in value by 12.5%. Similarly, the Belfry 4 letters to Mrs. Cantrell and Mr. and Mrs. Sheehan of the same date indicated that the overall value of Belfry 4's portfolio had reduced by 13.7%. The Belfry 5 letters to Mrs. Cantrell, Mr. Spierin and Mr. McMullin of the same date outlined a decrease of 10.3% in the value of that funds property portfolio. Belfry 6's letter to Mr. O'Reilly of the same date highlighted that the portfolio had reduced in value by 13.2%. These losses had a deleterious effect on the loan to value percentages. With Belfry 3 this now stood at c. 75%. With Belfry 4 this resulted in a loan to value percentage standing at c. 82%. In respect of Belfry 5 the re-valuation led to the loan to value percentage standing at c. 75% and in Belfry 6 at c. 74%. Common to all cases is that the stated effect was to oblige the Belfry funds to attempt to renegotiate the terms of its borrowings.

15.3 Of note also is that only the letter of 5th August, 2008 relating to Belfry 4 referred specifically to the LTV covenant. Thus in the letter of 5th August, 2008 to Mr. and Mrs. Sheehan (Belfry 4) they were advised:

> "Following the revaluation of the properties at the year end, the Group's loan to value percentage now stands at c.82%. This exceeds the original Loan to Value covenant with the lenders (AIB Capital Market London) and has resulted in the Group having to renegotiate the terms of its loan facility in the short term;"

It is noteworthy that the terms and precise meaning and effect of the LTV covenant are not spelt out. The letters to investors in all the other funds stated the loan to value percentage but did not made any express reference to any LTV covenant in the lending agreements.

16. Date of delivery of letters of 5th August, 2008

16.1 Before passing on from the letters of 5th August, 2008, and bearing in mind that most of the plaintiffs commenced their proceedings by plenary summons in early August 2014, it is important to note the following. Beyond the fact that these letters were sent to investors and received by them, there was no agreed evidence as to precisely when they were sent, or precisely when they were received. In this context, the court's attention was drawn to the "Application Form" used by each plaintiff investor when investing in the relevant fund. This form gives the details of the investor and encloses a cheque or bank draft payable to the relevant fund, and contains various agreements and acknowledgments. Thus the Application Form of the sort that would have been used by Mrs. Cantrell to invest in Belfry 2, where the nominee company was Tullamona, the following clause 3 appears:-

> "3. Without prejudice to any other mode of delivery, notices or other communications from Tullamona to me relating to the Shares, notice shall be deemed to be sufficiently given or made when delivered but in any event not later than 2 days after dispatch (in case of mail) or 24 hours after dispatch (in the case of telex or cable) addressed to me at the address herein given or such other addresses as may be specified by me by written notice received by Tullamona."

16.2 No argument was addressed at hearing in relation to the specification of the nominee company in this form, and whether this would be binding on the relevant Belfry company. However it appeared to be accepted, for the purposes of the trial of the preliminary issue, that the court should assume that this provision had the effect that the letters dated 5th August, 2008 should be deemed to be delivered 2 days after dispatch i.e. on 7th August, 2008. Of course any conclusion reached by this Court based on that assumption in the context of this preliminary hearing must yield, in the event of evidence of dispatch later than 5th August, 2008, to such evidence. If for example the letters were actually dispatched on 6th August, 2008 the effect of clause 3 would seem to be that they were deemed to be delivered on 8th August, 2008.

Similar considerations apply to correspondence sent subsequently to Belfry investors.

17. Correspondence post-5th August, 2008

17.1 In letters dated 17th June, 2009 sent by Belfry 3 and Belfry 4 to its investors, following further valuation as at 31st March, 2009, the companies notified investors that "at this reduced value all equity within the Company has been completely eroded"

17.2 In both Belfry 3 and Belfry 4 by letter dated 7th September, 2009 the investors were sent the Property Updates and Group accounts for the year ended 31st March, 2009, and the letter stated:-

> "Investment Valuation
>
> The revaluation of the portfolio has resulted in the value of your investment being written down to nil."

17.3 In Belfry 5 the company wrote to investors on 17th June, 2009 noting a decline in valuation as at 31st March, 2009, and stating that "at this reduced value all equity within the Company has been completely eroded …". Consolidated audited accounts and the Property Update to 31st March, 2009 were forwarded to investors on 10th September, 2009, and the letters stated that:-

> "The revaluation of the portfolio has resulted in the value of your investment being written down to nil."

This conclusion was, as in Belfry 3 and Belfry 4, reflected in the accounts furnished with the letter.

17.4 In relation to Belfry 6, after its letter of 5th August, 2008 the company next wrote to investors including Mr. O'Reilly on 25th June, 2009. Referring to an independent valuation as of 31st March, 2009 the letter stated "that this reduced value all equity within the Company has been completely eroded." By further letter of 4th December, 2009 Mr. O'Reilly was sent the consolidated audited financial statements and Property Update for the year ended 31st March, 2009 which confirmed the position, and the letter stated "the revaluation of the portfolio has resulted in the value of your investment being written down to nil as at 31st March, 2009". This letter was signed inter alia by Mr. John Rocket.

17.5 While the correspondence and audited accounts for Belfry 2 and 4 subsequent to 2009 do not show any recovery in the net value of the plaintiffs' shareholdings/investment, some value is attributed to the investments in Belfry 3, 5 and 6. Thus despite write downs to nil reported in the letters of 7th September, 2009 to Belfry 3 investors, some small value appears in subsequent years. By way of example, Mr. Tierney's original investment of Stg£52,733.00 valued at nil as of 31.03.09, was valued at Stg£24,830.00 as at 31.03.10, at Stg£22,686.00 at 31.03.2011, at Stg£7,970.00 at 31st March, 2012, at nil again on 31st March, 2013, at Stg£1,119.00 at 31st March, 2014, and Stg£3,075.00 at 31st March, 2015. Similarly proportionate revaluations were reported for the other investors in Belfry 3 namely Mrs. Goodwin and Ms. Honohan.

17.6 With regard to Belfry 5, and despite the right down of valuation to "nil" notified on 10th September, 2009 as of 31st March, 2009 there was some value attributed in subsequent years. Thus Mrs. Cantrell received a letter of 27th August, 2010 from Belfry 5 with audited accounts that her original investment of Stg£55,120.00 was valued as of 31st March, 2010 at Stg£10,879.00. In the equivalent letter in 2011 she was notified that the value of her investment in Belfry 5 as at 31st March, 2011 was Stg£2,530.00. Correspondence and accounts for subsequent years confirmed that the value of the investment had been completely eroded, that all properties held by the fund were being sold, and that all of the proceeds would be applied in reduction of the Group's outstanding bank debt. The letter of 30th September, 2014 to Mrs. Cantrell from Belfry 5 confirmed this to be the case and that "the investors will not have any liability in respect of this shortfall". Similar/proportionate positions prevailed in relation to the other plaintiff investors in Belfry 5, Mr. McMullin, and Mr. Spierin.

18. The Issues and the relevant provisions of the Statute of Limitations 1957 (as amended)

First issue: Accrual of cause of action in tort

18.1 In each of their defences the defendants plead that the plaintiffs' claims are time-barred by s.11 of the Statute of Limitations, 1957. The relevant parts of s.11, as amended provide:

> "11.(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued –

(a) actions founded on simple contract;

(b) actions founded on quasi-contract;

(c) ..,.

(d) …

(e) …

(2)(a) Subject to paragraph (c) of this subsection, and to section 3(1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Sub-paragraph (c) of subs.(2) relates to slander and is not relevant. Section 3(1) of the 1991 Act introduced a 'date of knowledge' test for accrual of personal injury actions and is not relevant.

18.2 It was not disputed that the general rule in claims for breach of contract is that the cause of action accrues not when the damage is suffered but at the time of breach . Accordingly it was not disputed that the plaintiffs' claims, in so far as they sound in breach of contract, were statute barred by s.11(1)(a) of the Statute of Limitations. Thus the claims for damages for breach of contract and rescission are statute barred because time ran from the date when the investments were entered into but proceedings were not commenced until August 2014 (and in Mr. O'Reilly's case, May 2015).

Conclusion 1:

The plaintiffs' claims in so far as they sound in breach of contract are statute barred by virtue of section 11(1)(a) of the Statute of Limitations because time accrued from the respective dates upon which the plaintiffs entered into the Belfry investments and over 6 years elapsed thereafter before any of the proceedings were commenced.

18.3 The defendants also assert that the plaintiffs' claims in tort accrued at the time the investments were entered into and were barred six years on. The plaintiffs respond that that the cause of action in tort did not accrue under s.11(2)(a) until actual damage was suffered, which they argue was not until 2009. This is the primary issue for determination.

Second issue: Breach of fiduciary duty

18.4 The second issue relates to the plaintiffs' claim for breach of fiduciary duty, and necessitates consideration of two provisions of the 1957 Act.

Section 44 provides:

"44. No period of limitation fixed by this Act shall apply to an action against a trustee or any person claiming through him where –

(a) the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or

(b) the claim is to recover trust property or the proceeds thereof still retained by the trustees or previously received by the trustee and converted to his own use."

The plaintiffs assert that in so far as the claim against the directors and AIB is founded on breach of fiduciary duty as trustees/constructive trustees no period of limitation applies.

Secondly the plaintiffs argue that as the fiduciary claim is founded in equity there is no period of limitation by reason of s.11(9) (a) which provides:

"(9) (a) This section shall not apply to any claim for specific performance of a contract or for an injunction or other equitable relief."

The defendants however rely on s.11(9)(b):

"(9)(b) Paragraph (a) of this subsection shall not be construed as preventing a Court from applying by analogy any provision of this section in like manner as the corresponding enactment repealed by this Act has heretofore been applied."

The defendants argue that as the facts relied upon to establish a fiduciary duty and breach of same are co-terminous with the facts relied on for the claim in tort, and as the remedies sought correspond with the remedies sought at law, the six year period applies by analogy. They also deny that s.44 has any application.

Third issue: Right of action concealed by fraud

18.5 The third issue raised relates to the plaintiffs' plea, in response to the raising of the Statute, of fraudulent concealment of the LTV covenant. The plaintiffs in their Replies rely on section 71(1)(b) of the 1957 Act:

"(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either –

(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

The plaintiffs assert that the existence of the LTV covenants was concealed by fraud and were not discovered, or could not with reasonable diligence have been discovered, until 2009, or alternatively some date within six years of the commencement of proceedings.

19 Primary Issue – accrual of the cause of action in tort
19.1 In the lengthy Statements of Claim delivered by the plaintiffs the facts pleaded point to different causes of action in tort. For the purposes of considering when the cause of action might accrue, I have formed the view, for reasons elaborated later, that these pleas fall into three categories:-

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

In respect of categories (1) and (2) the defendants argue that the causes of action accrued when the plaintiffs entered into the investments. The plaintiffs argue that the torts were not complete until they suffered loss which was when the value of their shares dropped to zero. These claims will be addressed first.

20. The Defendants' Submissions
20.1 The defendants all argued, based on the decision in *Hegarty v O'Loughran* [1990] 1 IR 148, that the plaintiffs could not rely on the date upon which they discovered that they might have a cause of action, citing the reasoning of Finlay C.J. who stated, at p.156:-

> "If the true meaning of the date at which the cause of action accrued were, as is contended, the date at which the plaintiff discovered or ought to have discovered that he had a cause of action, then s.71 would be an entirely superfluous section."

20.2 They argued that what the plaintiffs claim is that they were caused financial loss as a result of entering into the investments as a consequence of negligent advice, and that therefore the primary cause of action arose at the time they entered into the investments. If by entering into those transactions they were caused to suffer measurable loss then on their pleaded claims the plaintiffs suffered actual loss at the time they entered into the financial transactions - because they received either no benefit at all, or the benefits which they did receive were outweighed by the burdens. Thus it was argued that where the core claim is one of negligent advice causing the plaintiffs to enter into investments which were unsuitable for them, the actual damage which they claim to have suffered is the fact that they have become party to investments which are not suitable for them. They argued that the LTV covenant did not in fact result in loss, and that the LTV pleas should be viewed only as part of the negligent advice/misstatement claims which all add up to a claim that the plaintiffs were sold a wrong or unsuitable product.

21 *Gallagher v ACC Bank plc*
21.1 The defendants relied primarily on the decision in *Gallagher v. ACC Bank Plc*. [2012] 2 I.R. 620 in which the Supreme Court considered what constitutes the date of loss for the purpose of the statute of limitations in financial loss cases. The plaintiff ("Mr. Gallagher") invested €500,000.00 in ACC Bank Plc. ("ACC") in October 2003 in a fixed term investment bond under the name of "Solid World Bond 4". The bond was purchased by way of a loan from ACC drawn down contemporaneously with his investment in one lump sum. Mr. Gallagher was obliged to use the loan for his investment. The bond was a 5 year and 11 month bond with a capital guarantee. The bond could not be encashed during that time and no withdrawals could be made until maturity. The bond guaranteed a 100% return of the initial investment linked to 80% of any net increase in the value of a pre-selected basket of shares. There was no management of the shares during the term and the term of the bond could not be varied.

21.2 Mr. Gallagher commenced proceedings against ACC on 10th June, 2010, more than six years after he made the investment. He claimed damages for negligence, breach of contract, breach of duty and negligent misstatement. He claimed that he was induced by negligence to invest in this "borrow to invest" product and claimed loss in the amount of the interest paid by him on the loan transaction, being approximately €41,000.00. ACC brought a motion to dismiss the proceedings on the basis that they were statute barred as than more than six years had expired since the investment was made, a fact that was not disputed.

21.3 In the High Court Charleton J. held that the claim was not statute barred. He concluded that Mr. Gallagher, assuming his claim to be a valid one, did not suffer any immediate loss when he purchased the bond, but faced only a contingent loss as quantification of the extent of the damages was impossible at the time of the purchase, or over the lifetime of the bond, and if there was misrepresentation the tort could only have become complete when the financial loss crystallised. He noted the accrual of a cause of action in tort is complete from the date when the damage occurs, but suggested that where the damage manifests as an economic tort there is more scope for debate, observing that "each case is to be judged on the facts as to when the tort occurred, and whether damage resulted at that time or whether the wrong initiated a course of action that later resulted in a loss."

21.4 ACC's appeal was successful. The principal judgment in the Supreme Court was given by Fennelly J., with whom the rest of the court concurred. O'Donnell J. also agreed with the decision and judgment of Fennelly J. but made a number of observations principally directed to the different accrual of time and claims in contract and in tort arising out of the same facts and the need for debate "at the level of public policy" on possibly aligning the limitation periods and possible extension of the grounds of discoverability.

21.5 Fennelly J. referred to the decision in *Hegarty*, and stated:-

> "50. The principle established by *Hegarty* is that the cause of action in the tort of negligence is complete and the cause of action accrues when damage occurs. Finlay C.J., in using the term "provable", was not importing any requirement of knowledge. It may be significant that, earlier in the judgment, he had, like Charleton J. in the present case, cited the dictum of Lord Esher M.R. in *Read v. Brown* …Nonetheless, the solution adopted in *Hegarty* is not necessarily so clear as to be capable of simple and obvious application in every case, above all in cases of financial loss."

Fennelly J. then referred to the concurring judgment of Griffin J. in *Hegarty*, including the following passage at p. 158:-

> "Until and unless the plaintiff is in a position to establish by evidence that damage has been caused to him, his cause of action is not complete and the period of limitation fixed by that sub-section does not commence to run."

Commenting on this Fennelly J. stated:-

> "52. The date of accrual, in this passage, is the date when the plaintiff is in a position to establish by *evidence* that he has suffered damage. At least to some extent, the test, thus expressed, renders less certain the distinction between the date of commission of the wrongful act and the occurrence of damage."[Emphasis added by Fennelly J].

21.6 Fennelly J. then engaged in a comprehensive review and analysis of English cases on accrual of the cause of action in financial loss cases, and one High Court of Australia decision, but he did not feel it necessary on the facts of *Gallagher* to choose between differing approaches evident from this jurisprudence. At p.655 he stated:

> "107. I return to the language of Finlay C.J. in *Hegarty v. O'Loughran*. That was a personal-injury case, so he spoke of a "provable personal injury". In *Read v. Brown*, 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 capabl[e] of easy application in every case."

Fennelly J. did however express some views which will be considered later in this judgment. One of these was that the mere possibility of loss is not enough for the cause of action to accrue. The core of his judgment, and the parts most relied upon by the defendants in the present case, appear from p.657 onwards:

> "111. Brennan J. in the passage from pages 536 and 537 in *Wardley*, provided a useful framework of analysis. In particular, it is helpful to bear in mind the following:
>
> "A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur…"
>
> 112. This is close to the analysis applied by Charleton J. in the present case. I would not quarrel with his statement that:
>
> "Each case is to be judged on the facts as to when the tort occurred, and whether damage resulted at that time or whether the wrong initiated a course of action that later resulted in a loss."
>
> 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.
>
> 114. It is best to turn to the facts as pleaded in the present case. The key complaint of the plaintiff is that he was induced by the negligence of the Bank to invest in the Solid World Bond, which was a "borrow to invest" product, a feature which made it "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". He would not have entered into the transaction were it not for the negligence and misrepresentations of the Bank.
>
> 115. The plaintiff does not and cannot make any complaint about the quality of management of the investments in the Solid World Bond. There was no fund to be managed. The basket of shares was designated at the start and could not be changed. No complaint is made about the shares chosen. The plaintiff was locked in to the Solid World Bond for the entire term of five years and eleven months.
>
> 116. The complaint as pleaded is that the Bank caused the plaintiff to enter into the transactions. The loss claimed is the amount of the interest paid by him on the loan transaction. There could be no other. The plaintiff could not suffer any loss on the shares. The value of the Bond was guaranteed.
>
> 117. There are three possible approaches to the accrual of the cause of action: firstly, it could accrue when the plaintiff entered the transaction by borrowing the money and purchasing the bond; secondly, it might accrue at some intermediate date when the plaintiff could prove that he was at a loss in terms of a calculation of his liability for interest against movements in the value of the shares; thirdly, it could accrue at the end of the period of the investment.
>
> 118. It is to my mind 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.
>
> 119. In logic, if the plaintiff's loss was too uncertain at the start of the period, the same would be true to a greater or lesser extent at every point during the currency of the bond. No loss could be established during the term, since the plaintiff could not withdraw from the bond. If the plaintiff could not sue at the beginning, because of the need to await the development of the value of the bond, equally it is unlikely that he could sue on any intermediate date. The plaintiff stated in his written submissions that there was no evidence whatever of any damage being suffered by him prior to the maturity of the investment.
>
> 120. The only possible alternative date of accrual would be at the end of the period of five year eleven months when it could be seen whether the plaintiff suffered loss by measuring any gains in the shares against the interest paid on the loan. That alternative view would apply no matter what the length of the bond, which would mean that, in the case of a

bond for ten, fifteen or even thirty years, the defendant could say that no damage had been caused. That approach might be the correct one in the cases of a different kind of investment, especially one where obligations of management and investment were undertaken. The implication in the present case would be that the cause of action in tort would not even have accrued although 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, as set out in paragraph 10 of this judgment, the damage accrued on the entry into the Bond, when the plaintiff was sold a bond which was "wholly unsuitable" for him.

> 121. This case, therefore, is, on its own particular pleaded facts, a clear one. The cause of action accrued when the plaintiff purchased the bond. Since that was more than six years before he commenced the proceedings, his claim is statute-barred. I would accordingly allow the appeal, set aside the order of the High Court and order that the claim [o]f the plaintiff is barred by the provisions of s.11(2)(a) of the Statute of Limitations, 1957."

21.7 The defendants contend that the present cases as pleaded are centred on the alleged unsuitability of the investments for the plaintiffs, and therefore fundamentally the same as *Gallagher* . If the plaintiffs suffered loss they did so by the very fact of entering into the investments which were wholly unsuitable to them.

AIB also argued that by paying commission on entry into the investments the plaintiffs suffered immediate loss. Counsel for AIB relied on the UK Court of Appeal decision in *AXA Insurance Ltd v Akther & Darby and others* [2010] 1 W.L.R. 1662 where a majority held at a preliminary hearing that damage would not be constituted by the incurring of purely contingent liability, and there had to be "a measurable loss additional to the incurring of the contingent liability for time to begin to run for limitation purposes" (see headnote). AIB argued that the payment of commission at inception was measurable and provable loss, and started time accruing.

21.8 The defendants also relied on the decision in *Komady Limited v. Ulster Bank Limited* [2014] IEHC 325, in which Peart J. gave detailed consideration to the decision in *Gallagher*. The plaintiffs were customers of the defendant bank. On 23rd November, 2012, they initiated proceedings claiming that the bank had been guilty of mis-selling by negligently advising them to enter 'swaps' agreements on 18th July, 2006. The plaintiff argued that a discoverability test should be applied in circumstances where the unsuitability of his investment was concealed from him. He argued that it was not until 2012, when he sought and was given advice from legal and financial experts, and that the damage became manifest or apparent. This argument was rejected by Peart J.:-

> "The difficulty with that argument…is that it is in effect contending for a discoverability test, and that is something which has not been provided for by the Oireachtas in any amendment to the Act of 1957, except in relation to personal injury actions. In my view, as was the case in *Gallagher v. ACC* , the plaintiffs suffered their loss when in July 2006 they entered into the Swaps which were negligently mis-sold to them according to the assumed facts in that regard. As Fennelly J. stated [in *Gallagher*]: 'It is to my mind 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'."

21.9 The reasoning in Komady was subsequently applied in *European Property Fund plc v. Ulster Bank Ireland* [2015] IEHC 425, another 'swap fund' case, by Costello J., where fiduciary and discoverability arguments were rejected in an almost identical manner. The defendants argued that Komady was indistinguishable to the present cases. The court was informed that Komady is currently under appeal.

21.10 Counsel for Mr. Kilduff also relied upon the decision of Baker J. in [2014] IEHC 486. The plaintiff was an agricultural contractor. In April 2002, he entered into an oral contract for the purchase of a fertilizer spreader, which was delivered to him in October 2002. Financing for the machine was provided through a hire-purchase agreement with the second defendant, and was received in October 2002. In early 2003, Mr. Murphy was stopped by the Gardaí who informed him that the machine was not suitable for road transportation in conjunction with his tractor, and that he was in breach of road traffic laws. While the plaintiff returned the machine to the first defendant in October 2003, he did not commence proceedings until July 2008. He alleged that the machine was not fit for the purpose for which it was bought.

21.11 Baker J. rejected the contention of the first named defendant that the plaintiff's claim in contract was statute barred. While the judge found, as a matter of fact, that the contract was concluded in April 2002 (more than six years prior to the institution of proceedings), she held that the cause of action accrued on the date the machine was delivered in October 2002, as that was when the conditions of the agreement were performed. The claim for breach of contract was not therefore statute barred. However, she went on to consider whether the action in negligence and negligent misstatement was statute barred. The thrust of this claim was that Mr. Murphy acted in reliance on a representation made by a servant or agent of the first named defendant that the machine was suitable for use on Irish roads and that this representation was false. Baker J. held that as a matter of law, a representation is actionable only if it can be shown that it induced a party to enter into a contract, and ipso facto such a representation has to have been made before the contact was made. She relied on para. 35 of the judgment of Fennelly J. in *Gallagher* where he stated his broad conclusion on the English jurisprudence:-

> "The English cases stood broadly for the proposition that once a party relies on advice to his detriment by entering into a transaction whereby he fails to get that to which he was entitled, the cause of action is complete, notwithstanding the fact that quantification of the loss might be difficult."

21.12 Baker J. concluded:-

> "It seems to me that if the plaintiff's cause of action here were solely based on a misrepresentation of suitability of the product that the claim would have crystallized the date the contract was made, i.e. on the 8th April, 2002, because only such representations that were made which would have induced the plaintiff to have entered into that contract, which he did on the 8th April, 2002, were actionable by him…. The claim in negligent misrepresentation accrued on 8th April, 2002 and was statute barred when the proceedings were instituted."

21.13 The defendants - in particular AIB - also rely on a series of English cases that were considered by Fennelly J. in *Gallagher*. These start with *Forster v Outred* [1982] 1 WLR 86, which adopts a broad definition of what constitutes actual damage. The plaintiff had mortgaged her farm in 1973 to secure her son's debts, believing it to be only temporary security for a bridging loan to enable him to buy a hotel. In fact no loan term mortgage had been arranged, and when the venture failed she became liable and discharged her son's liabilities in 1975. She commenced the relevant proceedings in 1980 – within 6 years of discharging the liability, but over 6 years from the date of the mortgage. Stephenson L.J. delivered a judgment with which Dunn L.J. and Sir Richard Cairns agreed. He records, at p.94, a submission made by the defendant's counsel on the definition of 'actual damage', which he applied in finding the plaintiff's case statute barred:

"…it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases."

The defendants in the present cases argue that on this definition the plaintiffs suffered actual damage on initial investment in the Belfry funds. It is argued that the plaintiffs suffered an immediate contingent liability or possibility of loss as their investments might reduce in value or reduce to nil value if matters outside their control such as market forces drove down property values or triggered the loan to value covenants default.

I will return later to Fennelly J's observations on this and subsequent English decisions.

21.14 Counsel for Mr. Kilduff in written submissions also relied, to similar effect, on *Pegasus Management Holdings SCA v Ernst & Young (the Firm)* [2010] 3 EWCA Civ 181. There the plaintiffs in 2005 sued accountants who had advised heavy investment in a Luxembourg company to limit exposure to capital gains tax. The investment took place in 1998. In fact when the plaintiffs came to sell they incurred a significant CGT liability. The Court of Appeal found that the detriment/damage occurred when the shares issued, as the Plaintiffs were then left in a materially worse commercial position than they ought to have been, and accordingly the claim was statute barred. Rimer L.J. at p.327 stated:

"…there is a clear line of Court of Appeal authority that damage sufficient to complete the tort of negligence will or may be caused in a 'wrong transaction' case by the fact that, as a result of the defendant's negligence, the claimant has not received what he ought to have received. It is, in particular, not necessary to show that the claimant is immediately put into a position in which he is financially worse off than he would have been had the defendant not been negligent."

21.15 In Mr. Ledgwidge's submissions some reliance was placed on the separate judgment of Brennan J. in *Wardley Australia Limited v Western Australia Limited* [1992] 109 ALR 247, cited in extenso and with apparent approval by Fennelly J. in *Gallagher*. At p.262 Brennan J. stated:

"A plaintiff may suffer economic loss or damage in a number of ways: by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability. Whether loss or damage is actually suffered when any of these events occurs depends on the value of the benefit, if any, acquired by the plaintiff by paying the money, transferring the property, having the value of the asset diminished or incurring the liability. If the plaintiff acquires no benefit, the loss or damage is suffered when the event occurs. At that time, the plaintiff's net worth is reduced. And that is so even if the quantification of that loss or damage is not then ascertainable. But if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is borne- that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck."

Thus it was argued that at the point that the plaintiffs paid over sums of money for investment either they received no benefit at all or such limited benefit as they did receive was outweighed by the burdens occasioned by inherent flaws in the Belfry investments. It was argued that the application of *Gallagher* and *Wardley* in this fashion produced certainty in the application of the Statute of Limitations that is a desirable component in the limitation of actions. By contrast, the plaintiffs' arguments if accepted would lead to uncertainty as to the moment in time when loss is suffered in financial loss cases – would it be when the value of the initial investment reduced by 5%? or 15%? or 50%? or must the plaintiff wait until the end of the investment period, which might be 20 or 30 years away?

22. The plaintiffs' submissions
22.1 In their response, the starting point for the plaintiffs' submissions is also the decision of *Hegarty v. O'Loughran* [1990] 1 I.R. 148 in which the Supreme Court addressed the accrual of the cause of action in tort in a personal injury actions. Barron J. had decided at first instance that the cause of action accrued when the act causing the damage had been committed. The Supreme Court rejected this. Finlay C.J. at p. 153 stated:-

"A tort is not completed until such time as damage has been caused by a wrong, a wrong which does not cause damage not being actionable in the context with which we are dealing. It must necessarily follow that a cause of action in tort has not accrued until at least such time as the two necessary component parts of the tort have occurred, namely, the wrong and the damage."

22.2 At p.154 Finlay C.J. referred to the dictum of Lord Esher M.R. in *Read v. Brown* (1888) 22 Q.B.D. 128, at p. 131. Addressing the question of whether a cause of action arose wholly or partly within the City of London, Lord Esher stated:-

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

The Supreme Court did not disagree with this but, as McCarthy J. stated at p.161 –

"…the case of *Read v. Brown* (1888) 22 Q.B.D. 128 does not support the "manifestation" argument. It supports the proposition that there may be more than one ingredient to a cause of action but not that the existence or accrual of a cause of action depends upon the plaintiff's awareness of the existence of such ingredient."

At p. 157 Finlay C.J. concluded:-

"I would, therefore, conclude that the proper construction of this sub-section is that contended for on behalf of the defendants and that it is that the time limit commenced to run at the time when a provable personal injury, capable of attracting compensation, occurred to the plaintiff which was the completion of the tort alleged to be committed against her."

The court decided unanimously that, save where s. 71 of the 1957 Act applied, the running of time was not postponed by a discoverability test. This was followed by the enactment of the Statute of Limitations (Amendment) Act, 1991, which introduced a "date of knowledge" test for the accrual of time in personal injury actions. However it was – as it had to be - accepted by the plaintiffs that a "date of knowledge test" does not apply to the accrual of the cause of action in the present case where the loss claimed is purely financial (leaving aside pleas arising under s.71 related to fraudulent concealment).

22.3 These principles were applied by the Court of Appeal in the recent case of *Brandley v. Deane* [2016] IECA 54 where there was no claim for personal injury but where the plaintiffs claimed damages for breach of contract and negligence against the defendants in respect of the construction of foundations of two houses. The foundations had been completed in March 2004, a Certificate of Compliance with planning permission and building regulations was furnished in September 2004, and the houses were completed in January/February 2005. In December 2005 the plaintiff observed cracks in each of the houses. The plenary summons was issued on 30th November, 2010. In determining that the claims were not statute barred, the Court of Appeal followed the principle established in *Hegarty v. O'Loughran*, namely that the cause of action in tort does not arise until loss or damage has been sustained by a plaintiff. Ryan P. delivering the judgment of the court stated:-

> "15. … it is clear that negligence by itself without the accompaniment of damage or loss is not actionable. The plaintiffs did not suffer damage at the time when the defective foundations were installed. When the defective foundation was put in, the only complaint that the plaintiffs could have had was that the foundation was defective. They had not suffered any damage at that point – there was merely a defective foundation – but that is not damage of a kind that is actionable in tort. Indeed, it seems to me to be very questionable whether there was an action in breach of contract at that time, but I do not have to consider that on this appeal.
>
> 16. …
>
> 17. The evidence here is that the foundation of these houses was defective, but it did not cause damage at that time. It caused damage in December 2005. The evidence is not that there was hidden damage which became discoverable at a later point; it is that the damage resulting from the defective foundations happened in December 2005.
>
> 18. It seems to me to be clear that no damage resulted to the plaintiffs in March 2004 when the foundations were installed. I do not agree that the plaintiffs had any right of action at that point. They could not prove any loss. Moreover, it seems to me that it would have been quite open to the second defendant, Mr. Lohan, or the first defendant, as the consulting engineer, to have subsequently discovered or decided to investigate the condition of the foundations. They would have been entitled to put right any defects that they identified and the plaintiffs would have had no right of action as a result. There could have been some delay in the completion of the project, but that would have given rise to entirely different considerations. In respect of the specific acts of negligence, the fact that the defendants might have identified the defects and remedied them is an illustration of the absence of loss at that point and the unavailability to the plaintiffs of any right of action there and then."

22.4 Accordingly, the plaintiffs' case is that the cause of action did not accrue until the fact of damage occurred. That fact, it was argued, was when each of the investments fell to nil value. It was argued that the decision in *Gallagher* is distinguishable on its facts, but that the judgment of Fennelly J, while not setting down any general test, also supports their position.

23. Discussion

23.1 There is no doubt that Fennelly J. considered that Mr. Gallagher's case was "clear on its own particular facts". In *Lyons v Delaney and others* [2015] IEHC 685 Binchy J. had occasion to consider the circumstances in which the decision in *Gallagher* might be distinguished. Lyons concerned an application to set aside a third party notice joining solicitors whom the plaintiff alleged had failed to advise her as to the nature of an investment that she entered into in October 2003, over 6 years before proceedings were commenced. It was procedurally different to the present case, but it is of relevance because Binchy J. emphasised the fact-specific nature of the decision in *Gallagher*:

> "39. While the applicant has relied upon the case of *Gallagher v. ACC Bank Plc*. [2012] 2 I.R. 620 the facts of that case were very much different to this case. In *Gallagher*, the plaintiff invested in a financial product provided by the defendant, with borrowings also provided by the defendant. The core of the plaintiff's claim was that the product was not a suitable product to borrow money to invest in and it was most unlikely that it would deliver any return sufficient to offset the cost of the loan transaction. The plaintiff invested in the bond in 2003. The issue of proceedings against the defendant claiming damages for negligence, breach of contract and breach of duty occurred in 2010."

Binchy J. quoted from the judgment of Fennelly J. in *Gallagher* ending with his statement that:

> "This case, therefore, is, on its own particular pleaded facts, a clear one. The cause of action accrued when the plaintiff purchased the bond. Since that was more than six years before he commenced the proceedings, his claim is statute barred."

Binchy J. then stated:

> "40. It is clear that the decision of the Supreme Court in *Gallagher* is particular to the facts of the case. Moreover, there was no dispute in *Gallagher* as to the nature of the transaction entered into between the plaintiff and the defendant. Although the respondents have yet to deliver a defence, the plaintiff is quite clearly claiming that she entered into the transaction with a very different understanding as to what it entailed than subsequently transpired to be the case, and in a most fundamental way i.e. she understood she was investing a fixed sum of money, but claims that she was completely unaware that by entering into the transaction on her behalf, the respondents were involving her in the borrowing of a very substantial sum of money (disregarding altogether the nature of any recourse that the lending bank would have in the event of default of repayment of the loan). Furthermore, and presumably in that context, the plaintiff has reserved her right to plead sections 71 and 72 of the Statute of Limitations, in the event that the statute is pleaded by the respondents in their defence to the proceedings.
>
> 41. For these reasons, in my view it is far from clear that the plaintiff's claim is statute barred and accordingly the third party notice cannot be set aside on this basis either."

23.2 I agree with Binchy J.'s observations on the fact specific nature of the decision in *Gallagher*. I am of the view that there are also significant differences between the core case as pleaded by the plaintiffs in the present proceedings and the case as pleaded by Mr. Gallagher, that distinguish it:

> (1) The "key complaint" of Mr. Gallagher was that he was induced to invest in the Solid World Bond as a "borrow to

invest" product, which made it "wholly unsuitable for the plaintiff or any investor". He borrowed from ACC. He pleaded that the Bond was unsuitable for borrowing 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 is not pleaded or core to the 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, therefore his loss was immediate and continuing. The interest could be accurately ascertained up to the date of trial (and as it transpired amounted to "some €41,000" – see para.19 of the judgment). As Fennelly J. reasoned at para.s 118 -119 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 5 years and 11 months, whereas the Belfry funds were structured as medium to long-term, with 8 years only being indicative.

23.3 Perhaps the most significant difference is that, whereas Mr. Gallagher's investment was bound to fail from the outset, and he was bound to suffer loss of interest, the same cannot be said of the plaintiffs' investments in the Belfry funds. Those investments could have risen, or fallen – but it could not be predicted at the outset whether they would go up or down in value, or that they might fail entirely.

The factual context of *Gallagher* is further emphasised in the following passage from McMahon and Binchy The Law of Torts (Round Hall, Fourth Edition 2013) where the authors state:

> "46.35 One cannot read to much into the wider precedential value of the Supreme Court decision in *Gallagher*, as it was based on the peculiar nature of the bond in question and on the specific nature of the plaintiff's pleadings. Nevertheless, it highlights the difficulties of establishing when the tortious cause of action accrues in the case of financial losses. It also emphasises that the plaintiff need not wait for the full quantification of his losses before commencing his action, although he cannot do so until some damage is discernible and provable."

24. Obiter dicta of Fennelly J in *Gallagher*

24.1 It is equally clear that Fennelly J. did not attempt to formulate a general test for the date of accrual of a cause of action in financial loss cases. However his judgment is important in that having reviewed the Irish case law, he then analyses UK and Australian jurisprudence, and in the process expresses certain obiter dicta on the running of time in financial loss cases that give useful guidance to this court.

24.2 It must be said that Fennelly J. questioned the consistency of the UK case law and found difficulty in discerning any clear principle. At para. 95 he states:-

> "95. Having wrestled with the complexities of this case law, I find it difficult not to join in the lament of Lewison J. in *Pegasus Management v. Ernst & Young* [2009] P.N.L.R. 209, at p. 226, i.e., prior to the Axa decision, but referring to three decisions of the House of Lords and the fact that the question had been examined on "countless occasions by the Court of Appeal", that "this concentration of judicial firepower does not give easy answers for the first instance judge"."

24.3 At para. 65 of his judgment in reference to the test advocated in *Forster v. Outred & Co.*, and recorded by Stephenson L.J. (see above) he noted:-

> "65. This very broad definition covers both contingent or uncertain future loss and contingent liability. It was later questioned by Lord Hoffmann, at p. 549, in Sephton insofar as it extended to "liabilities which may arise on a contingency"."

He noted that Forster was followed in two subsequent solicitor's negligence cases, *D.W. Moore & Co. v. Ferrier* [1988] 1 W.L.R. 267, and *Bell v. Peter Browne & Co*. [1990] 2 Q.B. 495. At para. 70 of his decision he notes that in two other decisions the result went the other way: *UBAF Ltd. v. European American Banking Corporation* [1984] 1 Q.B. 713, and *First National Commercial Bank v. Humberts* [1995] 2 ALL E.R. 673. Fennelly J. then refers at some length to the High Court of Australia decision in *Wardley Australia Ltd. v. Western Australia* [1992] 109 ALR 247. That case concerned a claim made by the State of Western Australia alleging misleading and deceptive conduct against a merchant bank. The State alleged that, based on false representations made by the merchant bank, it had granted an indemnity to another bank against loss on a facility granted by the bank to a company Rothwells. The false representations related to the assets and financial condition of Rothwells. The indemnity was given in 1987. The State was required to pay pursuant to the indemnity when the company failed to meet its obligations under the facility. The relevant claim against the merchant bank was made in 1991, outside the three year statutory limitation period. Fennelly J. had this to say in relation to *Wardley*:-

> "74. The question of law was whether the State's cause of action accrued when it executed the indemnity, as was held by the first instance judge, or whether, the indemnity created an executory or contingent obligation, which crystallised only when the bank called on the State to indemnify it, as was held by the Federal Court and as was upheld on appeal by the High Court of Australia. That court held, at p. 524, that the indemnity "created a liability on the part of [the State] to the Bank to make payment if and when the Bank's relevant 'net loss' was ascertained and quantified". The majority judgment, delivered by Mason C.J., Dawson, Gaudron and McHugh JJ., was described by Lord Hoffmann in Sephton as a "masterly exposition of the law". The court accepted the authority of *Forster v Outread* as being "explicable by reference

to the immediate effect of the execution of the mortgage on the plaintiff's equity of redemption" (at p. 529). In a passage expressly approved by Lord Hoffmann in Sephton, the court observed, at p. 531:-

"It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. For our part, we doubt that the decisions travel so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date (*Forster v Outread* and *D.W. Moore and Co. v. Ferrier* illustrate the point)."

75. Brennan J. adverted to the range of different circumstances in which financial loss might occur. He emphasised the difference between the measure of damages in contract and in tort, by saying, at p. 535, that that question was "not how much worse off is the State than it would have been had the alleged misrepresentation been true, but how much worse off is the State than it would have been had it not relied on the alleged misrepresentation and entered into the transaction"."

Fennelly J. in his judgment then quotes the passage from the judgment of Brennan J. quoted earlier in my judgment and ending with the sentence:-

"In other words, no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is 'worse off than if he had not entered into the transaction'."

24.4 In para. 78 of his judgment Fennelly J. refers to the House of Lords decision in *Law Society v. Sephton* [2006] 2 A.C. 543. There, the Law Society sued a firm of accountants for its negligent audit of the accounts of a solicitor for the purpose of the annual report to the Law Society. The solicitor had in fact misappropriated large sums from his client account. The Society was compelled to make payments out of its compensation fund to clients of the solicitors. The Society's claim against the accountants would be statute barred if its cause of action accrued from the date of receipt of the relevant accountant's report, but not if it accrued when the compensation claims were made. The House of Lords held, as set out in the head note at p. 543, that –

"a contingent liability, such as a possibility of an obligation to pay money in the future, was not in itself damage until the contingency occurred".

At para. 82 Fennelly J. comments:-

"82 …*Sephton* does not appear, however, to establish any principle of law save to the effect that in pure contingency cases, the cause of action does not accrue until the contingency arises."

24.5 Fennelly J. then addresses the decision of the UK Court of Appeal in *Shore v. Sedgwick Financial Services Ltd*. [2008] PNLR 37, which established the soubriquet "Shore Loss". There the plaintiff was the managing director of a substantial company and entitled to valuable benefits under its occupational pension scheme. He was approaching retirement. When the company was being taken over, he obtained financial advice from the defendants. On their advice, in 1997 he transferred his then very valuable accrued benefits in the occupational scheme, under which his benefits would have been guaranteed, to a personal income withdrawal plan, which was more risky. He discovered, in particular in 2004, that the benefits under the new scheme were very substantially less than he had expected. Proceedings against the defendant advisers were issued in 2005. The question, according to Dyson L.J., who gave judgment on behalf of a unanimous Court of Appeal, was whether the plaintiff suffered damage as soon as he gave up his rights under the occupational pension scheme and transferred to the income withdrawal plan. Fennelly J. summarises the approach of Dyson L.J., and comments on that judgment at para.s. 86 – 88 of his judgment:-

"[86] Dyson L.J. referred to Sephton and drew a sharp distinction between "pure contingent liability" and "contingent risk". The plaintiff was undoubtedly exposed to risk, but not to a liability. He dismissed the plaintiff's argument that he had paid market value when he transferred to the income withdrawal plan and that this was analogous to paying £100 for shares instead of government bonds. It was no answer to say that the plaintiff's investment was worth what he paid for it. It was more risky: "A claim for damages immediately upon the acquisition of the shares would succeed. The investor would at least be entitled to the difference between the cost of buying the… bonds and the cost of buying and selling the shares" (see pp. 53 and 54). Appearing to reverse the burden he said it was "not possible to say that Mr. Shore did not suffer financial loss … when he invested in the [income withdrawal] scheme" (see p. 54). He said, at p. 54, that the essence of the reasoning in the cases was "the fact that the risk to which the claimant was exposed by the defendant's negligence might not eventuate did not mean that the claimant did not suffer loss as a result of being exposed to that risk". Next he took from *Moore v. Ferrier* that "it was possible that the director would not leave the plaintiff's employment" and "would not act in breach of the covenant", and from *Bell v. Peter Browne & Co.* that "it was possible that the former wife would not deny the plaintiff his one-sixth share in the proceeds of the matrimonial home".

[87] Dyson L.J. then deduced, at pp. 54 and 55, that:-

"It is the *possibility of actual financial harm that constitutes the loss*. That possibility is present even if there is also the possibility that the claimant will be financially better off as a result of being exposed to the risk. In my view, therefore, it is irrelevant that, as things turned out, Mr. Shore might have been financially better off under the PFW scheme than he would have been if he had deferred taking his pension under the [occupational] scheme …" (emphasis added).

[88] The emphasis on "possibility" of loss in this passage does not appear to me to be justified by his premise that loss would possibly not have occurred in the earlier two cases. It is far removed from the view of the High Court of Australia in *Wardley* and in particular that of Brennan J., quoted above, that a "transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck". It seems also difficult to reconcile with Lord Hoffmann's acceptance that, at least in certain cases, damage is suffered "only when it is possible to say that [the plaintiff] is on balance worse off." It contrasts with the approach of Ackner L.J. in *UBAF Ltd. v. European American Banking Corporation*, already quoted."

24.6 As Fennelly J. noted at para. 90, the decision in Shore had been, at least implicitly, accepted in later decisions "… but, so far as we have been informed, has not yet been considered by the Supreme Court". It follows from the passages just quoted that his view was that the decision in Shore might not be followed in the UK Supreme Court and should not be followed in this jurisdiction.

24.7 In a section headed "Searching for an answer", Fennelly J. expresses some criticism of the stricter view taken in some of the English case law, derived from the decision in Forster as to when loss in such cases accrues. His criticisms/opinions may be summarised as follows:-

(1) The English case law was notable for the "almost complete absence of expressions of regret … at the state of the law in which a person suffering financial loss should be shut out from relief and statute barred not only before he knew he had a cause of action but in circumstances where he could not reasonably have been expected to sue." (para. 96) He added:-

"It may be that the explanation lies in the mitigating provisions introduced in 1986, whereby an alternative three year time limit runs from the date of knowledge. Nonetheless, the recent cases exhibit little concern for the striking of a just balance between the rights of plaintiffs and defendants."

(2) In reference to *D.W. Moore & Co. v. Ferrier* he commented:-

"It still seems to me remarkable that the cause of action against the solicitors was held to have accrued immediately following the negligent drafting of the non-compete clause. At that time, the new director had just joined the company. Were the other directors on their own behalf or on behalf of the company seriously expected to sue the solicitors at a time when there was no reason to expect the new director to leave the company or, a fortiori, to set up in competition within the forbidden geographical area?" (para. 97).

Fennelly J. makes a similar point in respect of the decision in *Bell v. Peter Browne & Co*., noting "the husband was implicitly expected to sue the solicitors immediately after the negligent drafting of the deed …"

(3) *Nykredit Plc. v. Edward Erdman Ltd*. (No. 2) [1997] 1 W.L.R. 1627, another decision relied upon by the defendants in the present case, was one in which Fennelly J. felt Lord Nicholls "… made a number of fine distinctions in his examination of what should be a comparatively simple notion of actual damage. To say the least, these do not lead to a clear cut result." (para. 98).

(4) Fennelly J. had difficulty with the proposition, based on the speech of Lord Nicolls in Nykredit, that the policy of the law should be to advance, rather than to retard, the accrual of a cause of action, and that this was "especially so if the law provides parallel causes of action in contract and in tort in respect of the same conduct". Fennelly J. stated:-

"[101] No reason has been put forward in support of the proposition that the policy of the law should be to advance rather than to retard the accrual of a cause of action. I cannot accept a rule of interpretation which would favour the defendant at the expense of the plaintiff. We are concerned with the interpretation of a limitation period laid down by statute, an Act of the Oireachtas. The policy of the Oireachtas is to be gleaned from the words of the Act.

[102] It is true that, in *Tuohy v. Courtney* [1994] 3 I.R. 1, Finlay C.J, speaking for the court at p. 48, identified one of the purposes of the limitation period under review as being "to promote as far as possible expeditious trials of action so that a court may have before it as the material upon which it must make its decision oral evidence which has the accuracy of recent recollection and documentary proof which is complete, features which must make a major contribution to the correctness and justice of the decision arrived at". This recognition of a legitimate legislative objective does not, however, lead to any particular interpretation of the legislation as enacted. In particular, Finlay C.J. went on to recognise "the necessity as far as is practicable, or as best it may, for the State to ensure that such time limits do not unreasonably or unjustly impose hardship".

[103] Nor can I 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."

(5) Fennelly J. was at his most critical in referring to the decision in Shore, stating:-

"Perhaps the case with which I have the greatest difficulty is *Shore v. Sedgwick Financial Services Ltd*. …. It seems to have been accepted that the plaintiff, Mr. Shore, got full market value (at the time) for the rights which he transferred out of the occupational pension scheme into the personal income withdrawal plan. Dyson L.J. explained that it was "the possibility of actual financial harm that constitutes the loss". (para. 98)

It is at least implicit from this that Fennelly J. considered that the possibility of actual financial harm could not be equated with the "actual loss" required to complete a tort.

(6) In general Fennelly J. did not approve of the attempts made in the English case law to establish classifications or distinctions. At para. 105 of his decision he states:-

"[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. *Nykredit Plc. v. Edward Erdman Ltd*. (No. 2) [1997] 1 W.L.R. 1627 shows how difficult it is to devise anything like a straightforward 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."

O'Donnell J. in his judgment in *Gallagher* also doubted that the distinction between "transaction cases" and "non transaction cases" was particularly useful. For this reason I do not find the decision in *Pegasus Management Holdings SCA v Ernst & Young (the Firm)* [2010] 3 AER 297 (which was one of the cases cited in argument before the Supreme Court in *Gallagher*) relied upon by Counsel for Mr. Kilduff, and which sought to rely on such a distinction, to be of assistance.

24.8 Of significance is that in his judgment Fennelly J. continually returns to the wording "actual damage". Thus at para. 104 he states:-

> "104. 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. …"

While this may be an interpretation of his judgment, he appears to favour the approach that in certain cases where there is a 'contingent liability' or a 'contingent risk' of loss, actual damage is suffered only when the plaintiff is, on balance, worse off or there is, in the words of Lord Hoffman, "measurable loss".

25. Observations of O'Donnell J in *Gallagher*
25.1 Two of the defendants, AIB and Mr. Ledgwidge, in their submissions place some reliance on the judgment of O'Donnell J. in *Gallagher* to support the proposition that as the plaintiffs' claims in tort arise from contractual relationships, this court should adopt the approach advocated by Lord Nicholls in Nykredit that public policy should be to minimise rather than expand the disparity between the running of time in contract and tort cases.

25.2 First it is important to note that O'Donnell J. at p.659 expressly agreed with "the decision and judgment of Fennelly J". As mentioned earlier O'Donnell J. also doubted that the distinction between "transaction cases" and "non transaction cases" was of particular utility because:

> "That seems to me to be a matter of characterisation of a claim rather than something intrinsic to it".

He adds:

> "I also fully agree with Fennelly J. that in the absence of any clear principle, these cases are best dealt with on an incremental basis closely related to the facts of the individual case."

25.3 O'Donnell J. then states:

> "Since it is likely therefore that the issue will recur, and since the subject is a matter which should be the subject of broader debate and consideration, it may be useful to add some general observations on the issue raised by this case, and in particular to explain why I would respectfully differ from Fennelly J. on the question of whether, where possible, courts should seek to reduce the differences in limitation periods for causes of action in tort and in contract, when they arise out of the same facts."

His judgment then makes observations about investment or advice claims which sound in contract but also, on the same facts, in negligence, and policy considerations that might be said to favour accrual of the cause of action at the same time, and provide a fair and predictable result. He does state at p.661 that "at the level of principle there is some merit in the approach advocated by Lord Nicholls in Nykredit…", but he then observes:

> "In my view this is not a question of approaching the interpretation of an Act of the Oireachtas by reference to policy considerations. If the Oireachtas had reached an advertent conclusion on the question as to when causes of actions in respect of latent financial loss could be brought, then this case would be much simpler. The only choice the Oireachtas made however was to maintain the principle that time starts to run, both in contract and tort, from the date upon which a cause of action accrues. That choice, if it was made by the Oireachtas, was made when the type of tort liability now contemplated was unknown."

25.4 While O'Donnell J. considered that the choice of dates for occurrence of damage "necessarily involves some consideration of policy" his judgment accepts that there are competing policies – the policy of permitting a plaintiff to pursue a claim, and considerations such as "certainty, predictability, fairness to defendants and the desirability of early determination of controversies", as well as "the consideration that the adaptation of tort claims to a contractual setting necessarily risks having a distorting effect on the law, and more importantly spreading liability, and therefore cost, more widely than is desirable." (page 662). He concludes his observations with the following:

[130] In my view, the focus should be on legislation in the shape of a revised statute of limitations, rather than on judicial decisions on the question of accrual of a cause of action. If there is a perceived inadequacy in the current rules, particularly those to be applied to claims of defective professional advice giving rise to claims which may only become apparent some time after the acts alleged to have caused the wrong, then that is best, and perhaps only, addressed, by a general review of the law such as that recently recognised by the Law Reform Commission, Report on Limitation of Actions (LRC 104-2011) which suggested a short general limitation period, the possibility of extension on grounds of discoverability, and a long stop provision after which no action could be brought. Whether that or any other change is desirable is best debated at the level of public policy, when all the interests concerned are involved, and when the costs of any change in the law can be considered, evaluated and debated. It is inherently unlikely that a satisfactory solution to such difficult problems can be arrived at on the limited information that is available in any single set of court proceedings, and using only the rules on accrual of a cause of action."

O'Donnell J. went on the decide *Gallagher* "by reference to its own facts."

26.1 I agree with O'Donnell J.'s comments that there is a need for legislation and that that is the level at which policy considerations should be debated, decided and implemented. I do not believe it is appropriate for this court to embark on considerations of competing policy in searching for a solution, particularly as the relevant provisions of the Statute of Limitations were promulgated in 1957 when claims in tort of the sort pursued by the plaintiffs leading, it is claimed, to financial loss, were not within the legislature's contemplation. In view of this, and insofar as there is a difference of view between the judgment of Fennelly J. and the observations of O'Donnell J., it is not necessary or appropriate for this court to come down on one side or another.

26.2 I am of the view that the decision in Komady falls to be distinguished from the present cases for a number of reasons. It will be recalled that the plaintiffs claimed that the interest-rate swaps were mis-sold because they were not consistent with their financial planning objectives as explained to Ulster Bank at the time, and that the misrepresentation to them as to the suitability of the swaps amounted to concealment by fraud of the fact that they were unsuitable. Peart J. found that the plaintiffs were "…in effect contending for a discoverability test, and that is something that has not been provided for by the Oireachtas…" That claim has not been made in the present case. Moreover Peart J. concluded:

> "In my view, as was the case in *Gallagher v ACC*, the plaintiffs suffered their loss when in July 2006 they entered into the Swaps which were negligently mis-sold to them…"

Thus the facts, and the timing of actual loss, more closely resembled the position in *Gallagher* than the facts as pleaded in the present case. It also seems that, unlike in the present case, the plaintiffs in Komady did not seek to argue that the mere possibility of loss arising from misrepresentation was not sufficient to complete the tort, and the tort was not complete until actual loss occurred. I also note that Komady is under appeal.

26.3 I also do not consider that the decision in *Murphy v O'Toole* assists. The plaintiff had agreed to buy an Amazone sower in April 2002 and took delivery of a defective machine in October, 2002. His claim for breach of contract was that the machine was not suitable for the purpose for which it was required which included driving it on the public highway. The ratio decidendi in that case was that the breach of contract occurred on delivery, and as his claim for breach of contract was initiated within 6 years of the date of delivery he was not statute barred. This must be so – the machine did not become unsuitable for use on the road – it was unsuitable ab initio.

Baker J. went on to examine the claim in negligent misstatement – the claim in tort- but did so only on the basis "In case I am wrong on the first point…". Arguably the second basis for her decision is obiter. In any event, Baker J. formed the view that the court should engage first in ascertaining the true nature of the plaintiff's claim. At para.59 she states:

> "This is a claim for damages for breach of the obligation of the seller of goods to the buyer, governed to a large extent by the Sale of Goods Act, 1893 as amended. This is consistent with the view expressed by the Supreme Court in *Gallagher v ACC Bank* that the court should look to ascertain the central and primary claim made in litigation and that where appropriate the policy of the law should be to minimise rather than expand the disparity between the running of time in contract and [tort] case, at least where the wrongdoing alleged is identical."

In coming to this conclusion Baker J. relied on the judgment of O'Donnell J. in *Gallagher* notwithstanding the somewhat differing view taken by Fennelly J. speaking for the majority – see particularly para.s 101 and 103 at p.654 (quoted above). Aside from this it is clear that Baker J. took the view that the facts before her pointed to a case the essence of which was breach of contract and breach of an implied term under the Sale of Goods Act, 1893, as amended. The nature of the present cases is very different on their pleaded facts, and in particular in respect of delayed effect on the investments of the LTV covenants.

27. A conclusion on accrual in tort
27.1 What can be said is that certain guidelines and principles emerge forcibly from *Hegarty v O'Loughran* and *Gallagher* :

(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. This receives particular support from the judgment of Griffin J. in *Hegarty v O'Loughran* at p.158 where he stated:

> "Until and unless the plaintiff is in a position to establish by evidence that damage has been caused to him, his cause of action is not complete and the period of limitation fixed by that sub-section does not commence to run."

(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.

To these may be added two obiter dicta of Fennelly J. that find favour with this court:

(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.

This in my view is consonant with the ordinary standard of proof in civil cases. The insufficiency of a mere possibility of loss or damage was also what prompted the Court of Appeal in Brandley to determine that the putting in of a defective foundation did not amount to a tort until it resulted in actual damage in the form of cracks – in so doing the Court of Appeal quoted from Fennelly J. in *Gallagher* at p.656 where he rejects the proposition that the cause of action accrues where there is a mere possibility of loss. As Fennelly J. pointed out in para.110:

> "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."

I am persuaded by the logic of this observation. It would be a harsh, and arguably absurd, interpretation of section 11(1) of the Statute of Limitations if a plaintiff was obliged to issue a writ protectively when a wrong has been done but no provable damage has occurred, on the basis of a mere possibility that damage might result. This would lead to a proliferation of writs and the incurring of unnecessary legal and filing expenses in cases where no loss or damage ensued.

> (8) Fennelly J's statement that the passage quoted from the judgment of Brennan J. in *Wardley* provides a "useful framework of analysis". It will be recalled that part of that passage reads:
>
> "If the plaintiff acquires no benefit, the loss or damage is suffered when the event occurs. At that time, the plaintiff's net worth is reduced. And that is so even if the quantification of that loss is not ascertainable. But if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether the loss or damage has been suffered at the time when the

> burden is borne – that is, at the time of the payment, the transfer, the diminution in the value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur…"

28. Application to the plaintiffs' cases

28.1 Firstly I am satisfied that there was sufficient material before the court in the pleadings and the agreed documents to enable it to reach conclusions on the primary issue at preliminary hearing, taking the plaintiffs' cases at their height.

28.2 The Prospectuses in respect of all the relevant Belfry funds in the section devoted to "Risk Factors" advised investors of certain risks and in general that investment in shares and in property "is speculative, as values can fall as well as rise", and advised of the link of the proposed investments in UK commercial property to the rise and fall in property value and rentals. Investors were advised that the property market is "cyclical and a loss could occur if the Properties were to be sold during a down-turn". The degree to which different plaintiffs were or were not advised that any particular fund was "high risk" is disputed but is not relevant to the present discussion.

The plaintiffs in general must therefore be taken to have been advised, and to have known and understood, that their investments entailed some risk; that they could go up or down in value; that they could go down in value at once or at any time; and that losses could result from property sales in a downturn. I use the words "in general" advisedly. This generality may not apply, or at least not with the same force, to Mrs. Goodwin who pleads that she and her late husband, due to his ill-health, were not fit to make an investment decision. Also Ms. Cantrell pleads that details in the individual prospectuses were not brought to her attention.

28.3 What is of note is that the Prospectuses did not on their face advise the plaintiffs of the risk that a downturn in the value of properties could result in the investments losing their entire value. Mr. McMullin pleads that he was advised that as it was property based the investment would not fall more than 10% or 15%.

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

28.5 This possibility was not changed by the existence of the LTV covenants. The position remained that the investments could increase or decrease in value depending on how the market performed. In fact the values increased initially. The LTV covenants could only have an impact if there was a relatively significant loss in property value. There was therefore only a possibility, at the time of investment, that the LTV covenants would have an impact, and that was conditional on a significant decrease in the value of the property. The existence of this possibility of loss from the operation of the LTV covenants did not amount to "actual loss".

Conclusion 2:

Assuming that actionable wrong occurred when the Belfry investments were entered into, the cause of action in tort did not accrue at date of entry into the investments as there was a mere possibility of loss but no actual loss, and the LTV covenant made no difference to this.

28.6 Certain defendants – in particular, as noted earlier, AIB – argued that the moment the plaintiffs invested they suffered a loss by reference to the 2% commission due and payable on investment to AIB. While the plaintiffs who paid it appear to plead that their invested sum included the 2% commission, this does not seem consistent with the Prospectuses which make it clear that each investor was to make an additional payment of 2% which was to be paid to AIB as commission. Thus clause 6.1 in Belfry 2 states:

> "A placing commission of 2% of the investment made is payable to the Placing Agent [AIB]. This means that if the Investor is making the minimum investment of €75,000, an additional amount of €1,500 will be payable to the Placing Agent."

This is also expressly clear from the table in clause 13.2 setting out in tabular form the amount of "Investment Participation", "2% Commission" and the combination of these in a third column headed "Amount of Cheque Required". Thus the commission payment was additional and on the face of the Prospectuses not part of the funds provided for investment.

28.7 Moreover the real purpose behind the plaintiffs pleading the 2% commission seems to be to bolster their claim in relation to the impact of the LTV covenant rather than ground a claim for loss of the commission. Thus Ms. Cantrell at para.32 of her Statement of Claim pleads the effect of the 80:20 LTV covenant and adds:

> "…In addition, the variation leading to the covenant being invoked was in fact less, being 82:18 when the Bank's fees of 2% were calculated into the LTV ratio."

This is carried forward and informs the plea at para.38.vi. Whether this is correct or not does not need to be decided on this preliminary issue.

28.8 In any event, this argument for loss at the outset cannot not apply to Mr. Tierney or Mr. O'Reilly, both of whom were employees of AIB in respect of whom the commission was waived.

28.9 As to the other plaintiffs, it is clear from the Prospectuses that they paid this commission at the outset. However what is claimed in their Statements of Claim and particulars as to their loss is the amount invested. There is no specific plea related to loss of this 2% commission. Leaving aside that pleading point, there are two reasons why this argument cannot be sustained. Firstly AIB promoted and sold the investments, and distributed and collected the application forms and investment cheques. Their 2% commission was clearly a form of remuneration for this service as "Placing Agent", and in that sense it is difficult to see how the plaintiffs could claim it as an item of loss or damage. Secondly, the plaintiffs received a benefit for their investment – they received equity, namely shares in the relevant Belfry fund which had real value at inception based on the property investment.

Conclusion 3:

The commission paid to AIB on entry into the investment did not constitute actual loss.

Property Updates

28.10 The status of the Property Updates and consolidated annual financial statements deserves some further comment at this point, because their timing and the information that they establish is critical. The Property Updates were prepared annually by the directors of Belfry 2-6 respectively, separately in respect of each Belfry fund. They list acquisitions and disposals in the year to 31st March. In a table they list the properties comprised in the fund with columns for 'Property Cost' (net of purchase price, acquisition costs and capitalised expenditure), 'Total Cost' (although this column does not appear in the Property Update to year end 31st March 2007) and 'Valuation 31 March….', all values being given in Sterling. The tables, at least for years ending 31st March, 2007, 2008 and 2009, are prefaced by a note:

> "The table below shows the total acquisition and capitalised cost of the current property portfolio and the revised values following a recent independent valuation carried out by Messrs Cluttons, Chartered surveyors."

The Property Updates speak for themselves and as stated earlier I take them to be admitted facts for the purposes of the preliminary issue. Copies were sent to the plaintiff investors, although the time at which they were sent out varied from year to year. In any event the tables and the information constitute provable evidence of the valuation of the property investments accepted by each Belfry fund as of 31st March in a given year. The underlying reports from Messrs. Cluttons would also be provable evidence of actual valuation as of 31st March in a given year.

Directors' Report and Consolidated Statements

28.11 As to the "Directors' Report and Consolidated Financial Statements" (to give them their full name), these are also agreed documents. They are audited annual accounts to year end 31st March for each fund, accompanied by signed Directors' Reports. They incorporate the values in the Property Updates, and include Profit and Loss accounts and "Reconciliation of Shareholders funds" that give a valuation as of the year end of the shareholders' (and hence the plaintiff investors') collective interest in the relevant fund. These financial statements in respect of Belfry 2, 3, 4 and 5 for the year ended 31st March, 2008 were signed off by the directors on 7th July, 2008, and the court assumes for the purposes of the preliminary issue that that is the date upon which these financial statements were approved by the relevant Belfry boards.

28.12 In respect of Belfry 6 the financial statements were signed by the auditors on 22nd July, 2008, but the precise date on which the two directors signed off and the accounts were adopted by Belfry 6 is not given. It may be presumed for the purposes of this preliminary issue that it was between the signing off by auditors on 22nd July, 2008 and 5th August, 2008 inclusive as the letter to Mr. O'Reilly dated 5th August, 2008 enclosed a copy of the statements bearing directors' signatures signing off on the Directors' Report.

28.13 It was a matter of some controversy as to whether the signing off by Belfry directors of the audited accounts crystallized the value of investor interests on the date of signing (as contended by the plaintiffs), or whether the point of signing the accounts should be deemed to establish the value of each shareholder investment back to 31st March in the relevant year - as contended by counsel for AIB.

28.14 In the period with which we are concerned – 2007 to 2009 inclusive - various provisions of the Companies Acts 1963-2006 imposed obligations on companies such as the Belfry companies, or groups of companies, in relation to annual accounts. Section 148(1) of the Companies Act, 1963 (as replaced) sets out the basic obligation to prepare annual accounts, and subs.(7) provides that:

> "The directors of the company shall lay the individual accounts before the annual general meeting of the company within 9 months of the balance sheet date."

Section 156(1) provides that where the directors prepare accounts the "balance sheet and profit and loss account of the company shall be signed on behalf of the directors by 2 of the directors of the company." Under s.158(1) there must be attached to the balance sheet a report "by the directors on the state of the company's affairs", which must be signed on behalf of the directors by two directors (subsection (2)). Section 13(1)(a) of the Companies (Amendment) Act, 1986 elaborates on the information that must be included in the directors' report. Thus the information should impart a "fair review of the development and performance of the company's business…during the financial year…" that is "balanced and comprehensive" which is "to the extent necessary for an understanding of the company's development, performance or position…". Importantly s.13(1)(b) requires it to include :

> "particulars of any important events affecting the company or any of its subsidiaries, if any, which have occurred since the end of that year."

28.15 The agreed Belfry company financial statements reflect these statutory requirements. Thus the process appears to have been as follows: in each year revaluations of the underlying properties were undertaken as of 31st March; these informed the preparation by the directors of 'consolidated financial statements' for the year ended 31st March; those accounts with Directors' Report were then audited by independent accountants; the Directors' Report took into account any significant events since the year end; the Directors' Report was then signed by two directors on behalf of the Board.

28.16 While it is undoubtedly true that for the most part the accounts in terms of content relate to financial standing as of the year end i.e. 31st March, AIB's argument is open to two objections. Firstly the board is obliged to consider and in its report refer to any important events affecting the company since the financial year end. Secondly the fact that the board must consider the accounts and two directors must sign their report on behalf of the board shows that the process is not complete until the board approves the accounts and the accounts are signed. This is no mere formality; if the board spotted discrepancies, mistakes or omissions, or was unhappy with estimates or judgments in the accounts as presented, it would be entitled – possibly obligated – not to approve the accounts. Moreover, until they are approved in this fashion the accounts are not suitable for submission to members or presentation at the AGM, or filing in the Companies Registration Office, or sending to the plaintiff investors.

28.17 I have therefore come to the conclusion that while the accounts are indicative of the financial position of the relevant company, and may for some purposes relate back to year end e.g. for taxation, declaration of dividends and future company accounting, they do not for present purposes crystallize the value of an investor's interest until approved and signed off by the directors. It is only at that point in time that a plaintiff /investor can point to the accounts as evidence and rely on them as presenting or enabling an estimate of the value of their interest.

28.18 In the letters of 5th August, 2008 each investor in each fund was reminded of the value of their initial investment and informed of the value of their individual holding ("Net Asset Value") as of 31st March, 2008, based on the valuations by Cluttons as of 31st March, 2008 and the further information/reconciliation in the audited and 'signed off' accounts. On the basis that the information and conclusions in the accounts crystallized the NAV of shareholders investments, it gave them an actual shareholding value as of the date of the adoption of those accounts by the relevant Belfry board.

28.19 The first time the fund properties actually fell in value is evidenced by the Property Updates to 31st March, 2008:

Total Cost Stg£'000 Valuation at 31.3.2008

Belfry 2 74,669 69,655

Belfry 3 191,751 187,225

Belfry 4 163,690 156,400

Belfry 5 252,071 235,452

Belfry 6 171,029 148,500

28.20 The Belfry 2 Property Update states that the loss reflected an "overall decline" in the UK property market "heavily influenced by volatility and resulting illiquidity in the financial markets" and that "The rising cost of borrowing has contributed to the fluctuations in investment yields and a downturn in the property market". In other words, the loss in value is attributed to market forces. Similar statements appear in the reports for the other funds.

28.21 Of significance is that there is no evidence from the Property Updates that this loss in value was caused by or attributable to the LTV covenant (which is not in fact mentioned at all).

28.22 In the 'Financial Update -Summary' in the Property Update for Belfry 2, which values the shareholders funds to 31 March 2008 "subject to audit", notwithstanding an "unrealised deficit on properties since 31 March 2007" of Stg£9,280,000, still states "Total increase in shareholders funds to 31 March 2008 – Stg£3,829,000". The Belfry 3 Property Update also records an increase in shareholders funds to 31st March, 2008, notwithstanding the reduction in underlying value of the properties.

The position is different with Belfry Funds 4, 5 and 6 where the Property Updates record decreases in the value of the shareholders funds to 31st March, 2008.

28.23 The letters dated 5th August, 2008 sent to investors, which for the purposes of this preliminary hearing I have deemed to have been received on 7th August, 2008, have been outlined earlier in this judgment. The investors were also sent the financial statements for the relevant "Group" for the year ended 31st March, 2008. It will be recalled that in the case of Belfry 2 the letters noted that the independent valuation to 31st March, 2008 showed "a decrease of 11.7% in the overall value of the property portfolio". They noted that "the gearing utilised by the Group has magnified the impact of the 11.7% fall in the value of the property portfolio as the actual physical amount of devaluation is effectively deducted from the Shareholder's funds" and that "Following the revaluation of the properties at year end the Group's loan to value percentage now stands at c. 77%". They did not, however, refer to the LTV covenant in Belfry 2's agreement with its lenders. Only the letter to Belfry 4 investors such as Mr. and Mrs. Sheehan made specific reference to an LTV covenant.

28.24 This correspondence and the consolidated financial statements contain evidence of loss in value of the investor shareholdings from the previous year. However in Mrs. Cantrell's case the letter notified her that her original investment of €200,000 in Belfry 2 had a Net Asset Value of €491,100 at 31 March 2007 and a Net Asset Value of €262,459 at 31 March, 2008. Thus no loss at all on her original investment had crystallized, or was "provable", on the basis of the audited accounts establishing the value of her shareholding in Belfry 2 as of 7th July, 2008. The accounts and shareholder fund revaluation are such as to have raised serious concerns for the future of the investment, but there is no evidence of actual loss.

28.25 Exactly the same considerations apply to the investors in Belfry 3 where the NAV of the shareholder's fund still exceeded to a considerable extent the amount of the initial investment. As with Belfry 2 there was no measurable, actual or provable loss and the investor benefit exceeded the burden.

Conclusion 4:

It must therefore be concluded that there is no evidence that Ms. Cantrell suffered any actual or provable loss in respect of her Belfry 2 investment more than 6 years before her Plenary Summons issued on 6th August, 2014. Her claims in tort in relation to Belfry 2, whether based on negligent advice (category (1)) or based on the LTV covenant (category (2)), are not statute barred as the alleged torts were not complete and time did not start running until some date later than 6th August, 2008.

Conclusion 5:

Similarly it must be concluded that there is no evidence that Mr. Tierney, Ms. Bernadette Goodwin or Ms. Mary Honohan suffered any actual or provable loss in respect of their Belfry 3 investments more than 6 years before their Plenary Summonses were issued on 6th August, 2014. The alleged torts, whether based on negligent advice or based on the LTV covenant, were not complete and their claims, which relate only to Belfry 3, are not statute barred.

29. Belfry 4, 5 and 6

29.1 In relation to Belfry 4, 5 and 6 the letters of 5th August, 2008 extract from the Property Updates and financial statements for each plaintiff investor figures that demonstrate a NAV below the initial investment:

Belfry 4: Original investment NAV at 31 March, 2008

Ms. Cantrell Stg£110,080 Stg.£77,923

Mr. and Mrs. Sheehan Stg£103,200 Stg.£73,053

Belfry 5: Original investment NAV at 31 March, 2008

Ms. Cantrell Stg£55,120 Stg.£55,657

Mr. Spierin Stg£68,900 Stg.£64,571

Mr. McMullin Stg.£ 146,590 Stg.£137,381

Belfry 6: Original investment NAV at 31 March, 2008

Mr. O'Reilly Stg.£67,200 Stg.£45,321

29.2 Thus the reductions in value below the initial investment are significant in respect of Belfry 4 and 6. They are relatively small in respect of Belfry 5. However these reductions are all "measurable". While on one view these losses are characteristic of the sort of fluctuation in value that investors with a basic understanding of the nature of the investment and the effect of market forces should have anticipated, in the context of the plaintiffs' pleas that the defendants by their Prospectuses and advice misrepresented the level of risk, I find that in the context of the plaintiffs category (1) claims these losses from the original invested sums constitute actual damage. Adopting Brennan J.'s analysis in *Wardley*, events had now occurred in which an adverse balance was struck.

29.3 It is important again to emphasise that up to this point there is no agreed or documentary evidence that the LTV covenants in the Belfry borrowing arrangements caused or contributed to these losses (indeed counsel for Mr. Ledgwidge suggested that the LTV covenants never led to loss as they were never invoked by the lenders). All the statements in the Property Updates point to these losses being due to market forces. Moreover while the reduction in property values established by Cluttons at 31 March, 2008 may ultimately have led to a situation of loan default (although breach of LTV covenant is only recorded in the letters of 5th August, 2008 in respect of Belfry 4) as a result of the LTV covenants, it does not appear that the LTV covenants in themselves could be said to have caused or contributed to the reduction in value up to that date or to have led to any actual loss.

Conclusion 6:

(a) The plaintiffs' claims in respect of Belfry 4 and 5 under category (1) for negligent misstatement/misrepresentation and breach of duty under the Companies Act, arising from alleged shortcomings in the Prospectuses and advice given in relation to the level of financial risk in the investments and the suitability of the investments for particular investors accrued on 7th July, 2008 when the approved audited accounts demonstrated actual loss, and accordingly such claims became statute barred on 8th July, 2014.

(b) Mr. O'Reilly's claim in respect of Belfry 6 category (1) for negligent misstatement/misrepresentation, and breach of duty under the Companies Act, arising from alleged shortcomings in the Prospectuses and advice given in relation to the level of financial risk in the investments and the suitability of the investments accrued on the date between 22nd July, 2008 and 5th August, 2008 inclusive upon which the audited consolidated financial statements of Belfry 6 were approved by the board/signed by two directors, and became statute barred on the sixth anniversary of that date and before his proceedings were commenced.

30. Category (2): The LTV covenant claims

30.1 I now turn to the second category of claim viz. pleas of negligent misstatement/misrepresentation alleging failure to specify, refer to or explain the LTV covenants or the possible consequences of such covenants prior to the investment of Belfry funds in UK properties. It is important to state my reasons for regarding this as a separate category of claim, because this was a matter of some controversy, with the defendants contending that the LTV covenants were pleaded merely as an aspect of the unsuitable investment/mis-selling claim rather than a distinct cause of action.

30.2 While the plaintiffs do not articulate the LTV covenants as a separate cause of action, this is not the first, nor, no doubt, the last, occasion where it is necessary and appropriate for a court to undertake some analysis of the pleadings to identify differing claims, or a core claim.

The LTV covenants are the subject of specific and detailed pleas in each Statement of Claim. Although they certainly are not the only claim, the pleas are prominent and recurring, and on plain reading stand out, and may fairly be described as core to the plaintiffs' claims.

Moreover, central to the LTV covenant claims are pleas in all cases of non-disclosure and failure to advise, which differentiate them from the category (1) pleas that centre on the wording in the Prospectuses and approaches and advice given orally to individual investors prior to investment.

There is also a question of timing that does not apply to the category (1) pleas. According to the Prospectuses the borrowing in question was not a done deal at the time the plaintiffs invested – for instance, section 6.3 of the Belfry 2 Prospectus states "The Group has commenced non-binding discussions with a number of UK and European financial institutions…" While this was born out by affidavit evidence presented by the defendants, there was no admitted evidence before the court to indicate specifically whether LTV covenants were the subject of those discussions, or whether LTV covenants were in contemplation at the time the plaintiffs paid over their money, or indeed the circumstances that resulted in the inclusion of LTV covenants when monies were borrowed and invested by the Belfry 2-6 fund subsidiary companies. Having said this, given the general references in the Prospectuses to ongoing negotiations over borrowing, the court can comment for present purposes that the conclusion of borrowing with LTV covenants probably post-dated the plaintiffs' signing of their investor application forms and handing over of their cheques . Thus the plaintiffs' claims as pleaded are certainly not confined to allegations that defective investment products were sold to the plaintiffs. The LTV covenant claims arise from borrowings that post-date the plaintiffs' investments.

Accordingly in my judgment the LTV pleas are based on distinct facts arising at a different point in time and giving rise to different considerations. It is neither logical, nor would it be fair to the plaintiffs, to pigeon-hole them as part and parcel of one 'mis-selling' claim, or, as Mr. Fitzpatrick S.C. on behalf of Mr. Ledwidge invited the court to do, to treat them as part of the category (1) claims simply because the LTV covenants became part of the 'structure' of the investments.

30.3 Regardless of whether the borrowings with LTV covenants were entered into at the time of investment or thereafter at the time of property acquisition, the question is when, on the plaintiffs' claims as pleaded and based on the agreed/documentary evidence, could it be said that the LTV covenants in the Belfry fund borrowing first caused actual loss.

30.4 As the court has already determined, it was not at time of investment by the plaintiffs in the Belfry funds, or by the subsidiary companies in the UK properties, as the most that could be said is that the effect of the LTV covenants at that time was to increase the risk or possibility of loss in the event that market forces drove down underlying investment property values.

30.5 Further there is no evidence before the court, whether agreed or disputed, that actual loss resulted from the existence of the LTV covenants following the revaluations as of 31st March, 2008 (or in any earlier year) or the ensuing financial statements signed on 7th July, 2008, or, in the case of Belfry 6, at some date on or prior to 5th August, 2008. Indeed such evidence as has been noted from the statements in the Property Updates point towards market forces as the cause of the drop in property and shareholder values up to 31st March, 2008.

30.6 While the letter of 5th August, 2008 in respect of Belfry 4 did refer to the "original Loan To Value covenant" in that fund being exceeded, the result of this was stated to be "…the Group having to renegotiate the terms of its loan facility in the short term." This in itself did not give rise to actual loss.

30.7 Common to all funds was that the reduction in property values led to the Belfry funds being in breach, or notionally in breach of, or about to breach, the LTV covenants and this led to the necessity to re-negotiate the lending or refinance across the board. During the period August 2008 to the summer of 2009 there were catastrophic reductions in the value of the investors' shareholdings, which were written down to nil value in 2009. As usual the properties were revalued at year end on 31st March, 2009. The letters notifying the plaintiffs of nil valuation of the shareholding, or "value of all equity…completely eroded", and the dates copy audited accounts for year ended 31st March 2009 which were signed off, were as follows:

Notification of nil value Accounts signed off

Belfry 2 - 7th September, 2009 20th July, 2009

Belfry 3 – 7th September, 2009 20th July, 2009

Belfry 4 – 17th June, 2009 27th August, 2009

Belfry 5 - 17th June, 2009 4th September, 2009

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

30.8 Whether and to what extent this reduction to nil value was caused by the LTV covenants as opposed to, or in combination with, other factors is a matter of dispute that may be relevant at full hearing but it is not one that can be resolved as a preliminary issue. Nevertheless common sense dictates that a starting point must be that it would be inherently unlikely that the market downturn alone could be responsible for total loss in value of U.K. realty. It is sufficient that the plaintiffs plead that the LTV covenants were a causative factor in respect of total loss, and on this preliminary trial the court must assume that the plaintiffs will succeed in proving that case. The possibility that it may be difficult for the plaintiffs at full hearing to establish as a matter of probability what level of loss in investor shareholding value is fairly attributable to loan default (or the threat of default or associated problems) caused by the LTV covenants, rather than other causes, is not a basis for finding of no actual loss at this preliminary trial. Rather it is the type of dispute over uncertainty of causation and quantification that the courts are usually in a position to resolve if presented with appropriate evidence. I also do not accept the narrow pleading point made by certain defendants that the Statements of Claim do not plead the LTV covenants as separately causative of any loss and damage. In my view the pleadings and particulars read as a whole sufficiently plead the LTV covenant as one of the causes of the loss claimed, namely the reduction to nil-value of the investments.

30.9 The Property Updates for all funds at 31st March, 2009 still suggested that the underlying properties held significant value, although greatly reduced from the previous year, so in themselves these reports did not indicate actual loss in shareholding value other than loss attributable to market downturn. This is critically important in respect of Mr. O'Reilly, whose claim in relation to Belfry 6 was commenced by Plenary Summons issue on 26th May, 2015 just over six years from the Property Update/revaluation at year end 31st March, 2009, and just under six years from his receipt of the letter of 25th June, 2009 notifying him of nil value. Cluttons valued the Belfry 6 properties at Stg.£98,930,000 at 31st March, 2009 (against a total cost of Stg.£171,475,000). The report records a decrease in shareholders funds, but does not revalue or enable the reader to revalue or re-calculate the value of an individual investor's shareholding, and does not suggest any loss referable to problems caused by the LTV covenants.

30.10 It was necessary to incorporate the property revaluations and other information into the audited consolidated financial statements in order to obtain a reconciliation of the value of the plaintiff investors' shareholdings, and to establish definitively that these had written down to nil. For reasons given earlier, the dates when this occurred are the dates of signing off on the accounts by the directors as listed above. Thus in the case of Belfry 2 and Belfry 3 the loss became "actual" on 20th July, 2009. However for Belfry 4, 5 and 6 the June 2009 correspondence from the companies clearly notified the investors, in advance of the signing off of the accounts, that their investments had completely eroded/had nil value. For the purposes of the running of time the investors in those funds now had confirmation, in the nature of a written admission from the companies, of catastrophic loss. For the investors in those funds this correspondence constituted evidence of actual loss, the pleaded tort was complete, and time started running.

30.11 One of the arguments in support of time accruing at the date of investment was that the dates for nil value were artificial as there was the potential for recovery, and there was in fact some recovery in respect of some of the Belfry funds. The financial statements do show some recovery post-2009 in respect of Belfry 3, 5 and 6, detailed earlier in this judgment at para.17.5 and 17.6. However the valuations to nil were based on hard facts – property valuations and company income and expenditure incorporated into the director approved audited financial statements. The valuation to nil was not therefore artificial - it was real in the sense that had any investor requested, or been in a position to compel, payment of the value of their shareholding there was nothing to pay them. On this basis there was actual loss at a given point in time. The fact that there may have been some recovery may be in ease of the defendants in respect of the quantum of damages, much as a plaintiff who suffers severe personal injury but makes an unexpectedly good recovery becomes entitled to commensurately lower damages. The better the actual recovery in value, the less the compensation.

30.12 Further, based on the figures extracted and relied upon by counsel, the recovery of value was both modest and temporary. In respect of Belfry 3 modest recovery in years 2010-2013 became negative in 2013 and the loss was almost 100% of the original investment amount at year end on 31 March, 2014 (-98%) and 31 March, 2015 (-94%). With Belfry 5 minor recovery in years 2010 and 2011 became negative again in 2012 and was -136% at 31 March, 2015. With Belfry 6 minor recovery in 2010 became negative thereafter and was -126% at 31 March, 2015. There was no evidence documentary or otherwise before the court suggesting any prospect of recovery of investment, let alone substantial recovery, in the short or long-term. Indeed the agreed correspondence painted a gloomy picture – it showed that post-2009 no new properties were being purchased, and all properties were being sold so that the proceeds could be applied in reduction of the outstanding bank debt. Thus even in respect of Belfry 3 the letter of 30 September, 2015 enclosing Property Update and financial statements to 31 March, 2015, refers to extension of the loan facility to "… facilitate completion of the agreed consensual programme for the disposal of the properties and an orderly wind down of the Group…", and Ms. Honohan was advised that her original investment of Stg£75,000 in 2003 was valued at Stg£4,374. It is clear that the catastrophic reduction in value of the properties, and Belfry funds, forced the funds to negotiate with their lenders and resulted in programmes of disposal and the wind-down of all the funds. Indeed Mr. Kennedy, counsel for certain directors, summarised the position in the course of argument "…the investments have been unsuccessful, the companies have little or no assets remaining, or certainly insufficient assets to make any payment back to any shareholder in the fullness of time" (Transcript Day 6 p.106). If there is any shareholder value it is likely to be small, and it has no more significance than a set-off against any actual loss that may ultimately be recoverable.

Conclusion 7:

(a) When the shareholder investments in each Belfry fund were written down to nil there was provable actual loss in the context of the plaintiffs' pleaded claims of negligence/negligent misstatement/misrepresentation related to the LTV covenants, and the cause of action accrued from that date. This finding is entirely without prejudice to the questions of whether and to what extent the LTV covenants, as opposed to other matters, caused the loss.

(b) In respect of Belfry 2 and Belfry 3 there was no provable evidence of actual loss from the negligence/negligent misstatement/misrepresentation claims related to the LTV covenants prior to the signing off by directors of the audited accounts to year ended 31st March, 2009, and the cause of action accrued from the date of signing off on 7th July, 2009.

(c) In respect of Belfry 4 and 5 the letters to investors from the companies dated 17th June, 2009, constitute evidence of actual damage and accordingly the cause of action related to the LTV covenants accrued from the date of such letters.

(d) In respect of Belfry 6 the letter dated 25th June, 2009 to Mr. O'Reilly constitutes the first evidence of actual damage and accordingly the cause of action related to the LTV covenants accrued from the date of such letter.

(e) In short, the plaintiffs' claims related to actual loss in shareholding value by reduction to nil value alleged to have occurred by reason of the existence or operation of the LTV covenants are not statute barred.

(f) These conclusions are not affected by any recovery in investor shareholding value post-financial statements to year end 31 March, 2009.

31. Category (3) – the Mismanagement Claims

31.1 This section considers the claims of negligence/breach of duty/fiduciary duty in the management of the investments – in the choice of investments, the level of rotation of properties (the "churning" claim) and the generation of excessive fees.

31.2 Somewhat surprisingly the plaintiffs have not provided particulars of any single or specific property said to have been wrongly acquired or sold, or any fees which are said to have been generated without justification, either within six years from the date of institution of the proceedings, or at any time after the relevant Belfry funds commenced investment. The defendants with some justification pointed to the generality of these claims, and the absence of any pleas that any particular loss was caused by any particular wrong, and indeed the absence of any quantification of the alleged losses.

31.3 Leaving this to one side for the moment, the broad factual basis for any such claims is to be gleaned from the Property Updates to 31st March in each year, copies of which were sent to each investor. These contain a considerable level of detail in relation to the acquisition of properties by the Belfry funds:- the address of the property, the nature of the property, the cost of acquisition, the scope for rental increase/review and renewal, and the prospect for capitalisation. In respect of each property newly acquired there is a kerbside photograph and "Executive Summary" detailing Tenure, Tenants, Leases, Expiry, Rental Income, Floor Area, Opportunities, Acquisition Price, and Valuation as at 31st March in the relevant year, and there is a "Location Map" showing the location of every property comprised in the fund. The reports also list disposals during the previous twelve months, listing the total acquisition cost and the realisation after all disposal costs. As previously detailed the Property Updates also contained a financial update, subject to audit, giving the acquisition prices for all properties held by the fund, and current valuations.

31.4 The Property Updates to 31st March 2008 show that there were no property acquisitions in Belfry 2, 3, 5 or 6, post - 31st March 2008. In respect of Belfry 4 the Property Updates show that there were no acquisitions post - 31st March 2007.

31.5 As to the level of fees being charged, the profit and loss account in the financial statements to year end for each fund disclosed the fees charged for property management, including the proportion of those fees paid or due to be paid to AIB. For example, in the Consolidated Financial Statements for Belfry 2 for the year ended 31st March, 2008, show that Management Fees of €1,181,410 exclusive of VAT were charged by Cheval Properties Ltd, and that that company "will subsequently pay 40%/48% of the management fee to Allied Irish Banks p.l.c. for its role in the provision of business, financial and banking advice during the acquisition and on-going management of the investment" (see profit and loss account, and note 16).

31.6 The financial statements also disclosed, under 'Related party transactions', the involvement of named directors of the relevant Belfry fund in Cheval or BDO Simpson Xavier who undertook administration work for the funds. The potential for conflict of duty was therefore apparent from the face of the audited accounts. It is also worth noting that the directors of each Belfry fund were identified in the Prospectuses, along with details of relevant relationships. For example, in Belfry 2 Mr. Kilduff is identified as Chairman of Cheval, Mr. Ledgwidge is identified as a partner in BDO Simpson Xavier, and Mr. Rockett is identified as Head of AIB Private Banking.

31.7 When then did the losses alleged to have been caused by the mismanagement claims actually occur? In relation to the initial acquisition of "properties in small tertiary cities" which it is pleaded were "off the radar of most investors due to the high risk involved" (Ms. Cantrell's Statement of Claim, para.48), this must have been on the date of purchase, because it is at that point in time that the plaintiffs are alleging that an investment was made that was in conflict with what they understood, from representations made, to be the nature and parameters of the property investments. This was the date of the wrong, and it is at that point in time that the (allegedly) bad investment that is said to cause loss is made (the damage). The cause of action was therefore complete when the (allegedly) wrong property in a "small tertiary city" was purchased, and time accrued from that date.

31.8 Moreover the plaintiffs cannot assert – nor do I understand them to assert – that the running of time was delayed in respect of this particular claim by virtue of concealment or otherwise: from the Property Updates and Consolidated Financial Statements provided after each year end the Plaintiffs were provided with detailed information from which they knew what property was bought, the fees charged or due, and the directors who had interests that benefitted from the payment of the fees. By simply studying the Property Updates and thereafter taking such legal or other advice as might be requisite they would have had ample time within six years from the date of the relevant property investment to take proceedings.

31.9 Similar considerations apply to the "churning" claims that –

> "The level of rotation of properties was very significant indeed; this led to very significant fees being paid to Cheval and AIB." (para. 52 in Ms. Cantrell's Statement of Claim).

The losses, in terms of fees, or other costs associated with disposals and acquisitions, or in respect of diminution of the value of the property portfolio by a "strategy of continuous investment", arose as and when this alleged strategy was being implemented i.e. when the disposals and acquisitions occurred, and when fees were charged. This alleged strategy cannot have extended beyond 31st March, 2008, when acquisitions ceased – thereafter there were only disposals, and wind down of the funds. Accordingly all damage alleged to have been caused by such strategy actually occurred over six years before the commencement of proceedings, the torts were complete at that time, and the claims for churning are statute barred.

31.10 In the light of these findings it is not necessary to further address apparent shortcomings in the particulars pleaded in support of these claims.

Conclusion 8: The plaintiffs' claims of negligence/breach of duty/fiduciary duty in the management of the investments – in the choice of investments, the level of rotation of properties (the "churning" claim), and the generation of excessive fees - are statute barred, as such claims accrued at the time properties were acquired, investments rotated, and relevant fees charged, which is when actual damage occurred, all of which occurred over six years prior to the commencement of proceedings.

32. The second issue: fiduciary duty and trust property - sections 11 and 44 of the 1957 Act

32.1 The breach of fiduciary duty is pleaded primarily, although not exclusively, in relation to the mismanagement claims. Since Conclusion 7 finds that these claims are statute barred, it is not strictly necessary to consider this further issue, but I do so for the sake of completeness and in deference to the arguments addressed to the issue.

Section 11(9) of the Act provides:

> "(9) (a) This section shall not apply to any claim for specific performance of a contract or for an injunction or other equitable relief.
>
> (b) Paragraph (a) of this subsection shall not be construed as preventing a Court from applying by analogy any provision of this section in like manner as the corresponding enactment repealed by this Act has heretofore been applied."

32.2 The defendants argued that s.11(9)(b) applies, and the six year period of limitation for tort in s.11(2)(b) tort applies by analogy to actions for breach of fiduciary duty, as was the case prior to the enactment of the Statute of Limitations.

32.3 The plaintiffs submitted that this analogy does not hold true, and argued that the fiduciary claims against AIB and the director defendants are against them as trustees de son tort in purporting to interact with the property, and that there is no limitation period applicable directly or by analogy. In reality they did not rely upon s.11(9)(a), but rather on section 44 which provides:

> "44. No period of limitation fixed by this Act shall apply to an action against a trustee or any person claiming through him where –
>
> (a) the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or
>
> (b) the claim is to recover trust property or the proceeds thereof still retained by the trustees or previously received by the trustee and converted to his own use."

It was argued that when investing the plaintiffs signed declarations of trust and that the claims and reliefs sought against the director defendants for breach of fiduciary duty, and the bank qua fiduciaries and trustees de son tort, are proprietary claims against trustees/constructive trustees to recover trust property retained or previously received by trustees, and hence no period of limitation applies.

32.4 As to the first limb of the argument it was not really disputed by the defendants that the Statute of Limitations contains no reference to actions for breach of a fiduciary duty, and that no limitation period would apply unless a period of limitation applied by analogy under s.11(9)(b). The origins of s.11(9)(b) are evident from *Knox v. Gye* [1872] 5 App Cas 656 where Lord Westbury stated (p.674):-

> "The general principle was laid down as early as the case of *Lockey v. Lockey* (1), where it was held that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law no account will be given after the legal limit of six years, if the statute be pleaded. If it could be doubted whether the executor of a deceased partner can, at common law, have an action of account against the surviving partner, the result will still be the same, because a Court of Equity, in affording such a remedy and giving such an account, would act by analogy to the Statute of Limitations. For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the statute of limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of Equity acts by analogy to the statute of limitations, the meaning being, that where the suit in equity corresponds with an action at law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure. But if any proceedings in equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the

statute."

More recently in *Companhia de Segurios Imperio v Heath (Rebx) Ltd and ors* [2001] WLR 112 the UKSC adopted this position and applied by analogy a period of 6 years where a court of equity was giving the relief that was correspondent with remedies available at law.

32.5 The above passage from the judgment of Lord Westbury in *Knox v Gye* was quoted with approval by Peart J. in *Komady Limited v. Ulster Bank Limited* [2014] IEHC 325. It will be recalled that the plaintiffs were customers of the defendant bank and initiated proceedings claiming that the bank had been guilty of mis-selling by negligently advising them to enter a Swaps agreement just over six years before the proceedings were commenced. Peart J. found the claims to be statute barred. He regarded the reliance on s. 11(9)(a) to be "another attempt to escape the rigours of s. 11(2)(a) of the Act of 1957". Having cited Lord Westbury, he stated:-

"37. There is nothing in the facts of the present case to take it outside what is stated by Lord Westbury. The facts giving rise to the equitable claim by virtue of any fiduciary relationship are co-terminus with the facts giving rise to the claim in tort, even if fiduciary obligations are of an ongoing nature during the relationship. That relationship does not alter the fact that the plaintiffs are able to plead, as they have done, that in July 2006 they were negligently and in breach of duty (presumably including a breach of fiduciary duty) induced by the bank to enter into the Swaps."

32.6 The defendants in the present case point out that the claim for breach of fiduciary duty is particularised along with the claims for breach of contract and negligence. Thus for example at para. 54 of the Statement of Claim in Ms. Cantrell's proceedings it is pleaded:-

> "In purporting to provide the said services, the Bank and the Director Defendants and each of them, their servants or agents were guilty of breach of contract and were negligent and acting in breach of duty (including breach of statutory duty and/or fiduciary duty) and were guilty of misrepresentation and/or negligent misstatement".

Particulars common to all of these claims are then set out at subparagraphs (l) to (rr). Accordingly, the defendants submit that the plaintiffs cannot rely upon s. 11(9)(a) to escape the rigours of the six year period in s. 11(2)(b) because the facts/pleas said to give rise to the equitable claim based on breach of fiduciary relationship are "co-terminus" or "correspondent" with the facts/pleas giving rise to the claim in tort – and therefore the six year period for bringing a claim applies by analogy. Nor can the fact that the plaintiffs have sought equitable reliefs – such as rescission (which in any case relates to the statute barred breach of contract claim), and accounts and inquiries alter the position.

32.7 In their submissions counsel for the plaintiffs argued that the claims in the present proceedings are different to those in Komady, because they are claims against the directors for breach of fiduciary duty and against the bank as persons who acted as trustees de son tort in purporting to interact with trust property for the benefit of the plaintiffs. They thus focus on the reference to "a trustee" in s. 44 of the Act of 1957. While accepting that the claims as pleaded do not come within s. 44(a) (as fraud/fraudulent breach of trust are not pleaded), reliance is placed on s. 44(b), the argument being that the plaintiffs' fiduciary claims, and the reliefs sought, are to recover trust property "or the proceeds thereof still retained by the trustees or previously received by the trustee and converted to its own use".

32.8 In making this argument the plaintiffs are faced with section 2(2)(a) in the 1957 Act that specifies who are not "trustees":

> "(2)(a) In this Act, "trustee" does not include –
>
> (i) a person whose fiduciary relationship arises merely by construction or implication of law and whose fiduciary relationship is not deemed by any rule of law to be that of an express trustee."

On first reading this would exclude AIB and the director defendants where there is no express trusteeship, and where the fiduciary relationship with the plaintiffs is based on construction of the Prospectuses and, in the case of the director defendants, deduced from their duties as directors. Directors are not per se trustees.

32.9 Counsel for the plaintiffs sought to circumvent this difficulty by reliance on a particular rule of law developed in English case law that draws a distinction between proprietary and personal claims, to support the argument that in the present claims the remedies sought against the directors and AIB are true equitable claims against parties who should be regarded as "true" trustees. They rely on dicta of Millett J. in *Paragon Finance Plc. v. D.B. Thakerar & Co*. [1999] 1 AER 400. That was a decision in relation to an application for leave to amend after the expiry of the six year limitation period in two actions against solicitors who had acted for the plaintiffs. As originally pleaded the claim sounded in breach of contract, negligence and breach of fiduciary duty; the plaintiffs sought to amend their pleadings to allege fraud, conspiracy to defraud, fraudulent breach of trust and intentional breach of fiduciary duty. Their application failed because the claim based on allegations of fraud and dishonesty did not involve substantially the same facts as the claim based on allegations of negligence, and was effectively a new cause of action. At p. 408 Millett J. stated:-

> "Before 1890, when the Trustee Act 1888 came into operation, a claim against an express trustee was never barred by lapse of time. The Court of Chancery had developed the rule that, in the absence of *laches* or acquiescence, such a trustee was accountable without limit of time. The rule was confirmed by s. 25(3) of the Supreme Court of Judicature Act 1873, which provided that no claim by a *cestui que* trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be held to be barred by any statute of limitation.
>
> The explanation for the rule was that the possession of an express trustee is never in virtue of any right of his own but is taken from the first for and on behalf of the beneficiaries. His possession was consequently treated as the possession of the beneficiaries, with the result that time did not run in his favour against them: see the classic judgment of Lord Redsdale in *Hovenden v. Lord Annesley* [1806] 2 Sch & Lef 607 at 633-634.
>
> The rule did not depend upon the nature of the trustee's appointment, and it was applied to trustees de son tort and to directors and other fiduciaries who, though not strictly trustees, were in an analogous position and who abused the trust and confidence reposed in them to obtain their principal's property for themselves. Such persons are properly described in constructive trustees.
>
> "Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was

independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.

…

"The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd. v. Craddock* (No. 3) [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungoed-Thomas J.

…

The importance of the distinction between the two categories of constructive trust lies in the application of the statutes of limitation. Before 1890 constructive trusts of the first kind were treated in the same way as express trusts and were often confusingly described as such; claims against the trustee were not barred by the passage of time. Constructive trusts of the second kind however were treated differently. They were not in reality trusts at all, but merely a remedial mechanism by which equity gave relief for fraud."

Particular reliance was placed on the passage in italics.

32.10 In arguing against the plaintiffs' proposition, Mr. Kennedy, Counsel for the director defendants, also cited *Williams v Bank of Nigeria* [2014] UKSC 10, where the English Supreme Court endorsed the distinction drawn by Millett L.J. in Paragon. Lord Sumption explained the reason for the distinction, at p.13:

"It is important to understand why equity adopted this rule, for its rationale will not necessarily apply to every kind of constructive trust. The reason was that the trust assets were lawfully vested in the trustee. Because of his fiduciary position, his possession of them was the beneficiary's possession and was entirely consistent with the beneficiary's interest. If the trustee misapplied the assets, equity would ignore the misapplication and simply hold him to account for the assets as if he had acted in accordance with his trust. There was nothing to make time start running against the beneficiary. It will be apparent that this reasoning can apply only to those who, at the time of the misapplication of the assets have assumed the responsibilities of a trustee, whether expressly or de facto. Persons who are under a purely ancillary liability are in a different position. They are liable only by virtue of their participation in the misapplication of the trust assets itself. Their dealings with the assets were at all times adverse to the beneficiaries, and indeed to the true trustees holding the legal interest."

32.11 Mr. Kennedy also referred the court to *JJ Harrison (Properties) Ltd v. Harrison* [2001] EWCA Civ 1467, a decision of Kevin Garnett QC sitting as deputy High Court judge, where the headnote at para. 3 provides a useful example of the distinction and the circumstances in which a director may be treated as a trustee:

"3. A director who obtained a company's property for himself by misuse of the powers with which he had been entrusted as a director was a constructive trustee. Although not expressly appointed a trustee he assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust: a director, on appointment to office, assumed the duties of a trustee in relation to the company's property. (*Belmont Finance Corp v Williams Furniture Ltd* (No.2) [1980] 1 All ER 393; *Paragon Finance plc v D B Thakerar & Co* [1999]1 All ER 400). The conveyance of the property to himself by the exercise of his powers in breach of trust did not release him from those obligations. He was trustee of the property because it had become vested in him; but his obligations to deal with the property as a trustee arose out of his pre-existing duties as a director, not out of the circumstances in which the property was conveyed."

Accordingly in that case the six year limitation period provided for in s.21(3) of the (U.K.) Limitation Act, 1980 for recovery of trust property did not apply – under s.21(1)(b) there was no limitation period as the claim was by a beneficiary to recover from a trustee (the director) trust property or, as it was no longer vested in him, the proceeds of trust property "previously received by the trustee and converted to his own use".

33. Discussion

33.1 Even if the Irish courts were to follow the reasoning in the English case law – a question that I do not feel it necessary to decide - in my view the plaintiffs' reliance on the distinction that such case law identifies, is misplaced. On the agreed documents the Prospectuses provided that each investor made a cheque/payment to the relevant Belfry fund company e.g. in the case of Belfry 2, to the Second Belfry Properties (UK) plc, and this was collected by AIB as "placing agent", and AIB passed the investment monies on to Belfry 2– facts that were not disputed for the purposes of this hearing. For every €5,000 invested 5000 shares were issued in the relevant company which, in the case of Belfry 2, was Tullamona Ltd, the third named defendant in Ms. Cantrell's case. Clause 6.1 stated:

"The Investor Shares will be issued to the Nominee and the Nominee will hold the Investor Shares as nominee of the Investors pursuant to the terms of individual Declarations of Trust."

33.2 The Declaration of Trust to be signed by each nominee company simply declares that the nominee company holds the appropriate number of investor shares "…as nominee and in trust for the Investor(s)…" and further that "We will hold as nominee and in trust for the Investor(s) all dividends and bonuses which may accrue …." The investor Application Form signed by each investor in Belfry 2 in turn requested and authorised Tullamona Limited "…to hold in the name of Tullamona all and any shares issued to me pursuant to the Prospectus in the capital of the Company ("the Shares") and all dividends and bonuses which may accrue…".

33.3 Accordingly the investor money was in fact paid to the relevant Belfry fund, and then used by the relevant subsidiary companies to buy and sell properties. AIB was merely a placing agent, and never held or retained the investor monies, shares or dividends (if any) on trust or at all. It could not be claimed that it was an express or even a constructive trustee. Nor could it be claimed that the commission paid to AIB were investor monies because, as the Prospectuses made clear, and as the accounts showed year on year, these were commissions paid in accordance with the contractual terms of the investment.

33.4 Moreover Tullamona's role is that of a bare nominee company and this is reflected in the pleadings. Thus in her Statement of Claim at para. 4 Ms. Cantrell pleads:

> "4. The Third Named Defendant [Tullamona] is a private limited company having its registered offices at……and is joined solely for the purpose of having orders made against it."

No substantive claim is made against these nominee companies for breach of fiduciary duty or breach of trust. Tullamona only held the investor shares as nominee – it never held investor monies, and was therefore never a trustee, express or constructive, in respect of such monies.

33.5 Furthermore the investor funds were actually paid to the relevant Belfry company and then invested by it through the vehicle of a subsidiary company. In the case of Belfry 2 it was the Jersey registered company Brabazon Property Investments Ltd, which also raised the debt finance, which actually invested in the UK properties. Brabazon Investments, and other wholly owned subsidiaries used in the other Belfry funds, are not named as defendants. They actually received and invested the investor monies, and bought and sold the UK properties, as is apparent from the Property Updates.

33.6 Accordingly it cannot be said that the investor funds (or properties representing their collective investment) were ever entrusted to the possession of AIB or the director defendants. As counsel for the director defendants argued, it is not suggested in the pleadings that there is any identifiable piece of property or asset which is claimed is being improperly retained by the directors, or that they retain anything on trust for the companies of which they are directors. On the agreed documents the case simply cannot be made that they or AIB were "true trustees" or that they have a proprietary liability as trustees or constructive trustees.

33.7 I therefore accept as correct the defendants' submission with regard to the claims for breach of fiduciary duty that the six year limitation period in tort applies by analogy under s.11(9)(b). However this does not alter the earlier conclusions in this judgment as to the date of accrual of the cause of action in tort, which apply equally to the claim for breach of fiduciary duty.

Conclusion 9:

(a) The plaintiffs are not entitled to rely on s.44 of the Act of 1957 to the effect that no limitation period fixed by the Act applies because neither AIB nor the director defendants were true "trustee[s]" of the plaintiffs' property for the purposes of that section, and further the plaintiffs' claims are not to recover "trust property or the proceeds thereof still retained by the trustee".

(b) Pursuant to s.11(9)(b) of the Act of 1957, the six year period of limitation for claims in tort provided for in s.11(2)(a) applies by analogy to the plaintiffs' claims against AIB and the director defendants for breach of fiduciary duty.

34. Third issue: Right of action concealed by fraud – s.71(1)(b) of the Act of 1957.
34.1 Having regard to my earlier determination that the claims for negligent misstatement/misrepresentation related to the LTV covenant are not statute barred, it is not strictly necessary to address this issue.

34.2 Independently of that, I am of the view that having regard to the principles enunciated by the Supreme Court in Campion and L.M., and quoted earlier in this judgment, the court should not attempt to decide this issue as part of a preliminary trial. Nor am I dissuaded from this by Mr. Kennedy S.C.'s suggestion that the facts in LM were rather different, or his argument that to decide this issue would given rise to significant saving of court time. It is appropriate to give my reasons for this conclusion.

34.3 Section 71(1)(b) refers to a right of action which has been "concealed by the fraud of any such person". It was not disputed that what is meant by fraud, or fraudulent concealment, in this context is not limited to common law fraud or deceit. In *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 Lord Evershed stated at p.572;

> "But it is now clear that the word fraud in [the English equivalent of s.71] is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v ARTS Ltd* [[1949] 1 K.B. 550] that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned is an unconscionable thing for the one to do towards the other."

34.4 In *King v Victor Parsons & Co*. [1973] 1 W.L.R. 29, at p.33 Lord Denning stated –

> "In order to show that he concealed the right of action by fraud, it is not necessary to show that he took active steps to conceal his wrongdoing or breach of contract. It is sufficient that he knowingly committed and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he kept it secret. He conceals the right of action. He conceals it by fraud as those words have been interpreted in the cases. To this word 'knowingly' there must be added 'recklessly'."

34.5 These statements have found favour with the Irish courts, although Canny notes that the need to prove a special relationship "has proven controversial" . Lord Evershed's judgment in Kitchen was followed by Carroll J. in *Morgan v Park Developments Ltd* [1983] I.L.R.M. 156, and quoted with approval by Hardiman J. in his dissenting judgment in *Gough v Neary* [2003] 3 I.R. 92, at 110. Lord Denning in *King v Parsons* has been widely followed and was quoted with approval by Peart J. in *Komady Ltd and another v Ulster Bank* [2014] IEHC 325 , at para.54 of his judgment.

34.6 Mr. McCarthy in submissions on behalf of the plaintiffs in support of the contention that failure to disclose the existence of the LTV covenant amounted to fraudulent concealment also brought to the court's attention the decision of the Court of Appeal in *O'Dwyer v The Daughters of Charity and others* [2015] IECA 226. In that case the court had to consider concealed fraud in the context of the Magdalene laundries and a claim by a plaintiff that she put up her son for adoption under undue influence/duress, and that her rights under the Adoption Acts were concealed by fraud. Hogan J., delivering the judgment of the court, held that failure to inform her of her rights was not concealment by fraud within s.71(1)(b) and thus her action was statute barred:

> "44. …There was no concealment either of actions taken by or on behalf of the first named defendant or of facts known only to it which if disclosed would demonstrate the existence of a cause of action."

At para.47 he elaborated on what might constitute fraud for the purposes of the section:

> "47. It is clear, the fraud must either consist of conduct which is concealed from the plaintiff or the failure to disclose the existence of facts known only to the defendants which, if disclosed, would found a cause of action."

34.7 Based on this Mr. McCarthy submitted that the plaintiffs could rely on deliberate and unconscionable acts of non-disclosure as amounting to fraudulent concealment. He submitted that even if the LTV covenants had not been agreed by the defendants at the time of investment by the plaintiffs, the loans (in all of which LTV covenants were ultimately agreed) were under negotiation, or at an advanced stage of negotiation.

34.8 This is borne out by the Prospectuses. In respect of Belfry 2 and 3 clause 6.3 states:-

> "6.3…The Group has commenced non-binding discussions with a number of UK and European financial institutions to fund circa 80% of the purchase price of Properties on competitive terms."

Similar statements appear in the Prospectuses for Belfry 4, 5 and 6 save that after "European financial institutions" are added the words "including AIB". AIB is defined in the Belfry 4, 5 and 6 Prospectuses to mean "Allied Irish Banks plc", but it appears that AIB Capital Markets, which the court was informed is a separate corporate entity to AIB, entered into loan agreements with LTV covenants.

34.9 In making this case Mr. McCarthy also relied on representations on the first page of each Prospectus to the effect that each Director named in the Prospectus accepted responsibility for the information contained therein and that to the best of their knowledge the information "…is in accordance with the facts and *does not omit anything likely to affect the import of such information."*[emphasis added]. As I have noted earlier Mr. McCarthy also sought to argue by reference to affidavit evidence related to Belfry fund operational meetings that the promoters must have been aware of the intention to enter into borrowing with LTV covenants at the time of relevant Prospectuses and investment by the plaintiffs. He also suggested, by way of example, that Mr. Rockett, as Head of Private Banking in AIB, must have been aware of the intention to borrow with LTV covenants. He suggested that in respect of Belfry 3 decisions were made to borrow from Bradford & Bingley on 15th July, 2003 following discussion of "details of this offer" at the very time that Mr. and Mrs. Goodwin, Mr. Tierney and Ms. Honohan were investing, on 3rd, 10th and 16th July respectively. He made similar observations in relation to Mr. O'Reilly's investment in Belfry 6 on 8th December, 2006 and the timing of lending to that fund where he suggested the facility was agreed on 11th December, 2006.

34.10 In the present cases the pleadings contain different pleas concerning the particular circumstances in which each plaintiff was prompted to invest, and different pleas in respect of the relationships between each plaintiff and AIB or its servants or agents at the relevant time. A good example is that Mr. McMullin pleads that he never received any Prospectus; other plaintiffs plead it was never explained to them. Without witness evidence, cross-examination and argument it is hard to envisage how this court could begin to determine the precise circumstances that may be relevant to each plaintiff's reliance on s.71(1), or the inferences that might fairly be drawn from the facts, or the meaning of those facts in the 'secondary sense' mentioned by McKechnie J. in Campion. The nature of the relationships between plaintiffs and the defendants, and whether they amount to 'special relationships', the state of knowledge of particular director defendants, are mixed matters of fact and law upon which evidence and argument would be required. Further the legal or factual relationship between AIB and the lender AIB Capital Markets, upon which there was no agreed evidence, may be relevant. There are likely to be other relevant facts and circumstances relevant to the LTV covenants, the negotiation of the loans, and more particularly the state of knowledge, intentions and motivation of the defendants, their servants or agents at the time of the investment, and immediately before, at and immediately after the time of the LTV covenant lending. For example the existence or otherwise of LTV covenants in the lending undertaken in Belfry 1 (on which there was no evidence before the court) may be relevant to the negotiation of the lending for Belfry 2, and the fact of LTV covenants in lending for Belfry 2 may be relevant to Belfry 3, and so forth; the patterns thereby established may therefore be relevant. Mr. McCarthy S.C. relied on selective statements in the Prospectuses and isolated exhibits to support his arguments, but without full evidence as to the documents under discussion at the relevant meetings, and cross examination of relevant witnesses, and due consideration of the inferences that might fairly be drawn from the evidence, this court could not make findings or draw conclusions. Moreover to attempt to do so in the absence of full discovery would be unwise. It would not be possible for the court to give a "clear and unequivocal answer to the issue", and in view of my earlier conclusions it would not be dispositive of the cases.

34.11 It is only with a full hearing that the court could decide whether there were such conscious or deliberate acts, or non-disclosure, as could amount to fraudulent concealment.

34.12 Another aspect that is relevant to s.71(1)(b) is when, if there was fraudulent concealment, the plaintiffs "…discovered the fraud or could with reasonable diligence have discovered it." There was no agreed evidence bearing on this, other than the agreed correspondence. It will be recalled that the first express mention of the LTV covenants in respect of Belfry 2 is the letter of 19th March, 2009 (the letter of 5th August, 2008 only referred to the magnifying effect of "gearing"); in respect of Belfry 3, 5 and 6 the letters of 5th August, 2008 referred to loan to value ratio, but not expressly to a LTV covenant; only in the letter of 5th August, 2008 in respect of Belfry 4 is there, for the first time, express reference to a LTV covenant. Did this correspondence itself reveal the alleged fraudulent concealment and cause time to run? Or did this correspondence put the plaintiffs in each fund on notice, such that they were then put on their inquiry? Should they thereafter have used reasonable diligence to ascertain the full position in relation to the LTV covenants? And if so, objectively and reasonably how long would it have taken for any particular plaintiff to have discovered the right of action? Is the subjective understanding of a particular plaintiff of the contents of the correspondence relevant to what constitutes "reasonable diligence" in their case – is a more knowledgeable or experienced investor to be assessed more strictly?

34.13 These are questions of fact and degree that will depend on the evidence in each case, and the state of knowledge and understanding of individual plaintiffs, and the questions raise mixed issues of fact and law upon which the court has not had the benefit of full argument. Accordingly even if the court had sufficient evidence to conclude that there was fraudulent concealment it does not possess the further evidence and argument to enable it to determine the date from which time is to run against any particular plaintiff.

34.14 It is appropriate to note at this point that the defendants argued that the plaintiffs in their Reply pleadings, and in particulars furnished in response to notices for particulars raised by the defendants, do not sufficiently plead particulars of fraud in the context of s.71(1)(b) to entitle the plaintiffs to rely on fraudulent concealment. This argument over the alleged inadequacy of pleading might perhaps have been raised on a motion for further and better particulars, or a motion to strike out the relevant Reply pleading. It was not an issue properly before the court, which was tasked with determining the preliminary issue of whether the plaintiffs' claims are statute barred, and it is not one that it is appropriate to decide in circumstances where the court for the reasons given declines to determine any issue that might arise under s.71(1)(b). I am also influenced by the fact that the process of discovery has yet to be undertaken in these cases, and as submitted by counsel for the plaintiffs this has the potential to give rise to further pleadings/particulars.

Conclusion 10:

(a) It is not necessary for the court to determine any issue arising under s.71(1)(b) of the 1957 Act having regard to the court's earlier determination that the plaintiffs' claims are not statute barred.

(b) Further because all the facts or inferences relevant to determining issues arising under s.71(1)(b), including the acts/omissions and the intentions and state of mind of relevant parties, are not agreed and could not be determined without the evidence of witnesses and cross-examination, and further legal argument at full hearing, it is not possible or appropriate to attempt to determine these issues at a preliminary hearing.

35. Summary

Drawing together the conclusions reached in this judgment, the preliminary issues arising in respect of the plaintiffs' claims under the Statute of Limitations 1957 are determined as follows:

1. Breach of contract claims:

The plaintiffs' claims in so far as they sound in breach of contract are statute barred by virtue of section 11(1)(a) of the Statute of Limitations 1957 because time accrued from the respective dates upon which the plaintiffs entered into the Belfry investments and over 6 years elapsed thereafter before any of the proceedings were commenced.

2. Claims in tort:

Assuming that actionable wrong occurred when the Belfry investments were entered into, the cause of action in tort did not accrue at the date of entry into the investments as there was a mere possibility of loss but no actual loss, and the LTV covenant made no difference to this. The decision in Gallagher v. ACC Bank is distinguishable on its facts, but obiter dicta of Fennelly J. in the Supreme Court support this conclusion.

3. The commission paid to AIB on entry into the investment did not constitute actual loss.

4. In respect of the Belfry 2 investment there is no evidence that Ms. Cantrell suffered any actual or provable loss more than 6 years before her Plenary Summons issued on 6th August, 2014. Her claims in tort in relation to Belfry 2, whether based on negligent advice (category (1)) or based on the LTV covenant (category (2)), are not statute barred as the alleged torts were not complete and time did not start running until some date later than 6th August, 2008.

5. Similarly in respect of Belfry 3 investments it must be concluded that there is no evidence that Mr. Tierney, Ms. Goodwin or Ms. Honohan suffered any actual or provable loss more than 6 years before their Plenary Summonses were issued on 6th August, 2014. The alleged torts, whether based on negligent advice or based on the LTV covenant were not complete, and their claims, which relate only to Belfry 3, are not statute barred.

6. (a) The plaintiffs' claims in respect of Belfry 4 (Mr. and Mrs. Sheehan) and Belfry 5 (Mrs. Cantrell, Mr. Spierin and Mr. McMullin) under category (1) (for negligent misstatement/misrepresentation, and breach of duty under the Companies Act, arising from alleged shortcomings in the Prospectuses and advice given in relation to the level of financial risk in the investments and the suitability of the investments for particular investors), accrued on 7th July, 2008 when the audited accounts to year end 31st March, 2008, which demonstrated actual loss in shareholder value, were approved/signed off by the directors, and accordingly that basis for the plaintiffs' claims in Belfry 4 and 5 became statute barred on 8th July, 2014.

(b) In respect of Belfry 6 Mr. O'Reilly's category (1) claim (for negligent misstatement/misrepresentation, and breach of duty under the Companies Act, arising from alleged shortcomings in the Prospectuses and advice given in relation to the level of financial risk in the investments and the suitability of the investments) accrued on the date between 22nd July, 2008 and 5th August, 2008 inclusive upon which the audited consolidated financial statements of Belfry 6 were approved by the board/signed by two directors, and accordingly became statute barred on the sixth anniversary of that date and before his proceedings were commenced.

7. The LTV covenant claims:

(a) Only when the value of shareholder investments in each Belfry fund were written down to nil was there provable actual loss in the context of the plaintiffs' pleaded claims of negligence/negligent misstatement/misrepresentation related to the LTV covenants, and the cause of action accrued from that date.

This finding is entirely without prejudice to the questions of whether and to what extent the LTV covenants, as opposed to other matters, caused the loss in value.

(b) In respect of Belfry 2 and Belfry 3 there was no provable evidence of actual loss from the negligence/negligent misstatement/misrepresentation claims related to the LTV covenants until the directors signed off the audited accounts to year ended 31st March, 2009, and accordingly the cause of action accrued from the date of signing off on 7th July, 2009.

(c) In respect of Belfry 4 and Belfry 5 the letters to investors from the Belfry companies dated 17th June, 2009 constitute the first evidence of actual damage and accordingly the causes of action related to the LTV covenants accrued from the date of such letters.

(d) In respect of Belfry 6 the letter dated 25th June, 2009 to Mr. O'Reilly constitutes the first evidence of actual damage and accordingly the cause of action related to the LTV covenants accrued from the date of such letter.

(e) In short, the plaintiffs' claims related to actual loss in shareholding value by reduction to nil value alleged to have occurred by reason of the existence or operation of the LTV covenants are not statute barred.

(f) These conclusions are not altered by any recovery in investor shareholding value recorded post-financial statements to year end 31 March, 2009.

8. The plaintiffs' claims of negligence/breach of duty/fiduciary duty in the management of the investments – in the choice of investments, the level of rotation of properties (the "churning" claim), and the generation of excessive fees - accrued at the time particular properties were acquired, investments rotated, and relevant fees charged, which is when actual damage occurred. As the annual Property Updates and audited accounts furnished to investors expressly notified the plaintiffs of the detail of these alleged wrongful acts, and as they all occurred over six years prior to the commencement of all proceedings, all claims related to these matters are statute barred.

9. Further with reference to the plaintiffs' claims against AIB or the director defendants for breach of fiduciary duty or breach of trust –

(a) The plaintiffs are not entitled to rely on s.44 of the Act of 1957 to the effect that no limitation period fixed by the Act applies because neither AIB nor the director defendants were true "trustee[s]" of any property of the plaintiffs' for the purposes of that section, and further the plaintiffs' claims are not to recover "trust property or the proceeds thereof still retained by the trustee".

(b) Pursuant to s.11(9)(b) of the Act of 1957, the six year period of limitation for claims in tort provided for in s.11(2)(a) applies by analogy to the plaintiffs' claims against AIB and the director defendants for breach of fiduciary duty.

10. Suspension of accrual under s.71(1)(b) of the Statute of Limitations 1957 due to alleged fraudulent concealment of LTV covenants:

(a) It is not necessary for the court to determine any issue arising under s.71(1)(b) of the 1957 Act having regard to the court's earlier determination that the plaintiffs' claims in relation to the LTV covenants are not statute barred.

(b) Further because all the facts or inferences relevant to determining issues arising under s.71(1)(b), including the acts/omissions and the intentions and state of mind of relevant parties, are not agreed, and could not be determined without the evidence of witnesses and cross-examination, and legal argument at full hearing, it is not possible or appropriate to attempt to determine these issues at a preliminary hearing.