Neutral Citation: [2014] IEHC 486

THE HIGH COURT

[2008 No. 5608 P]

BETWEEN

PAUL MURPHY

PLAINTIFF

AND

JOE O'TOOLE & SONS LIMITED AND

BANK OF SCOTLAND (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 17th day of October 2014

1. The plaintiff is a farmer and agricultural contractor. In 2002, he bought from the first defendant a piece of agricultural machinery for the purposes of his contracting business, namely, an 'Amazone Four Metre One Pass Sower'. The purchase was financed through a hire purchase-type agreement with the second defendant. This judgment is given in the matter of a preliminary issue raised in the defence of the first defendant, namely, that the plaintiff's claim is statute barred, and I heard evidence and legal argument from both the plaintiff and the first defendant for that purpose. Judgment was entered by consent in favour of the second defendant against the plaintiff.

Timeline

2. The plaintiff took delivery of the Amazone machine on 30th October, 2002 and in early 2003, the plaintiff had been travelling along the public highway with the machine attached to his tractor, when he was stopped at a Garda checkpoint and informed that the combination of the tractor with the Amazone was not suitable for transportation on the public highway and was not in compliance with road traffic legislation. The plaintiff returned the machine to the first defendant in October 2003, and issued these proceedings on 10th July, 2008.

3. The claim is framed as a claim for breach of contract, and also as a claim in negligence and negligent misstatement, and with regard to this latter claim the statement of claim pleads that the first defendant negligently advised the plaintiff that the machine was suitable for transportation by tractor on a public highway, and/or that the first defendant negligently failed to consider the suitability of the machine to be transported in combination with a tractor on the highway. There is general plea that the first defendant failed to supply a machine suitable for the purpose for which it was required.

4. The first defendant in its Defence pleads by way of preliminary objection that the claim is statute barred by the Statute of Limitations Act 1957. For the purpose of that argument the first defendant argues that time began to run at the date the contract was made, which is argued was in or around the month of April 2002, and that the six-year time limit provided by s. 11 (1)(a) of the Statute of Limitations Act 1957 had run before the proceedings were instituted in July 2008.

5. In the context of that plea, the plaintiff has made a number of arguments. The first argument is that the contract was a conditional contract, conditional upon hire purchase finance, and that the evidence unequivocally points to the fact that the finance was not obtained until October 2002. It is asserted that in those circumstances, time did not begin to run until the condition precedent was satisfied. The plaintiff also argues that time began to run only when the Amazone machine was delivered, namely in October 2002, and that the plaintiff was accordingly in time when he issued proceedings in July 2008. Finally, the plaintiff argues that the claim in negligence accrued when damage or loss was incurred by him, which he says is either the date of delivery or of the finance agreement.

When was the Contract Made?

6. The first question I address is the formation of the contract. The contract was made orally and was not recorded in writing nor was an order form created. Furthermore, the events giving rise to this action occurred some twelve years ago, and the parties were less than clear in their recollection of some of the relevant events.

7. The plaintiff gave evidence that he had been engaged in the business of agricultural contracting since in or around the year 1994, offering to farmers in his area of County Carlow the service of sowing crops on a seasonal basis and assistance with fencing and other farming occupations. He said that in 2002 his business was going well, and he determined to buy a larger capacity seed sower or hopper. His old hopper or sower was transported at the rear of his tractor and he had become aware of an alternative form of sower which was carried in front of the tractor which had much larger capacity, possibly a capacity of double his old machine. His said he picked up a brochure on his first visit to the first defendant's showrooms and he noted, in particular, an assertion on the brochure that the Amazone hopper or sower was ideally suited for road transport. He made a number of visits to the first defendant's showrooms and it was not in issue that the plaintiff had been in the past a customer of the first defendant, and had dealt with John O'Toole, a director of the first defendant company and the son of the original founder of that company.

8. The plaintiff provided no documentary evidence of the relevant dates but he says his first visit to the O'Toole showrooms was in June or July 2002, and in support of his assertion, he says that he, in the normal way, would have been too busy in April of any year to have made visits to the showrooms. He said he met both John O'Toole and his father Joe O'Toole on two occasions, and that, while after the second meeting he had come to the view that the Amazone machine was particularly suitable to his needs, he did not at that stage enter into a contract to buy the machine from the first defendant. He said he was aware of the machine before he first visited the O'Toole showrooms and that after the visit he had seen the machine, or a machine of a similar type at the Agricultural Show in Tullow some time between 15th and 18th of August, 2002, and had viewed the actual machine in the first defendant's showrooms some time in late July or early August 2002, when the machine arrived from the manufacturer. He says he intended to acquire a new Fendt tractor suitable to transport the Amazone hopper and that he would not have bought the Amazone until after he had taken delivery of this on 20th September, 2002. He says he made contact then through his broker with Bank of Scotland (Ireland)

and an agreement was reached that that Bank would provide him with funding. He paid a deposit to the first defendant of €10,905.30 in two instalments, both in mid-October 2002, and these dates are established with documentary evidence. The amount of the deposit was the precise amount of VAT chargeable in respect of the machine, and the plaintiff was registered for VAT and ultimately sought and obtained a refund of the VAT from Revenue. The hire purchase agreement with Bank of Scotland commenced on 23rd October, 2002 and the plaintiff took possession of the machine on 30th October, 2002.

9. John O'Toole gave evidence for the defendant and he produced extracts from his business diary for various dates in 2002. The first such entry on the 18th March, 2002 shows an entry of the mobile telephone number of the plaintiff. The second entry on 25th March, 2002 records that he had quoted Paul Murphy for a new Amazone hopper machine, not of the type or size ultimately bought, and this entry also contained a note with regard to another piece of machinery which the plaintiff bought at that time, but which is not relevant to this action.

10. The third entry was for the next day, the 26th March, 2002, and showed Paul Murphy's name entered on the page and at the end of the page a recording that he had "quoted Paul Murphy for a 4-metre Amazone machine". In the course of evidence, this was explained as the relevant quotation for the machine which the plaintiff ultimately bought.

11. The entry on 8th April, 2002 records John O'Toole's note that he "sold" to Paul Murphy a new 4-metre Amazone hopper machine at the price of IR£39,900 plus VAT. There is also an entry that Paul Murphy had asked for a quote on an Amazone 3-metre machine which, in the course of evidence, was explained as a rear-mounted machine which the plaintiff had considered buying to supplement his other machinery.

12. The next entry is on 10th April, 2002, and records a quote to Paul Murphy for a new Amazone rear-mounted machine, and a power harrow, being an attachment for the plaintiff's existing tractor to accommodate the smaller rear-mounted Amazone machine.

13. The next entry was on 6th May, 2002 which records an order by or on behalf of Paul Murphy for a stop-start kit, at a cost described as an "extra 900 plus VAT", which in the course of evidence was explained and accepted by the plaintiff as being an optional extra attachment for the 4-metre Amazone which was ultimately bought.

14. There is an entry on 6th July, 2002, which identified Paul Murphy's name and no more, an entry on the 4th September, 2002, which records the address of Bank of Scotland, the name Ger Murphy, explained and accepted by the plaintiff as being his financial broker, and records the amount of €51,930, the exact Euro equivalent of the purchase price earlier identified in Irish Pounds.

15. An entry on 10th September, 2002 identified Pat Dalton, explained and accepted as another finance broker, and an entry on 27th September, 2002 merely has the name Paul Murphy on the same line as Lombard & Ulster. Pat Dalton's name appears with a telephone number on an entry on 19th October, 2002 with a reference to BNP (explained as Banque Nationale de Paris), and there is also an entry on that date referring to Bank of Scotland which appears in the same part of the diary as the name and telephone number for the aforementioned Ger Murphy.

16. John O'Toole gave evidence that the diary entries were contemporaneous and the plaintiff is unable to explain why there are entries in regard to enquiries by him as early as in March and April 2002. The plaintiff is adamant that he did not obtain a quotation in April 2002, nor on 6th May, 2002, and also denies that the machine was ordered from the supplier on his behalf on 8th April, 2002. The plaintiff says he could not even have been thinking about the Amazone machine in March or April 2002, and that he would have been too busy. He does accept that he ordered the stop/start machine as an optional extra, although he does not accept that this occurred on or about 6th May, 2002 as reflected in the diary entry. The plaintiff does not deny that the invoices and the diary entries are referable to the items he actually received and what he does not accept is the evidence of the first defendant as to the relevant dates. Again, the plaintiff differs from the first defendant with regard to the date when he was told that the machinery had arrived from the supplier, and he said that this happened in August and not June 2002.

17. I heard evidence, both from the plaintiff and John O'Toole, and I had the benefit of hearing their evidence in chief and in cross-examination. John O'Toole explained that the sale of the Amazone machine to the plaintiff was a large sale in terms of its value for the first defendant, which is a small family business and would not have sold many of those machines or machines of a similar value in any given year. John O'Toole was adamant that the contracts were made in April, and he says the first contact made with the first defendant was a phone call from Paul Murphy on 18th March, 2002 which was taken by a member of his staff. He said he had a number of phone calls between his first contact with Paul Murphy, when he returned his call on that evening, and he also says that on 25th March, 2002, he went to inspect the fitting on the plaintiff's existing tractor and he also recalled quite clearly the plaintiff seeking to negotiate a reduction in price in an hour long conversation when they agreed on the price.

18. On 8th April, 2002, John O'Toole says he ordered the machine over the phone from the suppliers and he identified an entry in his diary on 10th April, 2002 with regard to the possible acquisition by the plaintiff of a second Amazone machine which would be rear-mounted. He said that on the date of that proposed second sale, in a conversation regarding the second machine, the plaintiff asked him whether he had ordered an Amazone 4-metre machine. He said that the lead-in time between the placing of an order and the delivery of a machine was always a number of months, and he said that as the sowing season would start in early autumn, it was important that the machine be ordered and would be delivered in the summer months.

19. An area of contention in the case is the fact that no order form was created to identify the plaintiff's ordering of the machine. John O'Toole said that he took orders on a handshake then in 2002, and that the business still operated that way. He also said that he did not have a habit of taking a deposit when an order was placed, and that this is common in the industry and this was how he himself and the company had done, and continue to do, business.

20. In the course of cross-examination, it was put to John O'Toole that another customer, one Roy Elemis, was also interested at the same time in acquiring a 4-metre Amazone machine. John O'Toole accepted that Roy Elemis had expressed an interest in the machine, but his evidence was that no deal was made with Roy Elemis in March or April 2002, and that the machine was ordered for Paul Murphy. He says that a deal was finalised with Roy Elemis in May or June 2002, and denied that he had two customers for the one machine that he ordered on 8th April, 2002.

21. When pressed as to why he did not seek a deposit, and as to why the contract was not evidenced or made in writing, or why an order form was not produced and sought to be executed by a purchaser, John O'Toole said that it did occasionally, although rarely, occur that a person who ordered a machine did not complete the purchase. He said that when this happened, it was relatively easy to sell the machine to another buyer. In his business of dealing with farmers or contractors, such as the plaintiff, "a deal is a deal", or, as he also put it, "an order is an order". He accepted, in cross-examination, that he would not have delivered the machine to Paul Murphy without knowing, as he did know in October 2002, when the machine was delivered, that Paul Murphy had finance in place,

although it was the case that the machine was delivered some days before the Bank funding came from the third defendant.

22. Evidence was given by John Scrivener, who was the Managing Director of a company, Farmhand Ltd., the importer and supplier of the Amazone machine. He did not specifically recall the placing of the order by John O'Toole, but he did say that these orders were often placed by phone and the deals were done without written documentation. He did recall an order being placed for the optional spare part on 6th May, 2002, after John O'Toole said the Amazone machine was ordered. This order can be linked directly to the plaintiff who accepts that he ordered this optional spare part, albeit he says it was done many months later.

23. In cross-examination, John Scrivener said that if a customer did not have the money to pay for a machine after it had been ordered, another customer would be found. It was standard practice that a retailer would not deliver machinery unless the money was available, but that in the industry machinery was ordered without deposits or formal contract documentation.

Conclusion on Formation of Contract

24. Certain elements of the evidence of John O'Toole deserve comment. His diary entries are contemporaneous. The first entry identifies a price for the Amazone machine in Irish Pounds and a later entry identifies it in Euro, and this is consistent with the fact that the Euro changeover happened in January 2002, and for some time prices were often understood or recorded in the old currency, and the existence of the two entries is suggestive of the accuracy of the diary entries. I found the evidence of Mr. Murphy unconvincing insofar as he purported to be so clear as to the relevant dates of the transaction. In the circumstances, having heard the evidence of both Mr. Murphy and Mr. O'Toole, and noting that John O'Toole's evidence is supported by contemporaneous evidence, which I find to be an accurate record and useful to identify the relevant dates in issue, I prefer the evidence of John O'Toole. I am also persuaded by the evidence of the independent witness, John Scrivener, that the optional extra fitting was ordered on the 6th May, 2002 and this is supportive of the evidence that the plaintiff did order the Amazone machine on 8th April, 2002. I find as a matter of fact that the plaintiff did attend at the showrooms of the first defendant in March 2002, and thereafter negotiated the purchase by him of the Amazone machine for €51,930. I am satisfied that this occurred in March 2002, and I am also satisfied as a matter of probability that that order was placed on 8th April, 2002. I take particular note of the coincidence of that date with the clear recollection by Mr. Scrivener of the placing of the order for the additional optional extra a short time later.

25. I accept the evidence of John O'Toole that the practice in the trade is for a deal to be done on a handshake. It was the case that this was a particularly large purchase in terms of its value, but equally, a degree of trust existed between the plaintiff and the first defendant as a result of previous dealings. I hold, as a matter of fact, that the entry of 8th April, 2002 accurately reflects the legal position, namely, that on that date, an agreement was entered into with Paul Murphy for the sale to him of the Amazone machine at the identified price.

Conditional Contract?

26. The plaintiff also asserts that the contract was a conditional contract, one allied to and conditional upon the obtaining by the plaintiff of finance from, the second defendant. I turn now to consider this. It is not in issue that the plaintiff was not in a position to purchase the Amazone machine without hire purchase finance. The Bank fully financed the purchase, save for the VAT element.

27. The plaintiff says it is not credible that the first defendant would have regarded itself as contractually bound to deliver this machine unless it was sure the plaintiff could pay for the goods, and that for this reason the agreement was a tripartite agreement which came into operation in October 2002, when the finance was obtained. The plaintiff makes two different points: that the contract was conditional upon a condition precedent that it would not bind him unless and until he had loan finance, or that the contract was a tripartite agreement entered into at the time the finance was drawn down.

28. A contract for the sale of goods or land may be subject to a condition precedent. The case law is replete with examples of contracts for the sale of land which were subject to loan finance. The plaintiff relies on the English High Court decision of *Lee-Parker & Anor. v. Izzet & Ors. (No. 2)* [1972] 2 ALL ER 800, where the Court accepted that a written agreement for the sale of land, which contained an express provision that the sale was subject to the purchaser obtaining a satisfactory mortgage, was a condition precedent. That case can be distinguished from this case in that the condition precedent relating to finance was expressly made. The other case relied on by the plaintiff is *Schweppe v. Harper* [2008] ALL ER(D) 311, where the Court of Appeal followed *Lee-Parker v. Izzet*, but only after holding that the contract did contain a condition precedent that third party financing would be obtained by the plaintiff.

29. If the parties agreed that the agreement to sell the machine to Mr. Murphy would not be binding until finance was obtained, then this contract was a conditional contract. I accept as a matter of fact that the first defendant knew that Mr. Murphy would require third party financing to pay the agreed purchase price, but I do not accept that any discussion was had between the parties that the contract was subject to third party financing. Mere silence, or an assumption, even a correct assumption, that Mr. Murphy would require finance, did not make the attaining of finance an express term of this contract. For a contract to be a conditional contract, it seems to me that such a condition must be express between the parties, and the Court will not imply a financing term, as such a term was not necessary to give business efficacy to this contract which was perfectly capable of being made without such a condition, albeit that performance of the obligation of one party required financing. I hold that Mr. Murphy could and did order the machine without reference to the requirement of third party financing. Indeed were third party loan finance to have been a term of this contract it seems to me as a matter of probability that the first defendant would not have placed the order for the machine until it was sure that the third party financing was in place, and I accept the evidence of John O'Toole that in general his experience in business was that when machines were ordered the buyer did in fact in the majority of cases come up with the funds to complete the purchase.

30. Any arrangement for the funding of the purchase was one made between the plaintiff and the second defendant. The plaintiff urges upon me that the fact an invoice was furnished by the first defendant to the finance company in the middle of October 2002 is evidence that the contract was subject to finance, but it seems to me that the first defendant furnished the invoice to the finance company in lieu of furnishing it directly to the plaintiff for transmission on to the finance company in ease of the plaintiff and to speed up the release of the funds, and not because the finance company was part of the contract for sale.

The Sale of Goods Acts 1893 to 1980

31. The plaintiff further urged upon me the proposition that it is unlikely, or, he suggested, incredible, that the first defendant would have agreed to sell these goods without a deposit, or that the first defendant would have delivered the goods to the plaintiff without being paid. This brings me to consider the transaction in the context of the provisions of the Sale of Goods Acts 1893 to 1980.

32. Section 1 of the Sale of Goods Act 1893 identifies a contract for the sale of goods as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. This particular contract was for the sale of goods, delivery of which would not take place until a future date. Such a contract, by s. 1(3), is identified by statute as being

an agreement to sell, which, by s. 1(4), becomes a sale when the time elapses. Section 1 provides as follows:

> *"1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.*
>
> *(2) A contract of sale may be absolute or conditional.*
>
> *(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.*
>
> *(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."*

33. The Act divides contracts of sale into two classes of contracts, cases where there is an immediate sale or what the law in general would call an executed contract, and an agreement to sell, an executory contract where it is agreed that the goods shall pass at a future time. This second class of contract is not a sale in the true sense as in the absence of agreement to the contrary, no interest in the goods passes to the intended transferee at the time of the contract. It is an agreement to sell, containing by implication a duty on the part of the seller to deliver the goods and the property in the goods in accordance with the terms of the contract for sale.

34. The seller contracts to deliver the goods in accordance with the contract, and this includes an obligation to deliver goods which satisfy any implied or express term as to condition or fitness for use. The duty to deliver continues to subsist until the date for delivery arises. The payer contracts to pay for the goods and the Act implies certain terms to that regard.

35. This contract was an agreement to sell governed by s.27 of the Act of 1893 which sets out in clear terms the nature of the duties of seller and buyer to a contract so governed. Sections 27 and 28 provide as follows:

> *"27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.*
>
> *28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods".*

36. Accordingly, as a matter of law, the form of this transaction was that the parties entered into an agreement for sale as a result of which the first defendant incurred a liability or an obligation at law to deliver the goods in exchange for the concurrent obligation of the plaintiff buyer to pay for those goods. The mutual rights and obligations of the parties are set out by statute and s.39 of the Act gives certain rights to the unpaid seller within the meaning of the Act who obtains in respect of goods which have passed to the buyer a lien on the goods, a right of resale, a right of stopping the goods in transit in the case of insolvency, or a right to withhold delivery similar and co-extensive with his right of lien and stoppage in transitu. The contracting parties do not need to express these terms which are imported into the contract as a matter of law, and indeed which are reflected in the way in which the plaintiff and the first defendant conducted the business between them. The plaintiff ordered the goods, the first defendant placed the order with the supplier, the first defendant delivered the goods to the plaintiff and the plaintiff had an obligation to pay. The parties agreed an express variation of the contractual formula in that the goods were delivered without the exchange of payment in circumstances where the first defendant knew that the loan finance had been approved and that payment would be made directly to it in respect of the non VAT element of the purchase price within a matter of days of the delivery date.

Conclusion on the Nature of the Contract

37. Accordingly, I do not accept the argument of counsel for the plaintiff that the contract entered into between these parties was one conditional upon the loan finance, or indeed that it was one which did not come into existence and was not formed until the purchase money was available and paid over by the plaintiff. The contract was made in April 2002 and fell within the definition of an agreement for sale in the sale of goods legislation. It accordingly came to have implied as a matter of statute a formula for the performance of the contract by each of the parties to the agreement, the delivery of goods on the part of the seller and the payment for those goods on the part of the buyer. There was nothing in my view in this transaction which rendered it a contract which fell outside of this commonly found formula and the agreement for sale imported as a matter of law the mutual obligations between the parties which came into existence in April of 2002.

38. I reject the submission that this contract was one which was conditional for its enforcement on third party loan finance.

Statute of limitations: the accrual of the cause of action

39. Section 11 (1)(a) of the Statute of Limitations Act 1957 provides a limitation period of six years in breach of contract cases which is to run from the date the cause of action accrues. The general rule in a claim for breach of contract is that the cause of action accrues not when the damage is suffered but at the time of breach and this law is well established. Thus it is not always the case that in a claim for breach of contract the cause of action accrued is the date when the contract was made. The plaintiff in this case argues that the cause of action accrued on the date the goods were delivered, and that it was at that date that the plaintiff took possession of goods which did not meet what he says was the contractually agreed or implied condition, namely that they be fit for use upon public roads. The plaintiff asserts that the cause of action accrued on the date of delivery of the goods in October, 2002. The first defendant argues that the relevant date which the cause of action accrued is the date the contract was made, namely the 8th April, 2002, the date on which I have found that the contract, or the agreement for sale, was made. The first defendant argues that the respective obligations of the plaintiff and the first defendant arose on that date, and that if a breach occurred it occurred then.

40. In *Minister for Agriculture and Food v. Thomas Julian* [2003] IEHC 144 Dunne J. considered the meaning of the phrase in the Statute of Limitations of "cause of action" and quoted from the classic definition of the phrase in *Read v. Brown* (1888) 22 Q.B.D.128 where Lord Esher M.R. said at p. 131

> *"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."*

She considered whether an argument might be made as to whether it was necessary for damage to have occurred at the time of breach and in particular she noted the old case of *Gibbs v. Gould* [1881] Q.B.D. 296 and accepted, as she put it, "*that the cause of action accrues as soon as a breach of contract occurs whether or not damage has being suffered at that time*." A cause of action was defined by Viscount Dunedin in *Board of Trade v. Cayzer*, Irvine and Co. [1927] A.C. 610 at 617 as "*that which makes action possible*".

41. In the light of the authorities is clear to me that the cause of action in contract must be the date on which a breach occurs and not the date when the contract is made. There may of course be incidents where these dates or times are coterminous as was found in the Supreme Court decision of *Gallagher v. ACC Bank* [2012] IESC 35, which I return to below. In that case the court held as a matter of fact that the cause of action accrued at the date on which the transaction was entered into, the date on which the financial product was sold.

42. As indicated above the plaintiff's claim is on foot of what is characterized in the Sale of Goods Act 1893 as an agreement for sale where the goods were agreed to be delivered at a later date. There is no direct authority on point as to the running of limitation in the case of an agreement for sale but counsel for the plaintiff referred me to a statement at p. 87 in the recently published text by Martin Canny, *Limitation of Actions*, (2010) where he says

> *"If the goods are defective, time starts to run against the vendor from the time the goods were received and not when the defect becomes apparent."*

43. The author quotes the case of *Lynn v. Bamber* [1930] 2 K.B. 72 but I note that McCardie J. decided that case on an assumption, which was not disputed between the parties, that the breach of contract had occurred on the date the contract was made, namely the date when the defendant sold to the plaintiff, a fruit grower, plum trees described as of a particular high quality species, but were actually trees of an inferior quality, and the case centred on the question of whether active and fraudulent concealment on the part of a defendant constituted a good reply to a plea that a claim was statute barred. It is not authority for the proposition that time begins to run in a contract for the sale of goods to be delivered at a future time at the date of delivery. Canny's statement might well be intended to point to the absence of a discoverability rule in breach of contract cases rather than be an authoritative statement on the link between breach and delivery.

44. Chitty in volume 1 of his seminal text on the law of contract, *Chitty on Contracts*, 31st Ed. (London, 2012), refers the old case of *Battley v. Faulkner* (1820) 3 B. & Ald. 288 at para. 28.052 as authority for the proposition that in the case of an agreement to sell the buyer's right of action for breach of an express or implied warranty relating to goods accrues when the goods are delivered, although again he makes this comment in the context of another question, not relevant to this case, as to whether there is an argument that time runs from the date a defect is discovered rather than the date of delivery. *Battley v. Faulkner* involved a contract for the delivery of one kind of wheat and the Court held that the breach was complete on delivery of another kind of wheat and the question for the court was whether it could be said that time ran from the date of knowledge and not of delivery. The court held that time ran from the date the contract was broken and this was the date of delivery.

45. None of the cases referred to in the text books is directly on point, and one must look to first principles and the express terms the Act of 1893. The legislation distinguished between a sale where delivery takes place at the time of the contract and an *agreement for sale* where delivery is to occur on a future date. It seems to me that breach of agreement for sale occurs on the date when the goods come into possession of the buyer, and it is when the buyer takes custody of goods and it is then that the seller is in breach of the warranties or conditions as to quality or fitness for purpose as in the contract. This is the date when the breach occurred. The date of the delivery of the goods may or may not be the date title in the goods passes, but in this particular case there is no reason to suppose, nor has it been argued before me, that title to the Amazone machine did or could have passed to the buyer before the goods were delivered and before he paid for them. What is clear, however, is that under s.1 of the Act of 1893 the delivery of the goods, and the concurrent obligation to pay for the goods, is the point at which the contract or agreement for sale becomes a sale, and breach, if there was one, occurred at performance or delivery when the contract was no longer executory but was executed.

46. To look at the matter another way, the agreement for sale is an agreement on the part of the seller to deliver at a date in the future the Amazone machine in exchange for the payment by the buyer of the purchase price. The contract was not fully performed or could not be said to have been fully performed by the seller until the goods were delivered and it is at that stage that the breach of contract occurred. The plaintiff could not have commenced an action for breach of contract based on a plea of breach of condition or warranty of fitness for purpose in the period between April 2002, when the agreement was made, and October 2002, when the agreement was performed, because until performance it could not be said that there had been a breach of the obligations of the seller. This gap in time is not, for example, found in a simple contract for the sale of goods where a buyer buys an item in a retail shop as both the agreement for sale and the delivery occur at the same time and usually in the same place. When time separates the agreement for sale from the performance of the conditions in that agreement, the contract is not breached until it can be said that the contract was not fully performed or performed in compliance with the conditions on the part of the seller. It is at the date when the obligations of the parties crystallize, i.e. when the seller must deliver and the buyer must pay, and this is the date which can be properly characterized as the date when the breach occurred.

47. I hold that as a matter of law that the breach of the contract for sale, if there be a breach, occurred at the date of delivery of the Amazone machine to the buyer.

48. Accordingly the plaintiff's claim for breach of contract is not statute barred in that the cause of action accrued when the Amazone machine was delivered i.e. on the 30th of October, 2002. The proceedings were instituted in July of 2008 and within the six year time limit.

The action in negligence

49. In case I am wrong on the first point, I turn now to examine a further argument of the plaintiff, namely that his claim is framed not merely in contract but also in negligence or negligent misstatement a claim in tort, and accordingly that time does not run until damage is suffered. He relies on *Hegarty v. O'Loughran* [1990] 1 I.R. 148 where Finlay C.J. held that 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. It must be necessarily the case that a cause of action in tort has not accrued until at least such time as the two necessary components referred to as a tort have occurred, namely the wrong and the damage.

50. It is argued by the plaintiff that he had acted in reliance on a representation made by a servant or agent of the first defendant company that the Amazone machine was suitable for use on Irish roads and that this representation was made in late July or early August 2002. Irrespective of the date when the representation was made, it is argued the damage that the plaintiff suffered did not occur until he assumed liability to pay for the goods, or in this particular case to repay to the second defendant finance company the

money borrowed. The defendant argues that if there was a representation, which he denies, the representation will be actionable as a matter of law only if it was made before the contract was entered into. I accept that submission by counsel for the first defendant, the submission being one which states a well established proposition 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 contract was made. Counsel for the defendant relies on *Colthurst & Tenips Ltd. v. Colthurst* (Unreported, High Court, McCracken J., 9th February, 2000) as authority for the proposition that an untrue representation is actionable if "*the plaintiffs were induced to enter into the settlement by reason of the representation.*"

51. For the purposes of the hearing of the preliminary issue I must act on the assumption that a representation was made that the Amazone machine which the plaintiff bought was suitable for use on Irish roads. If there was such a representation, and if it is to be actionable, it must have been made by or on behalf of the first defendant before the contract was entered into. I have found that the contract was entered into on the 8th April, 2002 and accordingly any actionable representation must be made before then. I accept the argument of the first defendant in this regard.

52. Both counsel relied on the decision of the Supreme Court in *Gallagher v. ACC Bank* [2012] IESC 35. The plaintiff relies on the case in support of his argument that the plaintiff incurred loss only when he assumed the liability to the second defendant to repay the amount of the finance loan. I do not accept this proposition and in my view the plaintiff assumed a liability to the first defendant to pay for these goods when he entered into the agreement for sale on the 8th April, 2002. I have explained my reasoning for this above and I have found that the availability of finance was not a condition precedent to the existence of the agreement for sale and the plaintiff assumed a liability to pay the first defendant when he entered into the agreement for sale.

53. Counsel for the first defendant relies on the judgment of Fennelly J. in *Gallagher v. ACC Bank* in particular para. 35 of that judgment where Fennelly J. said the following after concluding his review of the English cases that they:

> *"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 may be difficult."*

54. Fennelly J. accepted that there would be cases where there was immediate loss even if there are no difficulties of quantification, and equally that there are cases where the loss is not immediate. 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. Accordingly I reject the argument by counsel for the plaintiff that time began to run in the plaintiff's claim, insofar as it is properly speaking a claim in negligence, when the plaintiff assumed a liability to pay. The claim in negligent misrepresentation accrued on 8th April, 2002 and was statute barred when the proceedings were instituted.

55. Counsel for the plaintiff argues this is a claim in tort. The question of characterisation is guided by the important and compelling reasoning of O'Donnell J. in *Gallagher v. ACC Bank* where the Court asked the question as to whether the claim was properly or centrally a claim in contract or in tort. O'Donnell J. pointed out that the claim made by the plaintiff in that case was one made in contract and in tort, but that they were "*in fact identical*". As the learned judge said at paras. 124 and 125:

> *"The same facts are repackaged as a claim in contract, negligence, and negligent misstatement. The pleadings do not distinguish between those claims. Instead, the same acts are pleaded as "particulars of wrongdoing" and no distinction is made between the legal nature of the wrong alleged.*
>
> *It is also fair to say, I think, that the cause of action in contract is in truth the central and primary claim here. Indeed there was a time not so long ago and certainly at the time the relevant provisions of the Statute of Limitations Act 1957 were enacted, when the contractual claim would have been regarded as the only possible cause of action arising on the facts here. Even today, it is the contract which creates the relationship giving rise to the obligation in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1965] A.C. 465 to take care in the provision of advice, and the terms of contract could control, limit or even negative any such duty. Once again, if there is a separate duty of care in negligence alone, then it is the contract which creates the proximity between the parties which gives rise to the duty of care."*

56. I am persuaded by this statement of O'Donnell J. that I should not engage upon the artificial exercise of distinguishing between or decoupling the claims in contract and tort. The central and primary claim in this case is a claim for breach of the agreement for sale of a machine, a claim made in contract and under the relevant provisions of the Sale of Goods Act 1893 and 1980.

57. In the English Court of Appeal decision frequently quoted at length, *Letang v. Cooper* [1964] 3 W.L.R. 573, Lord Justice Diplock identified the problem that had arisen and would continue to arise following the enactment of the Judicature Act of 1893 where forms of action were abolished. As he said at pp. 242 - 243:

> *"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. Historically, the means by which the remedy was obtained varied with the nature of the factual situation and causes action were divided into categories according to the "form of action" by which the remedy was obtained in the particular kind of factual situation which constituted the cause of action. But that is legal history, not current law."*

58. As Lord Justice Diplock said a court in looking at a set of factual circumstances ought not seek to categorise the circumstances into different forms of action, and the name of the form of action is no more than, as he put it, "*a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person*." The categorisation does not always properly identify the nature of the action and as he said to forget this would be to encourage the old form of actions "*to rule us from their graves*."

59. The abolition by the Judicature Act 1893 of separate forms of action informs me in considering the true nature of the plaintiff's claim, and I must engage in the exercise of ascertaining what that nature is. This is a claim for damages for the 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 court cases, at least where the wrongdoing alleged is identical. As O'Donnell J. said at para. 127 while the court must consider 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."

60. I adopt this reasoning, and hold that the facts of this case point to the case being one for breach of contract, the cause of action in which accrued at the date the breach of that contract accrued.

Conclusion
61. The plaintiff's claim in contract is not statute barred.