

**The High Court**

**Commercial**

**Record number 2010/5537P**

**Between**

**Patrick Gallagher**

**plaintiff**

**and**

**ACC Bank plc trading as ACC Bank**

**defendant**

**Judgment of Mr Justice Charleton delivered on the 11th of October 2012**

1. On the 7th of October 2011, this Court gave judgment allowing this case to proceed and refusing a motion by the defendant bank that the plaintiff's claim of misrepresentation leading to an investment in the 'Solid World Bond 4' was barred by efflux of time. All parties agreed that a contract claim was statute barred. The basis of that judgment was that the purchase of the bond under a misrepresentation was a tort the damage in which only occurred when the financial markets definitively crystallised the return as being a loss, or at least less than was represented; see [2011] IEHC 367. On appeal, the Supreme Court disagreed holding that on purchase of the bond through misrepresentation the plaintiff had all the elements of a tort committed against him; see [2012] IESC 35. Before that, it had appeared prudent to this plaintiff and to five other plaintiffs to allege fraud since under s71 of the Statute of Limitations a cause of action for this tort only accrues on actually finding out that such a wrong had been perpetrated. Kelly J allowed other plaintiffs to amend their statement of claim on conditions in *Cuttle v ACC Bank plc* [2012] IEHC . On these other claims, hundreds of other cases depend of people who had invested in either the Solid World Bond 4 or Solid World Bond 5.

2. This particular case had fraud pleaded only by way of reply to the bank's defence. Counsel for the plaintiff accepts that this pleading is inadequate. The defendant bank has now returned the case to the High Court arguing that since fraud is not now pleaded against the bank, and since the order of the Supreme Court only allows the case to proceed as to such portions of the case as allege fraud, the case of the plaintiff should now be struck out. The plaintiff argues that since the five cases of alleged fraud and misrepresentation and breach of contract (where investments were made later in time) that make similar claims to his are listed for trial on the 5th of November, instead of now bringing a motion he should be allowed to await the outcome of that estimated 24 day trial and then decide what he should do.

3. I disagree with the plaintiff's argument. The plea of fraud is extremely serious. It is unfair to have a case making such a serious allegation unpleaded but hanging over officials until the end of other proceedings. It is also unsatisfactory that the claim of the plaintiff is that as regards other plaintiffs, a type of selling that involved borrowing to invest is pleaded but that the personnel of the bank are different and the involvement of the plaintiffs are individual to them. I am not convinced by the argument that if fraud is uncovered in the course of another trial that such fraud will impact on a separate set of facts involving different bank officials. In *Packenhams v Irish Ferries* (Supreme Court, unreported, 31 January 2005), the Supreme Court held that claims of asbestos poisoning that could not then be proven could not be allowed to await the potential development of illness. Geoghan J said:

We think it unlikely that any of these plaintiffs would be prejudiced either under the statute of limitations or res judicata. But even if they were, there would be nothing we could do about it. We are quite satisfied that the order the President made was not the correct order. He had found that no injury of a type that would allow an award for damages be given had been pleaded or made out. In these circumstances, the appeal must be allowed and the several actions struck out.

4. I would simply add that I think it unfair to everyone, the plaintiff having lost in the Supreme Court, to allow the parties to hang around for two years or so to enable an appeal by whichever losing party in the other cases, or to permit litigation in the distant future that is not on what can be proven now but what might possibly emerge in another case. Counsel for the plaintiff also seeks, in the alternative, time to seek leave to amend the statement of claim to now include a claim for fraud. The order of the Supreme Court makes it clear that the plaintiff is entitled to proceed on fraud allegations. I am not in a position to refuse to allow the plaintiff to bring a motion to amend the pleadings to include a claim of fraud. That matter cannot be allowed to hang around, however. The order I will make is to dismiss the claim but to put a stay on that order for four weeks, such stay to be extended in the event of a motion being brought to amend the pleadings to allege fraud until decision on that motion; that order to be stayed pending the trial of the action should leave be given to plead fraud.