THE HIGH COURT

COMMERCIAL

2010 1804 P

BETWEEN

JOSEPH O'HARA

PLAINTIFF

AND

ACC BANK PLC

DEFENDANT

2010 5537 P

BETWEEN

PATRICK GALLAGHER

PLAINTIFF

AND

ACC BANK PLC

DEFENDANT

Judgment of Mr. Justice Charleton delivered on 7th day of October 2011

1. The plaintiff Joseph O'Hara is a solicitor and the plaintiff Patrick Gallagher is a restaurateur. In 2003 and 2004, the plaintiffs invested substantial sums of borrowed money in a financial product marketed by the defendant ACC Bank called the 'Solid World Bond'. The defendant bank lent them the necessary funds. The bonds were to mature over of a period of five years and eleven months. Mr. O'Hara invested more than Mr. Gallagher. Both of them individually purchased a bond in the sum of €500,000 in October 2003 and this was called the 'Solid World Bond 4'. The next year, in March 2004, Mr. O'Hara invested a further €250,000 in another offering from ACC Bank, which was called the 'Solid World Bond 5'. Borrowing substantial sums over nearly six years resulted in a significant liability in interest payments against the plaintiffs. That has far outstripped any return on the bonds.

2. While the name on the bonds might imply that monies were being placed into securities or share funds which were unshakable, the intervening years have proved that the world financial system is far from solid.

3. This judgment is on a preliminary motion to dismiss the proceedings on two legal grounds. Consequently, I will not now recite the allegations and counter allegations that would be made at trial by the investors and the bank. It suffices to say that Mr. O'Hara and Mr. Gallagher both lost heavily. The investment did not perform as well as they had expected and as they claim that the bank represented it would. As I understand it, while the capital sum was secure on the investment and has been returned, much of this has been dissolved by liability to pay interest on the borrowing.

Issues

4. In the case of Mr. O'Hara, ACC Bank pleads that it has already been determined by the Financial Services Ombudsman that the circumstances of the investment do not give rise to any legal liability on the part of the bank. In the case of Mr. Gallagher, ACC Bank pleads that the commencement of the case is out of time. Mr. Gallagher issued a plenary summons on the 10th June, 2010. Mr. O'Hara issued a plenary summons on the 24th February, 2010. Proceedings were therefore issued in each case more than six years after purchasing the bonds. I will deal with issues as to prior determination and breach of the limitation period in turn.

5. As this is an application to dismiss proceedings on the basis of a preliminary motion, the facts must be approached by the court on the basis of each of the plaintiffs being able to prove their case as set out in the pleadings and the defendant bank being unable to establish an answer.

Prior Determination

6. The relief sought by ACC Bank against Mr. O'Hara is encapsulated in the first paragraph of the notice of motion before the Court. The defendant bank claims:-

> "An order dismissing, striking out and/or staying these proceedings on the basis that having regard to the determination of the Financial Services Ombudsman dated 30th November 2009 in respect of a complaint brought by the plaintiff against the defendant, the proceedings cannot properly be pursued".

7. An issue was first formally raised by Mr. O'Hara with ACC Bank as to his dissatisfaction with his purchase of the bonds through a letter of complaint from O'Donnell Waters Solicitors, dated the 20th February, 2009. That firm wrote to ACC Bank seeking the return

of all the interest paid by Mr. O'Hara. The letter claims misconduct by misrepresentation and breach of contract against ACC Bank. The letter asserts that the bank advised Mr. O'Hara that the investment would be made only in what are referred to as 'blue chip' companies. Thus, the solicitors claim that there was an express or implied representation that he would not lose any money. The letter complains that a ten day cooling-off period was provided for in the loan facility which funded Mr. O'Hara's investments. This, however, was not operated because, as it is alleged in the letter, the investor was pressurized into making the borrowing through a representation that the monies had to be drawn down immediately. These assertions made in respect of the 'Solid World Bond 4' are repeated, as to the investment the next year in 'Solid World Bond 5'. The letter complains that neither investment was safe. It claims that the bank had a significant conflict of interest in granting both the loan facility and encouraging the investment. The solicitors claim that Mr. O'Hara was assured by the bank that he would not lose on this investment. Having purchased the bonds, the letter asserts that he was not kept appraised as to where the monies were invested, nor was he given any ongoing information as to the rate of return. The letter proceeds to complain that due to the misinformation given by the bank, the investments were made not in a series of 'blue chip' companies, but in a financial derivative type of product which yielded, in consequence, no accumulation of dividend income. Within the context of a plea of conflict of interest, it is alleged in the letter that no information was furnished to Mr. O'Hara, as investor, as to what commissions, if any, the branch manager and the higher officers within the bank received. The letter then states:-

> "It is now… abundantly clear, that the bank were in breach of duty and acted in a careless, reckless and wanton manner in advancing to our client, facilities to purchase bonds within their own bank. Indeed, it would appear that the only persons who are not going to suffer any loss now is the bank itself. Hence, there is, and always was, a direct conflict of interest in such an investment and our client should have been given all the necessary information regarding the investment, and been afforded an adequate opportunity to take independent investment advice."

8. By letter dated the 10th June, 2009, the bank replied. The bank asserts that all appropriate warnings of risk were given to Mr. O'Hara and acknowledged by him. The letter says that it is regrettable that market conditions had deteriorated since the time of the investment but that this does not establish any form of exposure by the bank to liability. Mr. O'Hara, the bank rejoins, was not pressurized into making an investment and indeed completed the necessary waivers as to time. The product brochure for each of the bonds, the bank claims, was given to Mr. O'Hara and this explained the mechanics of how each bond would work. As to the nature of the investment and reports thereon, the bank asserts that progress on the individual shares could be found in the financial pages of a leading daily newspaper. Further, they write that Mr. O'Hara was advised that there were risks associated with the purchase of these bonds and that he was thus enabled to make an informed decision as to whether he wished to proceed or not. It was his choice, the bank states in the letter, to borrow money in order to make this investment. There were risk warnings pertaining to each bond and these were furnished, the bank replies.

9. Under ordinary circumstances, any lawyer reading these letters would regard them as being preliminary to the issue of High Court proceedings. The letter from ACC bank, however, ends by stating the following:-

> "I trust that the foregoing satisfactorily explains the position. However, if your client remains dissatisfied, he has the option of referring his complaint to the Financial Services Ombudsman. If so required, this letter may be treated as a final response for this purpose and the matter can be referred to the Financial Services Ombudsman's Bureau for investigation within fifteen working days from the date of this letter".

10. The letter then gives detailed instructions as to how to call by telephone, write to, email and make web enquiries about the Financial Services Ombudsman. The letter also says: "a copy of this letter and enclosures has been forwarded to the Financial Services Ombudsman, for his records".

11. The Financial Services Ombudsman does not have a jurisdiction to receive records. The National Archives may receive records which are of national interest under the National Archives Act 1986, as amended. The Financial Services Ombudsman may perform only those functions conferred by statute. This does not include archiving records of disputes not before it.

12. Instead of commencing litigation before the courts, Mr. O'Hara progressed his issues with the bank by obtaining and filling out a form making a complaint to the Financial Services Ombudsman. It is a very sparsely detailed form as originally furnished. He filled out the required details. His letter of complaint to the bank was also appended to that document. In effect, this is the complaint made. The matter was investigated by the Deputy Financial Services Ombudsman. That investigation has the appearance of being competent. Whether the result of it was correct or not has nothing to do with these proceedings, which are separate and not an appeal from the ruling. The adjudication of the Financial Services Ombudsman was made on the basis of the quoted letters, which were supplemented by an exchange of information whereby questions were asked of each side and responded to. Mr. O'Hara's response was made by his solicitors. ACC Bank's response was made by their "Ombudsman Liaison Officer". On the 30th November, 2009, the acting Deputy Financial Services Ombudsman made a written ruling. This sets out the background to the complaint, and the case made by each side. It concludes with the following finding:-

> "This case concerns whether the complainant was mis-sold and/or aggressively sold, the Solid World Bonds in October 2003 and March 2004. The centre of the complainant's case is that it was represented to him that the bonds would be invested directly in blue chip companies and that he would benefit from any dividends as declared by these companies. I have reviewed the evidence before me and in particular I have looked at the brochures provided for each of the bonds. I am satisfied that it was clearly set out in the brochures that the nature of the bond was a tracker bond investment. I am also satisfied that the complainant was aware, or at least should have been aware, from the documents that he signed that the bank did not either directly invest in the shares or the bond did not benefit directly from dividends paid by those companies. Therefore I find that there is no evidence that the products were mis-sold or that there was misrepresentation made in respect of the nature of these products.
>
> In respect of whether the complainant was subjected to unfair sales techniques by pressurising him to draw down the loan, I find that there is not enough evidence to support this. It is clear from the documentation that the complainant, a solicitor, waived his right to a cooling off period on the loan. It was not a pre-requisite to investing in the bonds that a loan should be obtained from the bank. Rather, this is the option that was utilised by the complainant to avail of the investment opportunity. Furthermore I believe the fact that the short time frame in drawing down the loan and investing in a bond was repeated in 2004 after the experience of 2003 is corroborative that the complainant was not concerned about the selling techniques or the pressure put on him. It is only now, six years after the event, that the issue of mis-selling has been raised by the complainant. The bonds have not performed as the complainant would have liked but he cannot have recourse to the bank for the costs of his investment."

13. This adjudication was legally binding on the parties subject only to an appeal to the High Court within twenty-one calendar days

under O.84 C of the Rules of the Superior Courts (Statutory Applications and Appeals) 2007. The appeal involved is not by way of re-hearing, where the parties are heard afresh in oral testimony and are free to call new or different evidence. This is what happens, for instance, in civil appeals from the Circuit Court to the High Court or from the District Court to the Circuit Court. In contrast, under the relevant legislation, the position of the parties is frozen with the record of the proceedings before the Financial Services Ombudsman. Any appeal by either party is by way of originating notice of motion whereby the High Court is invited by the appellant to re-examine the papers and whatever record there may be of proceedings before the Financial Services Ombudsman. The papers are proved by affidavit evidence and any defect in the adjudication is alleged by way of affidavit also. An appellant is not limited to the scheme for judicial review of administrative and judicial decisions under O.84 of the Rules of the Superior Courts. The appeal is somewhat broader. Before the High Court, the appellant must establish as a probability that, taking the adjudicative process as whole, the decision reached was vitiated by a serious and significant error or a series of errors; see p. 9 of the judgment of Finnegan P. in *Ulster Bank Investment Funds Limited v. McCarren* [2006] I.E.H.C. 323, (Unreported, High Court, Finnegan P., 1st November, 2006). The nature of the powers and responsibilities of the Financial Services Ombudsman requires closer analysis in the context of the claim that his adjudication bars proceedings before the High Court on the same subject.

The Financial Services Ombudsman

14. The function and powers of the Financial Services Ombudsman were usefully set out by McMahon J. in Square Capital Limited v. Financial Services Ombudsman [2010] 2 I.R. 514 at paras. 8 to 18. Since that analysis is both comprehensive in what it deals with and is significant for what follows, I now quote it extensively:-

> "Section 57BB of the Act of 1942 [Central Bank Act 1942], as inserted by s. 16 of the Act of 2004 [Central Bank and Financial Services Authority of Ireland Act 2004] sets up the Financial Services Ombudsman as an independent officer:-
>
> > "(a)(i) to investigate, mediate and adjudicate complaints made in accordance with this Part [of the Act] about the conduct of regulated financial service providers involving the provision of a financial service, an offer to provide such a service or a failure or refusal to provide such a service…(c) to enable such complaints to be dealt with in an informal and expeditious manner…"
>
> Section 57BK, states that the principal function of the Financial Services Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication. Subsection 4 of the same section states that the Ombudsman "when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form."

Section 57BX makes provision for a complaint:-

> "(1) An eligible consumer may complain to the Financial Services Ombudsman about the conduct of a regulated financial service provider involving –
>
> > (a) the provision of a financial service by the financial service provider, or
> >
> > (b) an offer by the financial service provider to provide such a service, or
> >
> > (c) a failure by the financial service provider to provide a particular financial service that has been requested.
>
> (2) Except in the case of a complaint that may be within the jurisdiction of the Pensions Ombudsman, the Financial Services Ombudsman has sole responsibility for deciding whether or not a complaint is within that Ombudsman's jurisdiction."

Once the Financial Services Ombudsman is satisfied that the complaint is within his jurisdiction, he is obliged to investigate the complaint.

With regard to the adjudication of complaints and the remedies available to the Ombudsman, s. 57CI is the relevant provision and I reproduce the relevant portion here:-

> "(1) On completing an investigation of a complaint that has not been settled or withdrawn, the Financial Services Ombudsman shall make a finding in writing that the complaint –
>
> > (a) is substantiated, or
> >
> > (b) is not substantiated, or
> >
> > (c) is partly substantiated in one or more specified respects but not in others.
>
> (2) A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:
>
> > (a) the conduct complained of was contrary to law;
> >
> > (b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
> >
> > (c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
> >
> > (d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;
> >
> > (e) the conduct complained of was based wholly or partly on a mistake of law or fact;

(f) an explanation for the conduct complained of was not given when it should have been given;

(g) the conduct complained of was otherwise improper.

(3) The Financial Services Ombudsman shall include in a finding—

(a) reasons for the finding, and

(b) any direction given under subsection (4) as a result of the finding.

(4) If a complaint is found to be wholly or partly substantiated, the Financial Services Ombudsman may direct the financial service provider to do one or more of the following:

(a) to review, rectify, mitigate or change the conduct complained of or its consequences;

(b) to provide reasons or explanations for that conduct;

(c) to change a practice relating to that conduct;

(d) to pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of;

(e) to take any other lawful action."

It is clear from the above that the functions of the Ombudsman are different from that of the ordinary courts of the land in that, not only is he able to investigate and adjudicate, but he has also power to mediate. Moreover, complaints have to be dealt with in an informal and expeditious manner and to this end he "is required to act in an informal manner and according to equity, good conscious and the substantial merits of the complaint without regard to technicality or legal form".

Moreover, a complaint may be upheld even if the conduct complained of was in accordance with a law or an established practice, if it is unreasonable and unjust or oppressive; or if an explanation for the conduct complained of was not given when it should have been given; or where the conduct complained of was otherwise improper. Finally, by way of remedy, the Ombudsman may, in appropriate circumstances, direct the financial service provider to review, rectify, mitigate or change the conduct complained of or change a practice relating to that conduct, etc. These are remedies which might not always be available to a court of law.

From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act of 2004, it is obvious that the office of Ombudsman is different from an ordinary court discharging its lawful functions. In this connection, I agree with the views advanced by MacMenamin J. in *Hayes v. Financial Services Ombudsman* (Unreported, High Court, MacMenamin J., 3rd November, 2008) where he described the Ombudsman's office in the following language at p. 14, para. 33:-

> "What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue.
>
> The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57CI(2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction."

The informal procedures of the Ombudsman were also noted by Kelly J. in Murray v. Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme [2007] I.E.H.C. 27, (Unreported, High Court, Kelly J., 25th January, 2007), where he observed at p. 21 that:-

> "…the procedures of the Ombudsman are undoubtedly less formal than those of a court…"

The Concise Oxford Dictionary (11th ed., 2006) at p. 729 defines "informal" as "relaxed and unofficial".

For these reasons it is important to fully appreciate the role of the Ombudsman when a court such as this is considering an appeal from his decision. Clearly, an appeal to this Court from the Ombudsman's decision is not a full rehearing of the case where the court looks afresh at all material and comes to its own conclusion as to what it would have done in the circumstances. The appeal here, while having some of the characteristics of the traditional judicial review, including some deferential recognition for the expertise of the Ombudsman, will also have to bear in mind the nature and the functions of the Financial Services Ombudsman as laid down by the Oireachtas."

15. It is also to be noted that the jurisdiction of the Financial Services Ombudsman extends to matters of dispute in contract and tort that touch on the provision of financial services to consumers. As well as having a jurisdiction to find that a complaint is substantiated by reason of any conduct complained of being contrary to law, as a breach of contract or as a tort such as misrepresentation, a much wider jurisdiction exists whereby a remedy may be given. That jurisdiction extends far beyond that exercised by a court of law. It extends to matters which are not civil wrongs, save within the terms of the statute and which are the subject of a remedy only under the statutory jurisdiction exercise by the Financial Services Ombudsman. As will have been noted from the passage quoted, remedies in compensation, rectification, the changing of a practice, or the providing of reasons or explanations for behaviour by a financial service provider, may be founded, in addition to what is unlawful in contract or tort, on such matters as the breach of an established practice, on discrimination, on conduct based on an improper motive, on conduct based on a mistake of

law, on a failure to explain, or on conduct that is improper. It may be that the various remedies available under the Central Bank Act 1942 as so amended are not universally applicable to each of the wrongs set out. It would be difficult, for instance, to imagine an amount of compensation being awarded for improper conduct where there is no financial loss. It would equally be hard to imagine that a requirement to change a practice always necessitates compensation. On the other hand, the rectification of a financial transaction through the parties being put back into the position which they were in immediately prior to that transaction, could involve a finding that there was an established practice that had not been followed in that instance, or that conduct was otherwise improper. This might result, in many complaints, in a substantial payment back to an investor of what he or she had paid in the context of what the Act declares to be a remedy for what is called improper conduct. It follows, therefore, that whereas the courts established under the Constitution exercise a jurisdiction in law that is limited to remedies based on actions at common law and under statute, those complaining to the Financial Services Ombudsman have not only the benefit of those remedies, but also a legal jurisdiction exercisable only within the context of a complaint to the Financial Services Ombudsman for listed wrongs which can be the subject of the same remedies as a court and, in some instances, wider than those exercisable by a court. Those remedies, outside traditional legal remedies justiciable before a court, are only available through an application to the Financial Services Ombudsman. Apart from an appeal to the High Court from a finding of the Financial Services Ombudsman, the new jurisdiction created by the Act, and confined to the Financial Services Ombudsman, is not exercisable by a court. Instead, claims of improper conduct, discrimination and the like are capable of determination and remedy only in the context of a complaint made to the Financial Services Ombudsman. The statutory scheme is not to be construed as defining new legal wrongs that are capable of being pleaded before a court of law since the wrongs and the remedy in respect of them is created for adjudication only by that specialised statutory body; *Doherty v. South Dublin County Council* (No. 2) [2007] 2 I.R 696.

16. Under s. 57BX(3)(a) of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004:-

> "A consumer is not entitled to make a complaint [to the Financial Services Ombudsman] if the conduct complained of (a) is, or has been, the subject of legal proceedings…"

Under subs. (3) A an exception is made to this general rule that a consumer who has issued legal proceedings is barred from making a compliant to the Financial Services Ombudsman. Where, however, that consumer is a defendant in legal proceedings taken by a financial service provider, and has perhaps made a counterclaim or intends to counterclaim, then the Financial Services Ombudsman may still accept a complaint provided that the proceedings were commenced in order to prevent the making of the compliant, or to frustrate or delay its investigation. In hearing any complaint, the Financial Services Ombudsman is conferred by s. 57CE with, in essence, the same powers as a judge of the High Court hearing civil proceedings. Whereas the power to compel the production of documents is directed under that section only against the financial service provider, any complainant who would fail to comply with a request to produce documents would be unwise in terms of the enhancement of their credibility. Under s. 57CI(9), as already noted, a finding made on a complaint to the Financial Services Ombudsman is binding on both parties. Under s. 57CL, such a finding may be appealed to the High Court, the relevant rule of the Rules of the Superior Courts, as I have stated, providing for a twenty-one day period. If during the course of adjudication on a compliant a question of law arises, then, under s. 57CK of the Act, this may be referred by the Financial Services Ombudsman to the High Court. As the Financial Services Ombudsman has repeatedly emphasised in litigation, investigations are conducted informally; and this is what the statutory scheme aims for. Oral hearings are rarely held and, even more rarely, has the cross-examination of any person asserting any fact been permitted. The Financial Services Ombudsman, it thus appears, has jurisdiction to investigate and determine in an informal and expeditious manner any complaint ranging from rudeness by a bank official in the cashing of a cheque, causing no loss to the payee, to large commercial transactions between an investor and a financial service provider involving millions of euros. This is the scheme that has been set up by the Oireachtas. Once a determination is made by the Financial Services Ombudsman, as has been noted, any appeal is very limited. ACC Bank argues that once a consumer complains of a breach by a financial service provider of good conduct, as defined under the Act, the result is binding. If a complainant has commenced legal proceedings, they may not seek a remedy from the Financial Services Ombudsman. If a financial services provider has commenced what might be termed as vexatious proceedings against a complainant, then these may be overstepped by the Financial Services Ombudsman. Fundamentally, the argument is that once a complainant initiates the process of investigation and adjudication before the Financial Services Ombudsman, such complainant is thereafter locked out of any legal remedy before the courts on the same subject matter. The Financial Services Ombudsman is not empowered to decline jurisdiction except where there are existing legal proceedings. There is no entitlement under the Act for the Financial Services Ombudsman to say: this is more suitable for the High Court.

17. Mr. O'Hara asserts that, notwithstanding the fact that he did not take an appeal from the decision of the Financial Services Ombudsman, he is not bound by that finding. This is because, it is argued, the Financial Services Ombudsman does not constitute a judicial tribunal. He asserts, in addition, that if the determination against him was made by a judicial tribunal that it does not give rise to issue estoppel; and that issue estoppel can only arise in the context of an abuse of process which, it is claimed, is not embraced by the nature of these legal proceedings.

The Pleadings

18. My analysis of the pleadings in this action can be concise. I have read the statement of claim and defence and I have listened to oral submissions. The essence of the claim being made in this case before the High Court is the same as that made before the Financial Services Ombudsman. Possibly an additional claim might be made in the context of a breach of fiduciary duty as against the bank. That issue in the pleadings, it seems to me, is already encapsulated within the facts asserted against the bank in the complaint to the Financial Services Ombudsman. Any enhancement of the complaint made is entirely subsidiary to the foundation of wrongs alleged before the Financial Services Ombudsman. The real differences between the complaint to the Financial Services Ombudsman and this legal proceeding, should it be allowed to continue, are that expert evidence will be called in support of the plaintiff's claim, together with the oral evidence of Mr. O'Hara and any other relevant witness who will seek to establish the misrepresentations which he claims were made to him and that this entire process may be subject to contradictory evidence from the bank of the same kind. In other words, there will be a court case on the subject matter of the complaint to the Financial Services Ombudsman and not just the informal adjudication conducted by that statutory body.

Issue Estoppel

19. Issue estoppel derives from the principle that the courts should regulate their own process by preventing the abuse of litigation. An issue finally determined by a judicial tribunal cannot be re-litigated by the parties to an action. With the introduction into common law systems of quasi-judicial tribunals, that rule has been extended outside the ambit of a decision made by a judge and into decisions in the context of complaints before bodies which have a special jurisdiction conferred by statute. Having read the relevant case law, I am satisfied that the trend of decisions in this jurisdiction, and in the neighbouring kingdom, is in favour of applying the rules of issue estoppel to quasi-judicial tribunals, even though the jurisdiction which they exercise may be specific to them and not necessarily exercisable by a court, save in the context of any mechanism of an appeal specifically conferred by statute. In *Murray v. The Trustees and Administrators of the Irish Airlines, (General Employees) Superannuation Scheme* [2007] I.E.H.C. 27, (Unreported,

High Court, Kelly J., 25th January, 2007), the plaintiff had made a complaint before the Pensions Ombudsman as to the final amount that was properly to be determined as his pension. The Pensions Ombudsman held against him. Before stating that process before the Pensions Ombudsman, the options open to the plaintiff, on believing that the pension awarded to him on retirement from his job was lower than it should have been, were to accept what he was given, to issue court proceedings for a declaration as to the true amount, or to complain to the Pensions Ombudsman under Part XI of the Pensions Act 1990, as inserted by s. 5 of the Pensions (Amendment) Act 2002. He made a complaint to the Pensions Ombudsman and the ruling went against him. He then appealed that ruling to the High Court. The statutory scheme for appeal encompasses the same limitation of review on appeal as with appeals from the Financial Services Ombudsman. In appealing he also sought on his notice of appeal a declaration from the High Court as to his pension entitlement. The effect of this would be to litigate the issue on the appeal by way of oral evidence instead of confining the appeal to a review on the papers before the Pensions Ombudsman. Kelly J. held that, having made a complaint to the Pensions Ombudsman and having lost, a complainant could appeal on the basis that the determination was vitiated by a serious error or series of errors, the ordinary test for such a statutory appeal, but that he could not issue an appeal seeking declaratory relief equivalent to the issue of a plenary summons apparently entitling him to reopen the matter and call evidence. Instead, his appeal would be limited to an analysis of any wrong alleged in the adjudication of his complaint. Kelly J. was satisfied that the Pensions Act 1990 had created a specific jurisdiction for the determination of issues on pension entitlements. This finding was significant because there was nothing within the provisions of the legislation from which it could be inferred that the legislature intended to exclude the principles of res judicata in respect of such determinations. Kelly J. stated at p. 16:-

> "In my view it would be contrary to the policy of the legislature as gleaned from the relevant statutory provisions that it should be open to a party to avail himself of the statutory machinery but when dissatisfied with the result seek, not merely to exercise the statutory right of appeal, but also to commence in this court proceedings of a substantive nature which seek to, in effect, setaside the determination of the Ombudsman.
>
> A party, such as Mr. Murray, who is aggrieved with the determination of the trustees' may, at his option, avail himself of the services of the Ombudsman or bring proceedings in an appropriate court for declaratory or other relief. He may not do the latter when in receipt of an adverse determination from the Ombudsman. That is because the determination of the Ombudsman is res judicata of the dispute in question, subject only to the right of appeal".

20. The plaintiff claims that the prior adjudication by the Financial Services Ombudsman does not bar him from legal proceedings because the claim that he seeks to bring before the High Court in separate proceedings is different. It is contended, on behalf of the plaintiff, that some of the pleas made in these proceedings exceed in scope what was put before the Financial Services Ombudsman. It seems to me that even if this contention were correct, it is not necessarily always an answer to the plea of issue estoppel. The subject matter of the claim in these proceedings, misrepresentation leading to the purchase of bonds from a bank that also supplied the finance, is in essence the same. Additional claims founded in that subject could and should have been included in the complaint to the Financial Services Ombudsman. The principle of issue estoppel through abuse of process embraces not only issues previously tried by a judicial or quasi-judicial tribunal but issues which could and should have been included for adjudication in the earlier determination. In *Carroll v. Ryan* [2003] 1 I.R. 309, the Supreme Court was concerned with a series of judicial review challenges to decisions of the Law Society Disciplinary Committee. A multiplicity of proceedings led, eventually, to a plea in new proceedings which could have been raised earlier. Hardiman J. at p. 317 extensively analysed the rule in the context of current and traditional authority and I quote the relevant paragraphs:-

> "28. There is a well established rule of law whereby a litigant may not make the same contention, in legal proceedings, which might have been but was not brought forward in previous litigation. This rule is often traced to the judgment of Wigram V.C. in Henderson v. Henderson [1843] 3 Hare 100. The learned Vice-Chancellor spoke as follows at pp. 114 and 115:-
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> "…I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time".
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> 29. A number of decisions affirming this approach were opened to us. Two of these were Irish cases. In *Russell v. Waterford and Limerick Railway Company* [1885] 16 L.R. I.R. 314, Dowse B. said that:-
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> > "Where the cause of action is the same, and the plaintiff had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action".
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> 30. Similarly in Cox v. Dublin City Distillery (No. 2) [1915] 1 I.R. 345, Palles C.B. held at p. 372, that a party to a previous litigation was bound "not only (by) any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein". In the judgment of Kelly J. in this case, he also referred *to* Barrow v. Bankside [1996] 1 W.L.R. 257 and to Johnson v. Gore Wood & Co. [2002] 2 A.C. 1. The first of these cases speaks in terms of issues that might "sensibly" have been brought forward in previous litigation and also suggests that the rule of what is sometimes referred to as "estoppel by omission" is not in fact based on res judicata in the strict sense but it is an independent rule of public policy. Lord Bingham held that the court must take the need for efficiency in the conduct of litigation into account.
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> 31. In Woodhouse v. Consigna [2002] 1 W.L.R. 2558, Brooke L.J. referred to this public interest and continued at p. 2575:-
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> > "But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in Henderson v. Henderson (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits where one would do…."

32. This seems quite consistent with what Lord Bingham said in *Johnson v. Gore Wood & Co*. [2002] 2 A.C. 1, at p. 31 when he urged that the court should arrive at:-

> "…a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue that could have been raised before"."

21. Issue estoppel, as the basis for the rule that a court may stop an abuse of proceedings before it, prevents the raising of new issues that could and should have been pleaded and determined in earlier proceedings. It is not, however, to be blindly applied. The rule proceeds from the protection by the courts of the integrity of court proceedings and, in consequence, depends upon a finding of abuse. This does not necessarily mean malicious conduct, but extends to conduct which is misinformed or incorrect, but which has the effect of creating a multiplicity of court proceedings over the same issue to the detriment of the proper disposal of litigation. The absence of an excuse for not raising an issue in earlier proceedings, in this context, may be important. On the one hand, it is to be noted that, for whatever reason, ACC Bank decided to provoke a complaint to the Financial Services Ombudsman, as opposed to awaiting, as would be the usual course, the issue of a plenary summons. Balanced against that, on the other hand, is the fact that Mr. O'Hara is a distinguished solicitor. In discussing the application of the rule, Hardiman J. referred to repeated actions concerning the same subject matter as potentially arising whether or not an earlier set of proceedings was pursued to judgment or settlement; see p. 319. The analysis of the discretionary nature of the applicability of the rule encompasses a need to take into account the public and private interests involved within the context of the assertion of wrongs in any later cases; thus analysing whether a party, through the issue of later proceedings raising an issue which could have been determined in earlier proceedings, is misusing the process of litigation before the courts.

22. Hardiman J. ruled that issues, which properly belong to earlier litigation, and which might sensibly have been brought forward there, can bar their later prosecution. This was again emphasised by the Supreme Court in *A.A. v. Medical Council* [2003] 4 I.R. 302. In that case a doctor had been accused of inappropriate gynaecologic examinations of female medical patients who were awaiting minor procedures that were unrelated to any reproductive function. An enquiry was ordered before the fitness to practice committee under the Medical Practitioners Act 1978, as amended. In addition, the doctor was charged with sexual assault before the criminal courts. He initiated a judicial review before the High Court seeking to prohibit the enquiry on the ground of double jeopardy. When this failed, some years later he initiated a new judicial review claiming a new point; that the unavailability of legal aid before the fitness to practice committee of the Medical Council should restrain the holding of an enquiry. The Supreme Court disagreed with this course of the use of access to the courts. Hardiman J. emphasised that the new claim properly belonged to the earlier litigation and that parties, exercising reasonable diligence, which could sensibly bring such claims forward in earlier litigation, ought to do so.

23. In *Arklow Holidays Limited v. An Bord Pleanála* [2011] I.E.S.C. 29, (Unreported, Supreme Court, 21st July, 2011) the applicability of the rule was considered in the context of a multiplicity of judicial reviews from the decision of An Bord Pleanála where earlier proceedings might have raised same point. The decision emphasises that estoppel by representation cannot confer jurisdiction on a planning authority outside the terms of the borders set on its function through legislation. The remarks made on issue estoppel, however, are of wider application and require reference in this context. At pp. 27 to 30 Finnegan P. stated:-

> "In this jurisdiction *Henderson v. Henderson* has been applied in the public law area. It is understandable that it should be. It is not just individuals who must be protected from a multiplicity of suits: why not public bodies, local authorities and Ministers of State all of whom are funded by the taxpayer? The three elements of the rationale for the rule apply equally to public law litigation. *Henderson v. Henderson* estoppel in Australia (there called Anshun estoppel: *Port of Melbourne Authority v. Anshun Pty Ltd* [1981] 147 C.L.R. 589) applies in the public law area. In *Stewart v. Sanderson & Another* [2000] 175 A.L.R. 681 the applicant sought to extend the principle that estoppel by representation does not apply to administrative decisions by analogy to Anshun estoppel. The court relying on the different origins of estoppel by representation and Anshun estoppel refused to extend the principle. In the course of its judgment the court said:-
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> "The applicant thus sought to extend to the doctrine of Anshun estoppel, by analogy, the well established principle that estoppel by representation does not apply to administrative decisions. *Formosa v. Secretary, Department of Social Security* [1988] 46 F.C.R. 117 at 135 81 A.L.R. 687, and *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* [1990] 21 F.C.R. 193 -92 A.L.R. 93 were relied upon. However as appears from the discussion below the basis of the Anshun principle is quite different from the foundation of estoppel by representation, which lies in equitable principle. One obvious difference for example is that estoppel by representation seeks to provide justice between the parties whereas the justification for Anshun estoppel, as discussed above is broader. No principle or authority was cited to indicate that the capacity of a court to prevent an abuse of its processes and to safeguard the orderly administration of justice ought to be blunted merely because the supposed right which is sought to be vindicated before the court is derived from statute rather than the common law."

There are public policy considerations for the application of the rule in Henderson v. Henderson in the area of public law which I have already identified. The protection not just of individuals but also public bodies from a vexatious multiplication of suits and the desirability that there should be finality to litigation are two. Efficient and economic use of court time is a third. Relevant in the present case, however, is that it has long been a concern of the legislature that infrastructural projects can be greatly delayed by the planning and related processes and litigation arising therefrom. This has resulted in legislative attempts to ensure that challenges to such projects are dealt with promptly by the courts: see Planning and Development Act 2000 section 50 as amended by the Acts of 2002, 2006 and 2010. The policy of the legislature would be undermined if issues which could be raised at the first stage of the two-stage process were not in fact raised but were litigated piecemeal thereafter. Thus the possibility exists in a two-stage process of a challenge by way of judicial review to the decision at the end of the first stage being followed by appeal to the Supreme Court: this in turn if unsuccessful may be followed by the ordinary planning appeal process with further challenges in the High Court and the Supreme Court to the same. In A.A. v. The Medical Council Hardiman J. at p.318 said of the Medical Council:-

> "The respondent is discharging a public function in the hearing and determination of allegations of professional misconduct as well as observing the profession's interest in promoting high professional standards and public confidence. The allegations in question here relate to a time some six and a half years ago and it is manifestly in the interest of the applicant, the respondent, the profession, the complainants and the public generally that these be resolved as soon as possible and without unnecessary or unreasonable delay.""

Result on the Prior Determination Motion

24. I can find no special circumstances whereby the application of estoppel through an abuse of process of the courts in raising the same subject matter in a complaint to a statutory body and in separate proceedings should not apply in this instance. To all intents and purposes, it is clear that the allegations made in the complaint before the Financial Services Ombudsman are the same as those which are sought to be litigated in these proceedings. The nature of the jurisdiction conferred on the Financial Services Ombudsman by the Oireachtas cannot be ignored. It would be contrary to the statutory scheme and it would also be unfair for parties to a complaint before the Financial Services Ombudsman to be later subjected to very similar litigation. The legislation has made any determination by the Financial Services Ombudsman subject only to an appeal. Absent a special reason of sufficient impact to nullify any potential abuse of process, it would be wrong for this Court to say that complaint could be re-litigated all over again. Such a finding would undermine the will of the Oireachtas. No court is entitled to so decide, save in circumstances of unconstitutionality. It matters that Mr. O'Hara is a solicitor. Even, however, were he not, it is very hard to see how this Court could exercise any discretion it has against making a finding of abuse through multiple proceedings. Even a straightforward reading of the terms of the Act would indicate that the jurisdiction of the courts established under the Constitution becomes circumscribed once a complaint is made to the Financial Services Ombudsman; just as the prior initiation of court proceedings by a financial service provider will, save in the most exceptional circumstances, remove the jurisdiction of the Financial Services Ombudsman. Even had Mr. O'Hara not been a solicitor I would find it hard to escape these conclusions. The only countervailing factor is the apparent enthusiasm with which the jurisdiction of the Financial Services Ombudsman was dangled before Mr. O'Hara in correspondence. This is not now the place to plumb the motives behind that action. Even inferring that this reference was an inducement, Mr. O'Hara could have conferred with his legal advisors, or could have read the Act himself, and made a completely informed decision as to whether a complaint before the Financial Services Ombudsman or the initiation of proceedings by way of a plenary summons would best suit the merits of the grievance he felt. He cannot in law do both. Nonetheless, that issue may impact on the costs of this motion, as may the general lack of prudence by banks at that time. I am therefore obliged to find in favour of ACC Bank on the issue of prior adjudication.

Limitation of Action

25. As noted above, both plaintiffs initiated proceedings against ACC Bank more than six years after they had entered into the initial investment by the purchase in October 2003 of the 'Solid World Bond 4'. ACC Bank seeks a declaration that the proceedings of Mr Gallagher are statute-barred by virtue of the Statute of Limitations 1957, as amended. In each set of proceedings the claim made by the plaintiff against the bank is in contract and in tort: in essence, a breach of contract based on various alleged acts of mis-performance or non-performance; and a claim in tort based on misrepresentation or negligent advice. In contract, the limitation period is six years under s. 11(1)(a) of the Statute of Limitations 1957. A cause of action in contract accrues upon the breach of the agreement in question and is not dependent upon the occurrence of damage. Negligent misrepresentation may found an action in contract but, independently, it is also a tort. An action in tort depends upon damage resulting except when a tort actionable without proof of damage; the old distinction between actions in trespass and actions on the case. Ordinarily, on the plaintiff suffering damage, a cause of action in tort accrues. This may be much later than the tortious wrong out of which that damage sprang. The limitation period for torts under s. 11(2)(a) for the Statute of Limitations is also six years. In the very helpful textbook by *Canny, Limitation of Actions* (Roundhall: Dublin, 2010), the learned author groups the different types of tort into three categories by reference to the time at which these accrue as a cause of action. I quote para. 7-01:-

> "(i) Torts actionable per se (such as defamation, false imprisonment and trespass): the cause of action accrues upon the commission of the wrong;
>
> (ii) Continuing torts (such as a continuing trespass to land or continuing breach of statutory duty): a fresh cause of action accrues every day, but the right of action is restricted to that part of the wrong committed in the past six years; and
>
> (iii) Single torts requiring proof of damage (such as negligence, nuisance or misfeasance in public office): the cause of action accrues upon the plaintiff suffering damage."

26. I accept this analysis. This claim fits within the third category. The traditional definition of the accrual of a cause of action was given by Lord Esher M.R. in *Read v. Brown* (1889) 22 Q.B.D. 128 at 131 in which he describes it as the occurrence of:-

> "…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. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

27. To establish his claim as a plaintiff, Mr Gallagher must prove the tort of negligent misrepresentation and the occurrence of damage as a result. The argument of ACC Bank is that every investor who bought the 'Solid World Bond 4' or '5' suffered damage immediately upon and by reason of the misrepresentation inducing them to make that purchase. Since this negligent misstatement occurred six years prior to the issue of these plenary proceedings, the bank contends that the claim is statute-barred.

28. Putting a legal limitation on when an action may be commenced introduces certainty into the management of human affairs. People know thereby when an event is put behind them, when they are too late to sue and when they may let lapse any insurance cover they may have. Any time period that is set, however well balanced it may be, will always leave the potential that an apparently valid claim may be barred by the passing of time. In the final analysis, any limitation on the commencement of a cause of action is arbitrary. Instances will inevitably occur where apparently good reasons will seem to militate against the plaintiff commencing an action with the limitation period. A plaintiff may be unaware that damage has occurred, may believe that the damage is due to a different cause than the tort later complained of, or may merely suspect, without truly realising, the origin of the problem. Since the Supreme Court decision in *Hegarty v. O'Loughran* [1990] 1 I.R. 148, it is clear that the accrual of a cause of action in tort does not occur from the date when the plaintiff discovers that he or she has been damaged. Accrual is complete from the date when the damage occurred. All actions in tort, causing damage to the human body by way of personal injury and damage to property and damage occasioning economic loss, used to be subject to the same strict rule as to limitation. In what has often later been argued as an apparent mitigation of the rigidity of that rule, Finlay C.J. at p. 156 described the limitation period as commencing when provable personal injury, the subject of the claim in that case, capable of attracting monetary compensation, occurred. Griffin J. described the occurrence of damage as the date at which the plaintiff was capable of establishing that damage in evidence, even if unaware at that time. McCarthy J. noted at p. 161 that there may be a difference between the time when damage occurs and when it manifests itself. Subsequent cases have made it clear that a cause of action in tort accrues when the damage resulting from the wrong became manifest; *Irish Equine Foundation Ltd. v. Robinson* [1999] 2 I.R. 442. When damage is manifest can often be an earlier date to when damage is discovered. The manifestation of damage test does not imply that the plaintiff must necessarily have known about it. That rule can cause hardship in some cases. The legislature, it seems, thought that prospect particularly strong in instances where a person is made ill by a tortious action but where the reaction of human physiology has delayed the signs for several years. Consequently, a discoverability test has been introduced to mitigate the potential harshness of the six year limitation period in personal injury actions. This rule, applicable only to personal injury cases, requires a separate analysis as to when the damage

occurred and as to when the plaintiff realised that there had been damage, as opposed to that damage being merely manifest; see *M. v. The Health Service Executive,* [2011] I.E.H.C. 339, (Unreported, High Court, Charleton J., 20th July, 2011), at paras. 31 to 40. Discoverability is not the rule for torts causing physical damage or economic loss as there has been no legislative intervention in this area. Once the damage is manifest the cause of action accrues. The expression in case law of the rule in those terms, of when damage is manifest, is not to be contorted into a discoverability test*; Murphy v. McInerney Construction Limited* [2008] I.E.H.C. 323, (Unreported, High Court, Dunne J., 22nd October, 2008).

29. Where wrongs lead to a physical manifestation of damage, as with cracking in a building, the scope for argument as to the date on which this occurred will be limited. Where, as in this case, the loss resulting from the tortious action is economic, the scope for debate as to when this was manifest is considerably widened. The resolution of when an action in tort accrues on the manifestation of damage, as between an immediate and a contingent loss, is often difficult, as can be seen in the case law from the neighbouring kingdom. Reading that case law the principles are illuminated, but a universally applicable set of tests remains elusive. 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. The keenest problems in analysis arise when what the plaintiff obtains as a result of a tort such as misrepresentation is a financial product that may involve greater risk than was sought but which may turn out for better or worse; or where a tort opens the door to a potential liability which may or may not be later called up by a third party. In such cases, damage may readily be argued to have occurred when the plaintiff failed to obtain that which was sought, or was saddled with that which negligent advice delivered but, on the other hand, it may also be attractive to argue that the assessment of damages as of the date of the wrong is impossible because it cannot be ascertained how matters will probably turn out and that therefore accrual of a cause of action only can occur when that damage comes to pass. It may be that the wait and see approach may be more apposite when the potential for damage is contingent on the making of a third party claim or on market forces, whereas the actual occurrence of real loss as of the date of the transaction brings the date of accrual back to the date of the wrong alleged. Whatever the approach, debate will remain as to what is or is not, in terms of damage, a manifestation of damage and as to when that occurred.

30. In *D.W. Moore and Co. Ltd. v. Ferrier* [1988] 1 W.L.R. 267 a solicitor was tasked with drafting a restraint of trade contract on any director leaving the plaintiff firm. The contract was drafted negligently with the result that any former director could not join a firm competing with his former employer, but could bypass that prohibition by establishing his own business in competition. The Court of Appeal held that there was no presumption that, on a solicitor's negligent advice, damage occurred immediately. Rather, it was question of fact as to when the occurrence of damage was established. At the time of executing the agreement, the Court of Appeal reasoned that instead of receiving a valuable contract protecting their business against competition, the plaintiff firm had, instead, received a worthless piece of paper. The damage had therefore occurred at that point. Since the action was commenced only after the former director had begun a competing business, and this was outside the limitation period, the claim was statute barred. The judgment of Bingham L.J. makes it clear that, even though the quantification of damage may be difficult at an earlier point in time which is within the limitation period, as for instance when the former director, Mr. Fenton, on leaving employment agreed to enter into the worthless covenant, this difficulty did not extend the limitation period. At p. 279 to 280 he said:-

> "If the quantification of the plaintiffs' damage had fallen to be considered shortly after the execution of either agreement, problems of assessment would undoubtedly have arisen. It might have appeared that Mr. Fenton was unlikely to leave, taking much of the first plaintiff's business with him, to establish a competing business. If so, the plaintiffs' damage would have been assessed at a modest figure. But the risk of his doing so could not have been eliminated altogether, and so long as there was any risk that one of the first plaintiff's two directors might leave, taking much of the first plaintiff's business with him, to establish a competing business, there must necessarily have been a depressive effect on the value of the first plaintiff's business and on that of the second and third plaintiffs' derivative interests. In making his assessment the judge would have had to attach a money value to a possible future contingency; but judges do this every day in awarding claimants damages for the risk of epilepsy, the risk of osteoarthritis, the risk of possible future operations, the risk of losing a job and so on. The valuation exercise is, of course, different, but the difference is one of subject matter, not of kind."

31. In apparent contrast is the case of *Midland Bank Trust Co. Ltd. v. Hett Stubbs & Kemp* (A firm) [1979] Ch. 384 where it was held that the cause of action for failure to register an interest in land accrued only on the date when it became too late to effect registration. This may have been a case of a fresh cause of action accruing each day because of a continuing breach of duty, in other words a continuing tort; as in the second classification made by Canny noted at paragraph 25 above. In *Forster v. Outred & Co*. [1982] 1 W.L.R. 86 the plaintiff executed a mortgage over her freehold property as security for a loan made to her son. This was done on the advice of her solicitor which led her wrongly to believe that the security was to be effected only in respect of a temporary bridging loan for the purchase by him of some property. She brought an action only some time later when the nature of the transaction became apparent to her. The Court of Appeal held that the case was statute barred, the reasoning being that the damage had occurred when the charge was put on the property. At p. 98, Stephenson L.J. stated:-

> "I would accept … and would conclude that, on the facts of this case, the plaintiff has suffered actual damage through the negligence of her solicitors by entering into the mortgage deed, the effect of which has been to encumber her interest in her freehold estate with this legal charge and subject her to a liability which may, according to matters completely outside her control, mature into financial loss – as indeed it did. It seems to me that the plaintiff did suffer actual damage in those ways; and subject to that liability and with that encumbrance on the mortgage property was then entitled to claim damages, not, I would think an indemnity and probably not a declaration, for the alleged negligence of her solicitor which she alleges caused her that damage. In those circumstances her cause of action was complete on February 8, 1973, and the writ which she issued on March 25, 1980, was issued too late to come within the six years' period of limitation."

32. The reasoning of the Court of Appeal is that the damage had occurred when the equity of redemption to the plaintiff's property was reduced. However, the case might have been analysed otherwise. It is arguable that the cause of action accrued only when the plaintiff's son defaulted on his loan; thereby that debt became charged on her property. Some might argue that this was the accrual of the cause of action in tort as this was the point at which the damage occurred.

> 33. Where, on the other hand, negligent advice leads to a purely contingent liability, a cause of action will not accrue until damage results upon the crystallisation of that contingency. In *Darby v. Shanley t/a Oliver Shanley & Co. Solicitors* [2009] I.E.H.C. 459 (Unreported, High Court, Irvine J., October 16th, 2009), the defendant firm of solicitors advised a lady called Bridie Bird on drafting her will and on transferring land to the plaintiff. When she died, her widower brought proceedings challenging the will and the transfer. These were ultimately compromised on terms requiring the payment of damages by the plaintiff to the widower. Proceedings were then instituted, six years after the relevant advice. Irvine J. analysed the claim on the basis that the cause of action of the plaintiffs was complete only upon the settlement of the

litigation. The judgment, as now quoted, provides the only relevant analysis thus far in this jurisdiction:-

"4.3 Section 11(2) of the Act of 1957, as amended by s.3 of the Statute of Limitations (Amendment) Act 1991, provides as follows:-

> "Subject to paragraph (c) of this subsection, and to s. 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."

The claims of Patrick Darby and Declan Darby are claims brought in tort and are thereby governed by the limitation period set forth above. Accordingly, unless their claims were instituted within six years from the date upon which their respective causes of action accrued, their claims must fail. The claim of Patrick Darby was instituted on 7th December, 2004, whilst the claim of Declan Darby was commenced on 17th April, 2007.

4.4 In Hegarty v. O'Loughran [1990] 1 I.R. 148 Griffin J., in discussing the time at which a cause of action accrues, stated as follows at p.158:-

> "The period of limitation therefore begins to run from the date on which the cause of action accrued, i.e. when a complete and available cause of action first comes into existence. When a wrongful act is actionable per se without proof of damage, as in, for example, libel, assault, or trespass to land or goods, the statute runs from the time at which the act was committed. However, when the wrong is not actionable without damage, as in a case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until that damage happens or occurs."

4.5 In the case of Patrick Darby, as already stated, he maintains two separate claims of negligence against the defendants. The first of these relates to the alleged negligence of the defendants whilst acting as solicitors for Bridie Bird at the time she prepared her Will in February 1997. The latter allegation of negligence relates to advices given by the defendants in and about December 1998, at which date Bridie Bird executed the transfer. The plea of the defendants based upon the provisions of s. 11 of the Statute of Limitations 1957, relates solely to the negligence claimed in relation to the circumstances in which the defendants advised Bridie Bird regarding the preparation of her Will.

4.6 Whilst both plaintiffs might well have anticipated or feared a potential loss following the receipt by the defendants of the letter from Christie and Gargan Solicitors dated 8th February, 2000, which indicated that William Bird intended challenging the validity of both the Will and the transfer, or from the subsequent issue of the plenary summons maintaining those claims, the cause of action in neither case was yet complete. The cause of action for negligence in relation to the preparation of Bridie Bird's Will was only complete upon the date on which the probate proceedings were settled, that being the date upon which it could be stated both plaintiffs had sustained a loss arising from the negligence alleged against the defendants. That loss was ascertainable from the terms of the settlement which, in providing that the costs of all parties would be paid out of the estate, significantly reduced the legacies received by Patrick and Declan Darby. Accordingly, the settlement having been agreed to on 8th February, 2007, the Court concludes that Patrick Darby and Declan Darby had six years from that date to commence the present proceedings.

4.7 For the aforementioned reasons the claims of Patrick Darby and Declan Darby contending for negligence on the part of the defendants in relation to their involvement in the preparation of the Will of Bridie Bird are not statute barred by reason of the provisions of s. 11(2) of the Act of 1957. I am satisfied that the case of Tuohy v. Courtney [1994] 3 I.R. 1, which upheld the constitutionality of s.11 of the Statute of Limitations, upon which the defendants relied, is not of assistance in circumstances where the proceedings were commenced prior to the expiration of the relevant statutory limitation period."

34. It is readily understandable that damage is to be regarded as having been suffered straight away when a plaintiff enters into a transaction with the result that he or she immediately has, in terms of legal rights, much less than was represented than they would have. Examples of this to which I have already referred are *Forster v. Outred* [1982] 1 W.L.R. 86, and *Moore v. Ferrier* [1988] 1 W.L.R. 267. The most acute difficulty arises in the context of the purchase of apparent financial benefits which may, or may not, depending on market conditions, turn out to be more or less advantageous than what was apparently bargained for. Since the most valuable judgments on the issue of accrual emphasise an analysis of the facts, in that context it may be helpful to suggest that a judge might ask two questions:

> 1) Firstly, would a claim initiated immediately upon the acquisition of the instrument, or supposed financial benefit, in question then succeed? In some of the cases it is emphasised, as has been seen, that although the valuation of damages may be difficult because it depends upon an event which may or may or not occur, that if the essence of the claim is the assumption of an unwanted risk, then the nature of that risk can be quantified, albeit with difficulty, in damages.
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> 2) The second question is more problematic. It seems to me that a judge might, secondly, ask whether a plaintiff suffered any immediate loss on entering into the transaction in question. In some of the cases, the answer may be that, yes, the transaction at the point at which it was first entered into is less valuable than what was expected, or misrepresented leading to that expectation, but that market conditions may render it more or less valuable over the passage of time in which case the accrual of a cause of action through the occurrence of damage can be regarded as contingent upon an event which may or may not happen in the future. This may be regarded as a delay and find out approach and it must be observed that it does not necessarily provide a complete answer. On the one hand, it may be argued that an analysis of fact should be limited to the question as to what it was represented to the plaintiff that he or she was to get at that first point in time. If this is different to what the plaintiff in fact received, then it may be contended that damages occur at that point. If, on the other hand, that difference gives rise to a situation which is fluid in financial terms, and which may result in a benefit or which may result in a liability, depending upon unbargained for contingent factors, then it may more reasonably be said that the tort is only complete with the occurrence of that financial damage; perhaps at a much later date than the wrong in suit.

35. Consistency of analysis can be difficult to achieve in circumstances where both the nature of the transaction that was entered into and the outcome of that transaction are both under consideration. In *Shore v. Sedgwick Financial Services Limited* [2009] Bus. L.R. 42, the plaintiff worked for a company which was taken over by another undertaking. He had, earlier to this event, consulted the defendant about pension planning on retirement. The advice given, and later claimed to be negligent, involved him switching from his existing occupational pension and into a pension fund which turned out to more risky, and ultimately, as it turned out, less

advantageous than if he had left his pension where it was, or had then purchased an annuity. The Court of Appeal held that the plaintiff had suffered damage at the time at which he entered into the less advantageous scheme, which date was outside the limitation period. The judgments regarded the case as being equivalent to *Moore v. Feerier* [1988] 1 W.L.R. 267, already mentioned, and to the case of *Bell v. Peter Browne & Co*. [1990] 2 Q.B. 495, which was a case of a mis-drafted trust deed upon the break up of a marriage which left the plaintiff with no interest in his former family home which was much later sold by his wife. Dyson L.J. stated at p. 53:-

> "It is Mr. Shore's case (assumed for present purposes to be established) that the P.F.W. scheme was inferior to the Avesta scheme because it was riskier. It was inferior because Mr. Shore wanted a secure scheme: he did not want to take risk. In other words, for Mr. Shore's point of view, it was less advantageous and caused him detriment. If he had wanted a more insecure income, than that provided by the Avesta scheme, then he would have got what he wanted and would have suffered no detriment. In the event, however, he made a risky investment with an uncertain income stream instead of a safe investment with a fixed and certain income stream which was what he wanted.
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> The analogy with the investor who is negligently advised to buy shares rather than government bonds does not assist [the plaintiff]. In my judgment, an investor who wishes to place £100 in a secure risk-free investment and, in reliance on negligent advice, purchases shares does suffer financial detriment on the acquisition of the shares despite the fact that he pays the market price for the shares. It is no answer to this investor's complaint that he has been induced to buy a risky investment when he wanted a safe one to say that the risky investment was worth what he paid for it in the market. His compliant is that he did not want a risky investment. 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 government bonds and the cost of buying and selling the shares."

36. One wonders, however, at the reaction of any court faced with a plaintiff who is financially buoyant in consequence of what is claimed to be negligent advice when a risky investment turns out to be financially viable. Such a situation would be an example of one side of a contingency capable of turning out negatively, in terms of financial result, as well as positively. In those circumstances, a judge might dismiss any case brought immediately upon entering into the transaction on the basis that no damage has been suffered. It may reasonably be argued in these kinds of cases that advice will turn out to be negligent only where a plaintiff is worse off. One wonders, in such actions, how a plaintiff can be worse off until the time when he or she has suffered loss. A tort action based on a contention that a plaintiff may gain, in consequence of negligent advice, more than he was expecting, as well as receiving less than he was promised, is not one in which it is immediately apparent that the cause of action has accrued. In cases where a specific benefit was sought, but not delivered, as with the mis-drafting of a contract, the mis-drafting of a deed of trust and the failure to protect the interests of a person entering into a financial transaction, the damage may perhaps be more readily said to have occurred there and then. It may be contended, in such a case, that some event in the future will bring about a particular level of financial adjustment up or down but, notwithstanding that this event may or may or not occur, there is there and then a less valuable transaction than the one which the plaintiff wished to engage in. If, however, the contingency depends upon an investment or transaction being floated on a more volatile financial sea than the one which the investor wished to embark upon, then, it seems to me, the damage occurs when the plaintiff's boat founders in rough waters. I therefore find it difficult to be completely convinced by the reasoning in *Shore v. Sedgwick Financial Services Limited* [2009] Bus. L.R. 42.

37. *Wardley Australia Limited v. State of Western Australia* (1992) 175 C.L.R. 514 is a case where the High Court of Australia adopted a clear distinction between an immediate and a contingent liability. The State of Western Australia had been induced by misrepresentation by Wardley Australia Limited about a bank called Rothwells Limited to grant to that bank an indemnity. But for the misrepresentation, the contention was that the indemnity would not otherwise have been granted. When the bank suffered loss and made a claim on the indemnity, the State of Western Australia had to make a substantial settlement. The issue in the case was whether the State of Western Australia's cause of action accrued when the indemnity was granted or when that indemnity was activated. The reasoning of the High Court was that the indemnity had generated a contingent liability and that the State, therefore, did not suffer any loss until that contingency was fulfilled. Time therefore began to run only from the occurrence of that event. It could be argued, and indeed was argued in that case, that the damage had occurred once the indemnity was granted because the State of Western Australia had then been locked into a damaging situation. That situation, however, only resulted in loss upon a contingency. Some might urge that an assessment of the loss resulting from being locked into that situation should be approached as of that event in the same way as a risk of arthritis resulting from an injury is quantified by a judge in personal injury cases. I am not attracted by that approach: how can it be ascertained when the loss will happen, if ever, and what it will be? That kind of analysis must be done on a probability basis in some personal injury cases, but that is because the damage is already suffered and further consequences of it may arise in the future. I see that as entirely different to a plaintiff being caught up in an unbargained for or unwanted situation which may or may not result in a loss. The analysis of the High Court of Australia was that the contingency of loss was fulfilled when the bank's loss was ascertained and quantified, subject to the making of a claim for payment by the bank. Mason C.J. for the majority stated at paras. 24-26:-

> 24. "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 ((36) Forster v. Outred and Co. and D.W. Moore and Co. v. Ferrier illustrate the point.).
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> 25. In Islander Trucking Ltd. v. Hogg Robinson Ltd., Evans J. observed ((37) (1990) 1 All ER, at p 831), with reference to the cases in which solicitors have brought into existence defective documents:
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> > "The decision that damages are suffered at the time when the defective document is executed may, it appears, be put on one or both of two bases. The first is because the chose in action which the client acquires, or parts with, as a result of executing the document is regarded as a form of property which is held or acquired by the plaintiff and which is found to be devalued, that is to say worth either nothing or less then it would be worth if it was free from the defect which has resulted from the solicitor's negligence. The second possible basis is perhaps this: in the case of a claim against a solicitor, unlike a claim for damages in the building cases, the plaintiff is entitled to recover for economic loss, as distinct from any injury to person or property…The law is clear in relation to solicitors and has been authoritatively stated in these (cases). Where, in my respectful view, it might be said to depart from earlier common law rules is by reason of the fact that it apparently contemplates, as a common law rule, that a cause of action may arise at a time when its existence is unknown and could not reasonably be known by the injured plaintiff."

His Lordship went on to say ((38) ibid., at p 832) that, in D.W. Moore and Co., the contractual chose in action could be equated to an interest in property. In that case, the defendant solicitors negligently prepared and advised the execution of an agreement containing an unenforceable covenant against competition. Notwithstanding that the damage actually complained of was not suffered until much later and was dependent on two contingencies, the Court of Appeal held that there was a cause of action for some measurable loss which occurred when the defective contract containing the unenforceable covenant was executed.

> 26. If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, the plaintiff first suffers loss or damage on entry into the contract, we do not agree with them. In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred. A deferred liability may stand in a different position but there is no occasion here to discuss that matter."

38. I find that reasoning convincing. The reasoning of *House of Lords in Law Society v. Sephton and Co. and Others* [2006] 2 A.C. 543 also accords with what I regard as the desirable drawing of a clear distinction between an actual and a contingent financial liability. When a client of a firm of solicitors was defrauded by that firm, the Law Society could under the relevant legislation, at its discretion, pay out a sum in compensation. The statutory scheme, however, provided that "no person has a right to a grant enforceable at law". Rather, it proclaimed that the intention of those administering the scheme of grants to those loosing out in consequence of the misconduct of solicitors was to "seek to administer the fund in an even-handed and consistent manner". What happened in that case was that over many years the accounts of a solicitor called Andrew Payne had been audited by the defendant firm of chartered accountants Sephton and Co. They did not notice when they should have, or deliberately did not report, serious irregularities in the books of the solicitor, as they were obliged to do. A substantial sum of over £1 million had been misappropriated by the solicitor. It was argued that the statute of limitations barred the Law Society from suing the accountants. The case had been commenced once the fund had been contacted by disappointed clients, a time considerably later than the negligent auditing and outside the relevant limitation period. The argument for dismissing the case was that the damage had occurred at much earlier dates, those dates being when the negligently prepared accounts had been lodged with the Law Society. The reasoning of the House of Lords was that the eventuality whereby a former client of the solicitor's firm contacted the compensation fund and sought reimbursement was the date on which damage occurred, the cause of action then accruing. After a lucid discussion of the decided cases, at paras. 30 and 31, Lord Hoffman held with the Law Society:-

> "30. In my opinion, therefore, the question must be decided on principle. A contingent liability is not as such damage until the contingency occurs. The existence of a contingent liability may depress the value of other property, as in *Forster v Outred & Co* [1982] 1 W.L.R. 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone as in this case, the contingency is not damage.
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> 31. The majority of the Court of Appeal appear to have decided the case on the basis that the Law Society did not enter into any transaction giving rise to the contingent liability. It did nothing and the contingent liability was created by the misappropriations and the previous existence of the compensation fund and the rules which governed its administration. No doubt in most cases in which a party incurs a contingent liability as a result of entering into a transaction, that liability will result in damage for the reasons already discussed in relation to bilateral transactions. But I would prefer to put my decision on the simple basis that the possibility of an obligation to pay money in the future is not in itself damage."

39. Lord Walker of Gestingthorpe distinguished earlier cases finding an accrual of the cause of action as of the date of the wrong on a basis which I find convincing. At para. 48 he stated:-

> "In all these cases the claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or has been disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy, or a claim for damages. Your Lordships have not, I think, been shown any case in which the imposition on a claimant of a purely personal and wholly contingent liability, unsecured by a charge on any of the claimant's assets, has been treated as actual loss. That would have been the position if the claimant in the Forster case [1982] 1 WLR 86 had given a personal covenant guaranteeing her son's debts (which she seems not to have done—she paid them simply to prevent enforcement of the security on her farm) and if she had not given any security over any of her own assets".

40. Lord Manche, in his opinion, affirmed that where there were differences in the limitation period as between contract and tort or, as in this case, differences as to how those limitations periods would work out in practice, a plaintiff was entitled to choose the most advantageous cause of action

Result on the Limitation Motion

41. I return to what seems to me to be the two most relevant questions in differentiating an immediate from a contingent liability in the occurrence of damage in tort actions; para. 34 above. Were this case brought by Mr. Gallagher against ACC Bank in for instance 2004, he having purchased the bonds in October 2003, I have no doubt that the bank would plead that there was no cause of action because a tort had not been committed. The defendant bank would rightly argue that notwithstanding its negligence, no damage had occurred. A judge, hearing the case, would analyse the nature of the transaction entered into by Mr. Gallagher on the basis that he was now in a more volatile financial situation than otherwise he would have been had the misrepresentation not occurred. That could result, however, in a gain or in a loss. In two or three years the financial markets might decline or might strengthen. A judge would therefore not be in a position to say that damage had occurred. Were Mr. Gallagher to then argue that what he had bought was different to what had been misrepresented to him, the bank would immediately argue that it might turn out to be better. That argument would, in that context, dispose of the case by showing that no damage had yet occurred and thus that there was no accrual of a cause of action. Turning to the second question, as to whether the plaintiff, on buying this 'Solid World Bond 4'or '5' had suffered any immediate loss, it seemed to me that this would, again, have been contingent on the performance of the market. There might be a loss in the future, but equally there might be a gain; the vessel of financial promise might founder on turbulent financial seas and it might enter a port of plenty. An immediate loss might be said to be suffered had the result been that Mr. Gallagher had something that was immediately worthless, or unambiguously worth less than that which had been held out to him, in consequences of the misrepresentation. That would be the case had a solicitor not carried out instructions whereby a transaction was safeguarded with a trust deed, or carried out instructions negligently whereby a liability that had not been contemplated was then immediate, in which case damages might be difficult to assess but there would, in reality, be damage to assess at that point. The wrong would be complete.

42. Manifestly, the transaction in purchasing the bonds entered the holders of the investment into a situation of market return that during the currency of the plaintiff holding the bond could turn out for better or for worse. On the purchase of the bond, therefore, the holders did not suffer an immediate loss but were left facing a contingent loss. The quantification of damages in such a case was not simply difficult, but it was impossible because no loss had then occurred and a buoyant performance over the lifetime of the bonds was possible. After all, it should be remembered that such an attractive prospect is why the plaintiff purchased the bonds and it is the basis, as well, on which the bank claims to have sold this ultimately disappointing financial product. Thus, if there was misrepresentation, the tort only became complete when a financial loss crystallised.

Order

43. My understanding is that this judgment has been agreed by a number of other plaintiffs before the Commercial Court to be determinative of their actions. Three other plaintiffs, I am told, made a complaint to the Financial Services Ombudsman. Several more plaintiffs await this decision on the effect of the Statute of Limitations. In this case, ACC Bank succeeds in preventing Mr. O'Hara's action proceeding because it has in substance already been determined by the Financial Services Ombudsman; and Mr. Gallagher is entitled to proceed with his case because it is not statute barred.