THE HIGH COURT

[2024] IEHC 275

[Record No. 2021/3709P]

BETWEEN

RACHEL CASEY AND EOGHAN CASEY

PLAINTIFFS

AND

THE GOVERNOR & COMPANY OF THE BANK OF IRELAND

AND

BANK OF IRELAND MORTGAGE BANK

DEFENDANTS

JUDGMENT of Ms Justice Miriam O'Regan delivered on 10 May 2024.

Issues

1. The sole issue for consideration in this judgment is whether any potential cause of action on the part of the late Dr Casey ("the borrower") against the defendants would have accrued no later than the date of encashment by the borrower of the New Ireland policy number 081269B1 in June 2011 (in circumstances where the borrower notified the defendant of the encashment of the said pension policy on or about 8 June 2011).

2. The matter proceeded on the basis of determining this preliminary point.

Background

3. The borrower entered into a loan agreement with the defendants in 2006 (account no. 11781172) for the purpose of purchasing property known as 3 Daly's Terrace, Carmody Street, Ennis, County Clare for the purchase price of €375,000. The borrower sought advice from the defendants and that advice resulted in the entry into a loan agreement between the borrower and the defendants, signed by the borrower on 14 November 2006 with the facility commencing on 31 December 2006. As part of the special conditions to the agreement the borrower undertook to put in place a pension policy acceptable to the bank with the intention that the proceeds of the pension policy, at the end of the term or earlier determination in accordance with the conditions of the agreement, be set off against the outstanding principal balance. The total sum advanced was €356,250 and the term of the loan was for ten years. It was an interest only loan.

In the events the borrower had since April 2004 a New Ireland Assurance Pension Policy which was acceptable to the bank.

The funds were drawn down on 24 November 2006.

Following the agreement between the borrower and the bank the borrower paid into the relevant pension policy a sum of €5,000 per month until 19 September 2007. From November 2007 he made payments of €750.00 per month. On the borrower's instructions the pension policy was marked "paid up" on 14 September 2009 and the funds standing to the credit of the pension policy were withdrawn by the borrower on 8 June 2011 with the proceeds used to pay other debts (other than the mortgage indebtedness) and the balance paid into a different pension policy held by the borrower.

The mortgage matured on 30 November 2016 following which on 12 December 2016 the borrower entered into an alternate repayment arrangement with the bank.

The borrower died on 4 July 2017 and this was notified to the bank on 23 October 2017 whereupon in accordance with standard practice there was a hold placed on the account for an eighteen month period. On 10 October 2019 the bank made a demand of the plaintiffs to discharge the outstanding balance on the loan account. On 8 November 2019 a grant of probate in the estate of the borrower issued in favour of the plaintiffs.

In or about 2018/2019 the plaintiffs offered to sign over the property the subject matter of the loan agreement to the bank in full discharge of all liability however the bank refused this offer.

4. On 14 May 2021 a plenary summons issued by three named plaintiffs against one named defendant however, subsequently, following liberty to file an amended statement of claim, the current parties were recorded on the document and the amended statement of claim differed substantially to the original statement of claim of 30 June 2021.

It is common case that the only pre-action letter was that of 3 April 2020. The said letter runs to eight pages and the letter notes that interest only payments were measured in the sum of €1330.96 per month. It is said that shortly after the draw-down of the monies for completion of the purchase of the property the pension back mortgage product failed. At a date undisclosed it appears that interest and arrears began to accrue on the loan and in December 2016 with the assistance of an adviser the borrower entered into a new agreement. The borrower was then aged 66. Under the terms of this new agreement the borrower was to pay €1,200.00 per month, of which €828.00 was applied towards capital and the balance towards interest. At the time the borrower had a pension income only.

In the amended statement of claim it is stated that during the course of engagement between the borrower and the bank, the bank advised that the proceeds of the pension policy would be more than sufficient to redeem the mortgage loan facility upon the expiry of the

term thereof whereupon the deceased would own the premises free from encumbrances and also have the benefit of the pension policy.

At para. 21 it is stated that the bank's representations were false and misleading, and the mortgage loan facility and related pension investments were not fit for their intended purpose, or suitable for the deceased's requirements and they were not aligned with the deceased's appetite for risk or his capacity to bear risk.

At para. 24 it is stated that the borrower's pension performed poorly resulting in a depreciation in the value of the deceased's investment therein. It is said that when the loan facility matured the deceased was unable to repay the same from the proceeds of the investment, notwithstanding the advice that the bank had given him.

In a notice of motion of 1 June 2023, the defendants sought an order dismissing the proceedings on the basis that they are statute-barred and sought further or other orders as to the trial of preliminary issues with a view to saving costs or otherwise for the case management of the proceedings.

The matter came before this Court on 19 March 2024 when an order was made directing the trial of the preliminary issue herein before identified.

Submissions

5. At the hearing of the preliminary issues the defendants identified that in the letter of 3 April 2020 aforesaid the core allegation is to the effect that the borrower was mis-sold a pension backed mortgage which should never have been sold to him. It is said that the borrower reached the conclusion that the pension was not suitable and therefore withdrew from the pension in 2011.

6. Assuming for the purposes of this preliminary issue only that the plaintiffs are correct in their assertion that the loan agreement was unsuitable and/or that the bank was guilty of negligence and/or misrepresentation, it is asserted that the latest date upon which the borrowers cause of action crystallised was when the sums standing to the credit of the pension policy were withdrawn on 8 June 2011.

7. On the other hand, the plaintiffs' position is that the cause of action did not accrue until 10 October 2019 when a demand for payment was made.

8. Canny on Limitation of Actions 3rd Ed., 2022 at paras. 12 to 14 identifies that there is no statutory definition of the expression "cause of action" and the classic definition is provided by Lord Esher MR in *Reid v Brown* (1888) 22 QBD 128: -

> "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."

It is common case that under the Statute of Limitations, the limitation period applicable to the instant tort action is six years from the date of accrual of the cause of action.

Both parties rely on two decisions of the Supreme Court namely *Gallagher v ACC Bank plc* [2012] 2 IR 620 and *Cantrell v AIB* [2020] IESC 71.

9. In *Gallagher* the issue which was before the Supreme Court involved a borrow to invest product. Fennelly J in his judgment at para. 12 stated: -

> "Given that the plaintiff was borrowing money from the Defendant to invest in the product taking into account the cost of the said borrowing and the tax that the plaintiff

> would have to pay on any gains, the product would have had to far outperform the market's view of the likely performance of the basket of shares in order for the Plaintiff to make any or any significant gain."

It was later noted that the core of the plaintiff's complaint was that the product was not a suitable product to borrow money to invest in. The plaintiff was not asserting that there was any mismanagement of the investment but rather that the investment was inappropriate and unsuitable and ought never have been offered to investors. Essentially, the complaint related to the inherent features of the bond.

The Supreme Court gave consideration to the UK Court of Appeal case of *Forrester v Outred & Company* [1982] 1 WLR 86. In that matter, the plaintiff contended that her claim was not statute-barred on the basis, she asserted, that her cause of action did not accrue until she suffered damage which was, at the earliest, when demand was made of her. The plaintiff owned a farm and for the purposes of securing a loan for the benefit of her son to operate a hotel the farm was mortgaged. The son went bankrupt and subsequently a call was made on the plaintiff to pay the outstanding balance. Counsel's definition of actual damage in that case was accepted to the effect: -

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

Fennelly J also considered the judgment of the High Court of Australia in *Wardley Australia Limited v Western Australia* [1992] 175 CLR 514. In that matter it was alleged that false representations were made to the State of Western Australia and as a result an indemnity to another bank was given in 1987. The State was called upon to pay pursuant to the indemnity

when the company failed to meet its obligations. The claim against the merchant bank, based on the representations, was made in 1991 outside the three-year statutory limitation period. The question of law was whether the indemnity created an executory or contingent obligation, which crystallised only when the bank called on the State to indemnify it. The Court rejected the proposition that English decisions are to the effect that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss is a loss upon the contingency. Rather the Court was satisfied that a contingency loss turned on the plaintiff sustaining measurable loss at an earlier time quite apart from the contingent loss which threatened at a later date. In his judgment, Brennan J indicated that whether loss or damage is actually suffered when any of a number of possible events occurs depends on the value of the benefit. If a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is born – that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. The suffering of any loss cannot be said to occur before it is reasonably ascertainable (not before it is ascertained) that the burdens which the plaintiff had borne are greater than the value of the benefits that the plaintiff had acquired or will acquire. In other words, no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is worse off than if he had not entered into the transaction.

The Supreme Court rejected the English Court of Appeal's decision in *Shore v Sedgwick Financial Services Limited* [2008] EWCA Civ 863 to the effect that it is the possibility of actual financial harm that constitutes the loss. At para. 104 in *Gallagher,* Fennelly J noted that the cause of action in tort does not accrue merely when the wrong is committed. Actual damage is necessary. The English cases demonstrate and the judges have repeatedly said that cases of financial loss could present particular difficulties. At para. 110 Fennelly J stated that he did not think that the cause of action accrues when there is mere possibility of loss rather,

he thought it was helpful to bear in mind the comments of Brennan J in *Wardley* to the effect:-

> "A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck."

Fennelly J noted that there will be cases where there is immediate loss even if there are difficulties of quantification and there are uncertainties and contingencies. The Court was of the view that the plaintiff's claim as pleaded was that he suffered damage by the very fact of entering the transaction and purchasing the bond. The cause of action then accrued.

10. In *Cantrell*, O'Donnell J (as he then was) gave judgment on behalf of the Supreme Court. At paras. 97 the Court distinguished between the so called "no transaction" case and "flawed transaction" case. The first relates to, generally, but for the negligence no transaction would have been entered into whereas the second relates to, effectively, a negligent management of a transaction. The Court indicated that: -

> "it is generally easier to argue that damage occurs in a flawed transaction at the date of the transaction, since the plaintiff acquires something different and worth less than they ought to. In many "no transaction" cases, it may also be the case that damage is suffered immediately on the entry into the transaction, and it is easier to argue that damage is not immediate, but is only suffered at some future point."

At para. 132 the Court noted that the decision in *Gallagher* requires the courts to adopt a pragmatic approach in which the identification of damage for accrual of a cause of action must proceed on an incremental basis and that damage for the accrual of a cause of action must bear a close relationship to the lay person's understanding of that term. That is, real actual damage, which a person would consider commencing proceedings for. It was said that the decision in *Gallagher* must be understood in this light.

11. The defendants submit that the letter before action identified that the borrower was sold a product that went wrong from the outset. The defendants effectively suggest that this is a no transaction situation. It is said that the case being made by the plaintiff is to the effect that the borrower was mis-sold a product that went wrong from the outset as the pension performed poorly a short time after entering the transaction and therefore by June 2011 there was complete crystallisation of the cause of action. It is said that even if all loss was not crystallised at that time the borrower held an adverse balance. It is further said that there is no similar factual matrix in the jurisprudence identified.

12. On the other hand, the plaintiffs argue that there is no evidence as to the balance of benefits and burdens in 2011 and therefore it cannot be said that the cause of action had crystallised then. Absent valuation evidence to the Court it is impossible to determine that in advance of the demand in 2019 for a repayment of the balance outstanding, the balance of benefits and burdens was in the negative. It is admitted that by the date of demand the outstanding monies due to the defendants was greater than the value of the property. It is said that there is no evidence of a similar status arising prior to that time. It is argued that the transaction, unlike in the matter of *Gallagher*, was not doomed to failure from the outset.

Decision

13. Paragraphs 21 and 22 of the amended statement of claim complain of the negligent manner in which advice was given and the content of such advice together with a complaint that the bank product was not fit for purpose. Paragraph 23, as in the letter before action, is far more in keeping with the concept of a no transaction status, for example there it is said that if the borrower had known of the true nature of the product being acquired based on the

defendants' advise the borrower would not have drawn down a mortgage loan facility and/or invested in the pension product. To that extent therefore it does appear that the plaintiffs are maintaining somewhat alternate arguments in relation to the nature of the transaction and the impact of the asserted wrong advice given to the borrower, on the borrower.

14. In my view, by reducing, subsequently stopping and ultimately withdrawing all funds from the pension product by 2011 there is evidence of a breach of the special condition within the mortgage agreement between the parties for which the defendant does not appear to have taken any action. Certainly, the borrower may have felt that he had by then suffered a loss however, that cannot be equated with being in a position to establish actual damage capable of assessment in money terms at that time. Without the benefit of a valuation of the property, the amount achieved from an encashment of the pension policy, the amount paid by the borrower to the bank in interest only payments and any yield received from the property, it is impossible to determine whether or not an adverse balance was struck in respect of benefits and burdens in 2011. It may well transpire, with the assistance of appropriate evidence, that an adverse balance did indeed exist in 2011but that evidence is not currently before the Court. The only crystallisation that might be said to have occurred by 2011 was that the borrower was in breach of the special term of the loan agreement relating to the pension policy. Any risk thereby absorbed/acquired by the borrower and it's impact on the current claim of the plaintiffs is outside the scope of the current preliminary issue.

15. Furthermore by reason of: -

a. there is nothing to suggest that the agreement reached between the parties had inherent features which made it inevitable that the terms thereof would fail, as

distinct from, in the particular circumstances of the within matter it was unsuitable for the borrower;

b. there is no evidence that the defendants took any action based on the encashment of the pension policy notwithstanding that they were advised of same;

c. there is no evidence that the borrower did not continue to make some interest only payments to the bank thereafter;

d. the parties renegotiated the repayments to the bank in 2016 supporting a possible contention that the essence of the agreement survived the encashment of the pension policy;

e. there is no evidence that the borrower attempted to realise or surrender the property in 2011;

f. there is no evidence of actual as opposed to perceived by the borrower, loss in 2011;

there is insufficient evidence before the Court to establish a loss balance being struck in 2011 or that the agreement was then at an end.

It appears that the parties conducted themselves as though the balance of the agreement remained in force following the encashment of the policy in 2011. Neither proceeded on the basis that there was any form of termination, repudiation or frustration of the contract then or indeed in 2016 when there was a renegotiation of the payment terms.

16. In the circumstances as outlined above, in my view, it is not possible to definitively state, at this time, in the context of the current limited agreed evidence, that by reason of the fact that the borrower had unilaterally reduced, later ceased, and subsequently encashed the pension policy by that time the balance of burdens and benefits was such that there was an adverse balance accruing to the borrower, as opposed to the possibility of an adverse balance.

Effectively there is no evidence that by 2011, notwithstanding the subjective views of the borrower, there was any real actual damage suffered by the borrower with the balance of burdens and benefits then struck an adverse status for the borrower.

17. In the light if the foregoing it cannot currently be stated that the claim of the plaintiffs crystallised by 2011.

18. As this judgment is being delivered electronically, with regards to the issue of costs, as the plaintiff has been entirely successful, it is my provisional view that they should be entitled to their costs from the defendant, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.