AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000148
[2023] IESC 13

O'Donnell CJ
O'Malley J.
Woulfe J.
Hogan J.
Murray J.

Between/

MARK SMITH

Plaintiff/Appellant

AND

MARK CUNNINGHAM, KEVIN SOROHAN, ANN-MARIE SOROHAN AND PAUL KELLY PRACTICING UNDER THE STYLE AND TITLE OF PAUL KELLY & COMPANY, SOLICITORS

Defendants/Respondents

Judgment of Mr. Justice Brian Murray delivered on the 25th day of May 2023

Background

1. The tort of negligence is complete only when a party has suffered actual damage as a result of another's breach of duty. It is at or after that point that that party can institute proceedings to recover damages for negligence, and it is only then that the cause of action accrues for the purposes of the Statute of Limitations. This court has decided that in negligence claims involving damage to person or physical property, *'actual damage'* occurs, and the cause of action thus accrues, at the point at which the injury or damage to property is *'manifest'*. This has been held to mean the time that the damage was capable of being discovered and capable of being proved by the plaintiff. While that formula may present difficulties of application in a small minority of such cases (in particular where the wrongful act and damage do not coincide) there is what has been described as *'a working definition'* and it is applied to cases involving both of these forms of loss. The enquiry is objective and does not depend on whether the plaintiff actually knows that they have suffered an injury: it is directed only to whether provable damage exists, not to whether in a particular case there was in fact a reasonable or realistic prospect of its being discovered.

2. In the negligence action giving rise to this appeal, the plaintiff seeks to recover financial loss that is independent of damage to person or property. Such claims for (as it is often described) *'pure'* economic loss are more complex than property or personal injury claims and the formulation of a workable and generally applicable test to determine the point in time at which the plaintiff has

suffered *'damage'* has proven elusive. Obviously, economic loss is intangible. It can assume many diverse forms – the diminution in the value of an asset, the acquisition or sale of property on terms less advantageous than they should have been, or the wrongful exposure to a liability to pay monies (or the payment of such monies) being the most common. Sometimes these losses will be contingent on other events that may or may not occur, on occasion they are the product of uncertain and/or fluctuating valuations in volatile markets, and in the case of certain kinds of transaction they may be reversible at no or very little cost. It is to be expected that the reduction to a single coherent and generally applicable test of when *'damage'* in these various situations is *'manifest'* is (as some of the cases have described it) *'troublesome'*, and less than surprising that preference has been expressed for *'pragmatism'* over logic, and for leaving each case to be decided *'on its own facts'*.

3. In these proceedings (instituted in 2014) the plaintiff claims damages arising from his acquisition (in 2006) of a dwelling-house. The fourth named defendant (*'the solicitors'*) were retained by the plaintiff for the purposes of that transaction. The property as constructed did not comply with the planning permission granted by the relevant local authority and, the plaintiff contends, the solicitors should have conducted planning searches in advance of the purchase which, had they been carried out, would have revealed the true planning status of the property. The claim against those defendants is *inter alia* for alleged negligence in thus failing to ensure that the plaintiff received a good marketable title to the property.

4. The question that arises from these facts is whether the *'damage'* sustained by the plaintiff for the purposes of the applicable limitation period occurred when he acquired the property in July 2006 (in which case the action is statute barred) or whether it occurred when a subsequent contract entered into by the plaintiff to sell that property was rescinded in October 2008 because of the planning issues affecting the property (in which case the plaintiff's action was commenced within time).

5. Following the trial of a preliminary issue as to the application to that claim of the Statute of Limitations 1957, the High Court ([2018] IEHC 600) drew a distinction for the purposes of identifying the point at which a cause of action in negligence was complete between a *'defect'* and *'damage'*. It derived this test from authorities dealing with the recovery of compensation for injury to property. Meenan J. found that while the purchase of the property in July 2006 with a flawed title presented a *'defect'*, *'damage'* did not occur until a subsequent contract for the sale of the property was rescinded in October 2008 because of this *'defect'*. Thus, he concluded that, on the facts, the plaintiff's claim was *not* statute barred.

6. The Court of Appeal ([2021] IECA 268) in a judgment delivered by Collins J. (with whom Whelan and Ní Raifeartaigh JJ. agreed) concluded that the defect in this case, where the property was not compliant with planning permission, was an *'immediate and significant blot on title'* with concrete adverse implications for the plaintiff and his wife, that the cause of action therefore

accrued when the plaintiff purchased the property and, thus on the facts of this case, that the plaintiff's claim was statute barred.

7. This Court, in granting leave to appeal against the decision of the Court of Appeal ([2022] IESCDET 86) determined that the point from which time runs in a claim in negligence against a solicitor in connection with a conveyancing transaction is of general public importance. That issue depends on the proper construction of s. 11(2)(a) of the Statute of Limitations Act 1957, as amended, as it is applied to claims in negligence for the recovery of *'pure'* economic loss.

Facts

8. In April 2006 the plaintiff and his wife entered into negotiations with the second and third named defendants (*'the vendors'*) to buy a property at Gubadorish, Drumlish, County Leitrim (*'the property'*). Planning permission for the construction of the property had been granted by Leitrim County Council on 4 March 2004, and was subject to a number of conditions.

9. On 23 March 2006, the first named defendant (*'the engineer'*) (who had been retained by the vendors) executed a Certificate of Compliance with Planning Permission and Building Regulations (*'the compliance certificate'*). This certified *inter alia* that the property had been *'constructed and completed in substantial compliance with'* the planning permission, and that there was substantial compliance with the Building Control Act 1990 and the Building Regulations under that Act.

10. As noted in the Court of Appeal judgment, although it was not apparent on the face of the certificate it would appear from the statement of claim that the engineer had made the application for planning permission. Furthermore, it was evident from the compliance certificate that he had inspected the development periodically in the course of construction.

11. The plaintiff and his wife agreed to buy the property from the vendors for €240,000 and financed their purchase by means of a mortgage with Start Mortgages. The solicitors were engaged by the plaintiff and his wife to act for them in the transaction, and a contract was executed on 13 June 2006, with the sale closing on 12 July 2006. The plaintiff and his wife were subsequently registered as full owners in the Land Registry and the solicitors certified their title to Start Mortgages as required by the conditions of their mortgage.

12. In 2007 differences arose between the plaintiff and his wife. In early 2008 the property was put up for sale. In May 2008, the plaintiff and his wife, having found a buyer, signed a contract for the sale of the property for €280,000. A different firm of solicitors acted for them in this transaction.

13. It appears that the original planning permission was not included in the papers made available to the new firm and the file did not include receipts of payment relating to financial contributions payable under the permission. The new firm of solicitors then sought confirmation of the position from Leitrim County

Council, which responded on 10 June 2008. The Council advised that all financial conditions were complied with at that stage, but that:

> *'Condition No 2 of the grant of permission has not been complied with. A revised dwelling design was required for the approval of the Planning Authority prior to the commencement of the development. This development is now considered unauthorised and the matter has been referred to the Building Control and Enforcement Office for his immediate attention.'*

14. The planning authority then inspected the property, and it seems that the engineer made a submission to the planning authority, presumably to persuade it that the property was compliant with the planning permission. The Court of Appeal judgment records that a further letter dated 29 July 2008 was then sent to the engineer by the planning authority with more information about the concerns of the authority in relation to condition 2. It is pleaded that the instances of non-compliance with other aspects of the planning permission included that the planning permission had rejected the type of window contained in the original planning application, which were to be redesigned, yet that the windows ultimately installed were of the type that had been rejected. It was said that the as-built porch to the front façade had been enlarged to accommodate the installation of quoins and that this did not form part of the permitted development. The rear and lateral boundaries were said not to be compliant with the requirement of the planning permission. It was alleged that the front row hedge-way was retained in contravention of certain conditions in

the permission. Finally, it was said that the failure of the developer to notify the planning authority of the installation of the proprietary waste water treatment system prior to the occupancy of the completed development was contrary to condition 9(b) of the planning permission. The Court of Appeal judgment records that the letter noted that unless matters were resolved, *'the Authority will have no option other than to commence enforcement proceedings in respect of the development'*.

15. The contract for sale of the property was subject to conditions which included a satisfactory planning search, and in September 2008 the intended purchasers served a 28-day completion notice under General Condition 40. Due to the planning issues, the plaintiff and his wife were unable to complete within the contractual period, and in October 2008, following the expiry of the 28-day period, the intended purchasers decided not to proceed with the transaction and requested the return of their deposit (as, in the circumstances, they were entitled to do).

16. Soon after the decision of the intended purchasers not to proceed with the transaction, the planning permission was regularised by a grant of retention permission. That permission issued on 5 November 2008. It would appear that this was applied for by the original vendors, presumably with the consent of the plaintiff. However, by the time retention permission was granted, Ireland was in the midst of a financial crisis and the property market in the State was, as it was put in the Court of Appeal judgment, *'in precipitous decline'*. The property then remained on the market but was not sold. According to the statement of

claim, it was valued at less than €100,000 in March 2010. Later in 2010, an order for possession was granted to Start Mortgages after the plaintiff (who by then was unemployed) failed to make the mortgage repayments. The proceedings were, as I have observed, instituted in May 2014.

17. The claim advanced against the solicitors was simple. It was pleaded that they were required to use all reasonable skill, care and diligence in advising the plaintiff, that they undertook that they would ensure that the plaintiff got a good marketable title to the premises and that they would ensure that all legal preconditions were met to enable the plaintiff to receive such title. The particulars in the statement of claim alleged breaches of each of these obligations, complaining in addition that the solicitors had failed to demand a satisfactory planning search with regard to the property prior to the purchase being completed. Subsequent particulars supplemented these claims, alleging that the solicitors failed to advise the plaintiff and his wife of the necessity to have an engineer with professional indemnity insurance examine the property and the planning permission to establish compliance therewith. Had this been done, it was pleaded, the defect on title and the fact that the dwelling house was not built in accordance with the terms and conditions of the planning permission would have been immediately flagged and become known to the plaintiff, his spouse and the solicitors. It was also claimed that had the solicitors, in accordance with ordinary and proper conveyancing practice, obtained from the vendors receipts from the local authority for the financial contributions which were a term and condition of the planning permission, the fact that the house

was not built in accordance with the original planning permission would have been revealed.

18. The solicitors, between their defence and the affidavit delivered on their behalf seeking the trial of a preliminary issue, assert – essentially – that they were entitled to rely at the time of the conveyance upon the certificate of compliance provided by the engineer, also claiming that they were entitled to rely on replies to requisitions furnished by the vendors' solicitors to the effect that there was no unauthorised development.

19. The loss and damage particularised in the statement of claim was said to arise from the collapse of the sale of the property, and its subsequent loss of value at the point when an order of possession was granted in favour of Start Mortgages. As noted in the Court of Appeal judgment, it was not pleaded in the statement of claim that had the fourth defendant not acted negligently the plaintiff and his wife would not have proceeded with the transaction, and it does not appear that damages were sought on that basis.

The legal context

20. Section 11(2)(a) of the Statute of Limitations 1957, as amended, states:

> *'Subject to paragraph (c) of this subsection and to section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort*

shall not be brought after the expiration of six years from the date on which the cause of action accrued'.

21. The law governing the application of this provision to claims in negligence in which the only damage alleged by the plaintiff is financial, has been recently and comprehensively surveyed in the judgment of O'Donnell J. (as he then was) in *Cantrell v. Allied Irish Banks plc* [2020] IESC 71, [2021] PNLR 9 (*'Cantrell'*). As evident from both that decision and the earlier judgment of Fennelly J. in *Gallagher v. ACC Bank plc* [2012] IESC 35, [2012] 2 IR 620 (*'Gallagher'*), much of the difficulty arises from four related features of the provision as applied to claims in negligence for pure economic loss. First, the common law traditionally limited the recovery of that type of loss to claims in contract, in respect of which the applicable limitation period usually ran from the date of the breach of contract, not from the date of the incurring of the loss. The prospect of differing starting points for the running of the limitation period for claims in contract and tort arising from the same facts has been seen by some as dubious or, as O'Donnell J. put it in *Cantrell, 'more than a little odd'* (at para. 147). Second, and following from this, at the time of the enactment of the original iteration of s. 11(2)(a) it was not generally possible to recover losses of this kind in negligence, that facility only being acknowledged in the Superior Courts here in 1964 (*Securities Trust Ltd. v. Moore* [1964] IR 417 approving the then recently delivered decision of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.* [1964] AC 465). The conclusion that such loss could be recovered following a negligent act or omission came later again (*Finlay v. Murtagh* [1979] IR 249). The applicable limitation period,

accordingly, was not drafted with the complexities of financial losses in mind. Third, and as I have already observed, it is firmly established that the test for the ascertainment of whether a cause of action has accrued is objective, with the result that a plaintiff who does not know that they have suffered a loss (whether as a result of the negligence of the alleged wrongdoer or otherwise) may find that the Statute of Limitations has expired before they realise that they had been wronged. Claims for economic loss have proven particularly susceptible to that phenomenon. In particular – and fourth – (as I have also observed in the introductory paragraphs to this judgment) economic loss may be wholly or partially contingent, reversible, uncertain and/or the product of fluctuating valuations.

22. Bearing in mind that general context, the resolution of this appeal comes down to the implication of two recent decisions of this court – *Brandley v. Deane* [2017] IESC 83, [2018] 2 IR 741(*'Brandley'*), and *Cantrell*. In particular, the arguments advanced by the parties revolve around whether *Brandley* posited a rule of application to claims for economic loss that a *'defect'* might arise from a transaction which was distinct from the *'damage'* arising where financial loss followed, and (whether or not this is so) what is the test that should, consequent upon *Cantrell*, be applied in determining when damage occurred for these purposes. Both of these cases fall to be read in the light of the earlier decision in *Gallagher*, but an understanding of all three decisions requires some explanation of the development of the law in the United Kingdom, not least of all because some of the reasoning in the Irish cases has been set up by reference, and indeed in some respects in contradistinction, to the UK decisions. Those

developments are charted and analysed in some considerable detail in the principal judgments in all three cases, and it is unnecessary to repeat that exercise here. What follows is a summary insofar as relevant to the arguments advanced by the parties in the course of this appeal. It is best undertaken by reference to two contrasting decisions of the courts in that jurisdiction.

Two English cases

23. Most analyses of these issues begin with the decision in *Forster v. Outred* [1982] 1 WLR 86 (*'Forster'*). There, the plaintiff claimed that her solicitors had been negligent in failing to advise her in connection with a mortgage she executed over property of which she was the freehold owner. The mortgage was provided by way of security for all present or future actual or contingent liabilities owed by her son to the mortgagee. Her son subsequently went bankrupt, and she was required to pay out on foot of the security. Her proceedings were brought within six years of her being called upon to discharge her son's liabilities, but more than six years after the execution of the mortgage. She argued that she had suffered no actual damage as a consequence of the defendant's negligence until, at the earliest, the first demand of the mortgagees was made. The plaintiff argued that she must prove actual damage before the cause of action accrues, and that notional damage or damage on a contingency would not be sufficient for that purpose.

24. The claim in negligence, it was found, was statute barred: the plaintiff had suffered actual damage once she executed the mortgage deed. The judgment of

Stephenson LJ (at pp. 94 and 98) quoted and approved the following definition (suggested by counsel for the defendant) of actual damage in the context of claims for economic loss:

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

25. Stephenson LJ's conclusion was stated shortly as follows (at p. 98):

> *'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.'*

26. As Lord Hoffman noted in *Law Society v. Sephton* [2006] UKHL 22, [2006] 2 AC 543 (*'Sephton'*) (at para. 14), Stephenson LJ's judgment was not reserved, and was delivered in an interlocutory appeal. Nonetheless, the decision has functioned as a focal point in the development of the law governing the accrual of claims for negligently inflicted economic loss both in England and here. In particular, subsequent case law has concentrated on the suggestion in Stephenson LJ's judgment that the incurring of a contingent liability was in itself *'damage'* for the purposes of the accrual of a cause of action in negligence.

In the course of his judgment in *Gallagher* Fennelly J. noted later cases in which the outcome in *Forster* has been accepted, but only on the basis that the immediate effect of the execution of the mortgage on the plaintiff's equity of redemption in itself constituted damage (at para. 74). The case, thus viewed, was not one of a simple future contingency starting the limitation clock, but of a future contingency combined with *present* damage having that effect.

27. *Sephton* was one of the decisions referred to in this connection by Fennelly J. The defendant was a firm of accountants which was said to have negligently certified that the books of a firm of solicitors complied with the Solicitors Account Rules. That certification occurred for each year between 1989 and 1995. During that period the solicitor had misappropriated substantial sums from his client account. In July 1996 a former client of the practice made a claim against the plaintiff Law Society under the Solicitors Compensation Fund. Under the relevant English law, the Law Society did not face a liability in private law for the amount of any claim submitted to it, its obligation merely sounding in public law to assess and respond to the claim on a rational and intelligible basis having regard to the purposes for which the statutory compensation fund was established.

28. In May 2002, the Law Society brought proceedings in negligence against the defendant. It contended that it had relied upon the defendant's reports in not exercising its powers to investigate the solicitor's practice. At the trial of a preliminary issue as to the application to that claim of the Statute of Limitations, the defendant contended that the cause of action accrued at the point at which

the solicitor misappropriated monies after receipt of the relevant report. It argued that once that misappropriation took place, the client enjoyed the right to make a claim on the Society's compensation fund and the plaintiff from then had a potential liability to such a claim. The Law Society, on the other hand, said that it suffered damage only when a claim was made. It stressed that the misappropriation might have been repaid, either out of the solicitor's own money or by *'teeming and lading'.* All that could be said, it argued, was that once there had been a misappropriation, it was likely that there would be a claim; the Society could not, however, have commenced proceedings on the basis that claims were likely. The trial judge found the claim to have been statute barred, and the Court of Appeal reversed. The House of Lords held the High Court to have correctly determined that the claim was statute barred.

29. Three judgments were delivered (Lords Hoffmann, Walker and Mance) with each of which the other two members of the court (Lords Scott and Rodger) agreed. Lord Hoffmann explained (at para. 18):

> *'By virtue of the terms of the Solicitors' Compensation Fund Rules 1995, Mr. Payne's misappropriations gave rise to the possibility of a liability to pay a grant out of the fund, contingent upon the misappropriation not being otherwise made good and a claim in proper form being made. Such a liability would be enforceable only in public law, by judicial review, but would still in my opinion count as damage. But until a claim was actually made, no loss or damage was sustained by the fund.'*

30. Accordingly, the Law Society's position was certainly impaired or worsened at the point at which the misappropriations occurred as from then it was exposed to the possibility of a claim which, if made, it would have to pay. However, this was a mere contingency, dependent upon whether the misappropriation was repaid either by the wrongdoer personally or by *'teeming and lading'* from another client's account, and indeed upon the client making a claim. Incurring a contingent liability was not, as such, actionable damage (para. 25), generating a cause of action only when the contingency arose (para. 30). Critically, Lord Hoffmann stressed there are circumstances in which incurring a contingent liability will, if accompanied by other factors rendering the plaintiff worse off, generate sufficient loss to trigger the limitation period. The existence of a contingent liability may depress the value of other property, or it may mean that a party to a bilateral transaction has received less than he should have done or is otherwise worse off than if he had not entered into the transaction. But in itself, a contingency was not damage, nor was the possibility of an obligation to pay money in the future (at para. 31). The plaintiff must be *'financially'* worse off, and that requires either that the contingency has materialised, or that it is accompanied by something else that diminishes the value of the plaintiff's assets.

31. Those cases in which it had been found that a cause of action had accrued at a point proximate to the defendant's wrongdoing (as opposed to the plaintiff's realisation that it had suffered a loss) were collected by Lord Walker (at para. 48) as follows:

'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.'

32. One of the common features of those cases in which it had been found that a cause of action had accrued in respect of a loss described as contingent, was identified by Lord Mance thus (para. 70):

'In all these cases … the defendant failed to preserve or procure for the claimant an asset … which could and should have been preserved or protected by proper performance of the defendant's duty in relation to the transaction affecting the claimant's legal position.'

33. While there are differences between the individual judgments in *Sephton* (in particular as between the judgment of Lord Hoffmann and Lord Mance) two features of the analysis assume importance in considering the decisions in *Gallagher* and *Cantrell.* First, underlying the decision was a distinction between cases (such as *Sephton* itself) in which damage was measured by reference to the extent to which the plaintiff was worse off than he would have

been if he had not entered into the transaction (referred to in the English cases as the *'flawed transaction'* cases) and those in which the liability was for the difference between what the plaintiff got and what he would have got had the defendant done what it was supposed to do (the *'no transaction'* cases). In the latter case, it was said, the damage was more likely to coincide with the breach of duty.

34. The second relevant feature of the case arose from the approval in *Sephton* of the decision of the High Court of Australia in *Wardley Australia Ltd. v. State of Western Australia* (1992) 175 CLR 514 (*'Wardley'*). There, it was found that time for the purposes of a claim based upon allegedly false representations resulting in the grant by the State of Western Australia of an indemnity against a facility provided by a bank to a third party ran not from the point of the grant of the indemnity, but from the point at which the contingency was fulfilled. That was found to have occurred when the indemnity was called in. In so concluding, the court adopted the narrower interpretation of the decision in *Forster* that ultimately gained traction in *Sephton.* The court held that the effect of the indemnity was to create a liability on the part of the State to indemnify the bank if and when the bank's loss on foot of the facility was ascertained and quantified. It found that it was clear that the State had sustained no financial damage until the contingency was realised and loss becomes actual: until that happened the loss was prospective, and might never be incurred. The following statement of Brennan J. was cited with approval by Lord Hoffman in *Sephton,* as well as by Fennelly J. in *Gallagher* and O'Donnell J. in *Cantrell*:

"a transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur [...]".

35. *Forster* and *Septhon* are usefully viewed as defining two fixed points in this debate, the former demonstrating conditions under which the exposure to future economic loss which might, or might not, ultimately land on a plaintiff triggers the commencement of the limitation period, the latter positing that mere possibility of this occurring will not, without more, have that effect. The real issue presented by the facts here depends on where between those two poles this case lies. The plaintiff says that the issue with the planning permission was not significant and was one that could always have been readily resolved, and that had it been identified outside the constraints of a pending sale of the property in a falling market the losses he seeks to recover in this case would not have been incurred. At various points in his submission he suggests that the loss was thus '*contingent'.* On this basis, the case is akin to *Sephton*. The solicitors argue that when the property was vested in the plaintiff, it was already less valuable than the asset for which he had contracted and, to that extent, the case is similar to *Forster*.

36. In that regard, and as is clear from the next section of this judgment, it should be observed that while *Sephton* has been referred to with apparent approval in the case law in this jurisdiction, some decisions of the English courts around these issues have been questioned by both Fennelly J. and O'Donnell J., with

the latter in the course of his judgment in *Cantrell* describing *Shore v. Sedgwick Financial Services Ltd.* [2008] EWCA Civ. 863 (*'Shore'*) and *AXA Insurance Ltd. v. Akther & Darby* [2009] EWCA Civ. 1166 (*'AXA'*) as having *'isolated'* the decision in *Sephton* and *'narrowed the scope of the exception in that case'*. In the first of these cases, the plaintiff's claim arose from losses he alleged following advice from the defendants to transfer accrued pension benefits to an income drawdown scheme, which underperformed. Time was found to have run from the point of transfer, Dyson LJ concluding that there was a risk from that point, the eventuation of which would depend on certain contingencies. As he put it, the plaintiff made a risky investment with an uncertain income scheme instead of a safe investment with a fixed and certain income stream. However, as Fennelly J. pointed out in *Gallagher*, this occurred in a context in which at the time of the transfer of the occupational pension scheme, the plaintiff had obtained what was then full market value, and it would not have been possible to show, at the point from which the court found time to have run, that he was at any loss.

37. In *AXA*, the claim was by a company providing after the event legal expenses insurance, which alleged that the defendant solicitors had failed to properly assess claims before admitting them into the scheme. A majority of the English Court of Appeal found that the cause of action accrued at the point the relevant policies had been underwritten, rather than when the insurer became obliged to pay out on them: the insurer's book of business carried liabilities as soon as the respective policies had been underwritten thereby incurring liabilities in excess of those which would have been incurred if the alleged breaches had not

occurred. Arden LJ undertook a detailed review of the decision in *Sephton*, observing in particular what she perceived as the illogicality of the distinction suggested by that case between contingent liabilities that had an effect on a particular asset, and those that did not, going so far, indeed, as to suggest that the UK Supreme Court might revisit *Sephton*.

38. There is one final feature of these cases that complicates the context and which merits observation here. In each of them (and indeed in each of the three Irish cases to which I am about to refer) the plaintiffs became aware of the wrongful acts of which they complained *after* the relevant limitation period was said to have expired. While in a case involving negligence by a solicitor which results in a client not obtaining good marketable title the error might not be discovered until decades after the wrongful acts and when the client seeks to dispose of the property, this was not the case on the facts here. The plaintiff in this case could have sued within six years of the transaction; that period expired on 11 July 2012, and it is clear that he knew from the middle of 2008 at the latest of the facts alleged to comprise the negligence of the fourth named defendant. In this way, the issue which has driven much of the judicial condemnation of the inflexibility of the legislation which in this jurisdiction regulates the accrual of and limitation on causes of action to recover compensation for damage to property or financial loss – the prospect that those rules may operate so that a litigant may lose their cause of action before they even realised they had one – does not arise. I stress this, because some of the plaintiff's argument appears directed to the claim that it is unjust that solicitors can fail properly to discharge their critical function in the conveyancing of property and thereby cause

significant loss to their clients, and yet have available to them a limitation defence. Without a doubt, there may well be cases in which there will be a potential for injustice where a client finds, in such circumstances, that the limitation period for a cause of action against their solicitor has expired before they knew they had either suffered damage or had any cause for complaint. The court in *Cantrell* has already expressed concern at that prospect and raised the question of whether the constitutional implications of such a situation should be revisited. But in circumstances where the plaintiff in these proceedings knew two years after the initial transaction that the property had not been constructed in compliance with the planning permission, he simply cannot make that case. In that respect, his case is not dissimilar to that of the plaintiff in *Cahill v. Sutton* [1980] IR 269.

Gallagher, Brandley and Cantrell

39. In *Gallagher* the core allegation was that the defendant had wrongfully caused the plaintiff to enter into a combined *'borrow to invest'* financial product which, it was said, was unsuitable for him and which caused him loss and damage. The plaintiff said that the investment would have had to far outperform the market if he were to get any return over and above the interest he had to pay on the sum he borrowed. He said that he would never have entered into the transaction had the defendant not been negligent as he alleged. The proceedings were instituted more than six years after he had made the investment, but within six years of the expiry of the duration fixed in the agreements and when his losses were finally crystalised. On the trial of a preliminary issue as to whether the claim in

negligence was statute barred (as in the within proceedings, it was accepted that the claim in contract was timed out), the defendant contended that the claim in negligence was barred because time ran from the point at which the plaintiff had entered into the transaction, while the plaintiff said that time could not run until the investment period of five years and eleven months had expired (the plaintiff could not withdraw from the investment until that point). The High Court ([2011] IEHC 367, Charleton J.) had concluded that time had not accrued until the expiry of the investment period as, he felt, until then the plaintiff had only a contingent loss.

40. While Fennelly J. (with whose judgment Denham CJ and Murray, O'Donnell and McKechnie JJ. agreed) conducted an extensive survey of the English authorities starting with the decision in *Forster v. Outred*, together with the decision of the Australian High Court in *Wardley*, his essential conclusion was straightforward and was expressly grounded in the particular facts of the case. The plaintiff's case was, he said, a '*no transaction*' case as it was the plaintiff's own case that he would not have entered into the transaction but for the defendant's negligence. It was, Fennelly J. said, '*inescapable that the plaintiff's claim as pleaded is that he suffered damage by the very fact of entering the transaction and purchasing the bond. The cause of action then accrued.'* The case was thus decided '*on its own particular pleaded facts'.* Those pleaded facts reflected the probability that the return on the investment would not cover the interest that had to be paid on the borrowing and that, in consequence, at the point the plaintiff entered into the transaction, the product he had purchased was worth less than he had paid for it.

41. That said, Fennelly J.'s judgment presents a lengthy and useful reflection on some of the underlying issues. Aside from the scepticism to which I have earlier referred around aspects of the English cases (he described them at para. 96 of his judgment as exhibiting '*little concern for the striking of a just balance between the rights of plaintiffs and defendants'*), four points emerge from that analysis. First, he noted observations in *Wardley* questioning whether the principle underlying the English cases extended to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff was subjected by the agreement was a loss upon a contingency. Second, he cited on two occasions – again with apparent approval – the statement of Brennan J. from *Wardley* to which I have earlier referred in the context of the *Sephton* decision:

> '*if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is borne – that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur.'*

42. Third, Fennelly J. adopted a position as to the implication of a possibility of loss that differed from that reflected in at least some of the English cases. He said (at para. 108) that '*[w]here a person has been led by what he alleges to be*

negligent advice or other negligent action, such as, for example, negligent valuation of an asset, to enter into a transaction, I do not think the cause of action accrues when there is a mere possibility of loss' (at para. 110). As to the decision in *Sephton* in particular, he was of the view that all the case decided was that '*in pure contingency cases, the cause of action does not accrue until the contingency arises'* (at para. 82). But, at the same time, '*there will be cases where there is immediate loss, even if there are difficulties of quantification and there are uncertainties and contingencies'* (at para. 113). The end point was summarised by O'Donnell J. in *Cantrell*: it was clear, he said, that Fennelly J. had '*decisively rejected the remorseless logic of a decision such as Shore … in favour of such decisions as Wardley and Sephton, favouring, as it is said the common law does, experience and pragmatism over pure logic'* (*Cantrell* at para. 117).

43. Finally, the judgment confirms that discoverability is not the test: '*Irish law does not allow the accrual of a cause of action in tort to be postponed so that a limitation period will not run against an injured party until the existence of the cause of action can reasonably be discovered except in two cases specifically covered by statute'* (at para. 56).

44. *Brandley v. Deane* was not concerned with economic loss – at least as that term is conventionally understood – but it did feature prominently in the decisions of the High Court and Court of Appeal in these proceedings. It arose from cracking that developed in two houses forming part of a terrace developed by the plaintiffs, the foundations of which were inspected and certified as complying

with applicable regulations by the first defendant (an engineer) and which were laid by the second defendant (a contractor). The foundations were completed in March 2004 and certified in September of that year, the houses were completed between September 2004 and January/February 2005, cracks were observed in December 2005, and the proceedings instituted on 30 November 2010. To escape the statute (which was pleaded by all defendants) the plaintiff had to establish that the cause of action in tort accrued after the end of November 2004.

45. Following a detailed review of the cases, McKechnie J. (with whom Clarke CJ, MacMenamin, Dunne, and O'Malley JJ. agreed) concluded that while '*discoverability'* had been found by this court in *Hegarty v. O'Loughran* [1990] 1 IR 148 not to be the test for the running of the Statute of Limitations in personal injury claims and while it was not the test in property damage claims (at para. 76), the point from which the Statute ran was as follows (at para. 111):

> *'In my view, time begins to run from the date of manifestation of damage, which means it runs from the time that the damage was capable of being discovered and capable of being discovered and capable of being proved by the plaintiff. This was the conclusion reached in respect of personal injuries claims in Hegarty v. O'Loughran. The case law since then is ambiguous as to whether such a commencement date should or indeed has been transposed to property damage claims. However, for the reasons articulated up to this point of the judgment, I am satisfied that the date of manifestation of damage is also the appropriate start*

point in property damage claims, and the 1957 Act should be construed accordingly.'

46. Specifically, McKechnie J. concluded that it was *not* the defect that needed to be capable of discovery, but the '*subsequent physical damage caused by that defect'.* That distinction between '*defect'* and '*damage'* was critical to his reasoning: he explained that (at para. 131) '*the cause of action in negligence will not arise until physical damage has been caused to the buildings; the presence of an underlying latent defect is not enough.'* On the facts, this was important – while there had been a defect in the foundations it did not manifest itself until cracking occurred, and the proceedings had been instituted within six years of this happening. But it is clear that when McKechnie J. framed the test by reference to the point at which there had been damage that was '*capable of being discovered and capable of being proved by the plaintiff'* he was *not* suggesting that the question was whether a reasonable person exercising reasonable diligence would have discovered the injury: '*a discoverability test cannot be read into or deduced from'* s. 11(2)(a) (at para 85). Nor did this mean that the start date was deferred until the plaintiff is possessed of evidence sufficient to sustain the action.

47. As Collins J. observed in the course of his judgment (at para. 34(16)), in *Gallagher,* the plaintiff's claim was held to have accrued at a time when his actual loss could not actually be quantified (that being possible only at the end of the term of the investment). It shared this feature with *Cantrell.* The facts of that case were complex but the claims essentially arose from the fact that each

of the plaintiffs had lost monies invested by them in various funds promoted by the defendant bank. The schemes in question were intended to acquire property in the United Kingdom, and investors participated by acquiring shares in various companies, subsidiaries of which would purchase the property with the benefit of a combination of the invested funds and borrowings. The schemes were initially successful, but experienced significant falls in value as the financial crises took hold. Borrowings had been obtained on foot of agreements which included a '*Loan to Value'* ('*LTV*') covenant. This allowed the lender to take control of the properties in the event that the value of the fund fell below 80% of the initial value or below the amounts lent. That eventuality transpired in relation to all of the funds, the investments in which were ultimately written down to nil. The investors had entered the schemes over a period from June 2002 to December 2006 and instituted their proceedings (in the case of all but one of the plaintiffs) in August 2014 and, in the case of the remaining plaintiff, in May of the following year.

48. Findings by the High Court that claims made by the plaintiffs for breach of contract and breach of fiduciary duty were statue barred were not appealed, and both this court and the Court of Appeal were concerned exclusively with when the claims advanced by the plaintiffs in negligence had accrued. That issue arose in a context in which, as I have noted, each of the funds had initially performed well, only incurring losses as the financial crises worsened.

49. The decision of the court focussed on two essential components to the claims – of mis-selling, and a claim relating to the LTV covenants. The defendants

contended that insofar as the mis-selling claim was concerned time ran from the point of the investment, it being then that the plaintiffs had obtained a riskier investment than they ought to have secured had the defendants not been (as was contended) negligent, while the plaintiffs argued that it was only when the investments fell below their starting value that there was any damage, and thus that it was only from that point that the cause of action accrued. The argument as to the LTV covenant was similar, the defendant contending that it was the negotiation of the loan including those covenants (which post-dated the investments) that completed the asserted claim, while the plaintiffs alleged that the relevant point was when these covenants caused the collapse in the value of the investment and its being written down to zero.

50. At para. 36 of his judgment O'Donnell J. (with whom Clarke CJ, and Dunne, Charleton and O'Malley JJ. agreed) identified the essential difference between the parties as to the effect of the decision in *Gallagher.* The defendants contended that the effect of that case was that in the case of negligence claims with respect to investments, damage normally occurs when the investment is made. The plaintiffs argued for a different principle: *Gallagher,* they contended, was decided on its own facts and, in any event, the judgment of Fennelly J., they said, endorsed an approach whereby it is only when it can be said that, as a matter of probability, the burdens of an investment outweigh its benefits that damage can be said to have occurred. That, the plaintiffs said, happened only when the value of the investments first dropped below the amount originally invested in the case of the mis-selling claims and when the investment was first written down to nil for the purpose of the LTV claims.

51. In resolving that issue, O'Donnell J. conducted a detailed analysis of the English authorities. First, he said that the courts there had rejected '*the stark propositions'* that loss only occurred when it was crystalised on the one hand, or that it inevitably occurred on the entry into the transaction, on the other (citing *Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd. (No.2)* [1997] 1 WLR 1627). Second, he viewed the decision in *Sephton* as significant for its endorsement of the decision of the High Court of Australia in *Wardley* and, in particular, the statement of Brennan J. that in the case of a transaction in which there are benefits and burdens no loss is suffered until the point at which, by bearing the burden, the plaintiff is *'worse off'* than if he had not entered into the transaction. Third, as I have noted earlier, he discerned in later decisions of the English Court of Appeal (*Shore v. Sedgwick Financial Services Ltd.*) an isolation of *Sephton* and a narrowing of the scope of the exception in that case (para. 106). He observed (at para. 103):

> '*It is, I think, no disrespect to the deployment of considerable learning, analysis, and reasoning power in the case law considered above to observe that it has not succeeded in producing a principle that is entirely clear or satisfactory. The distinctions between no transaction cases and flawed transaction cases, and between contingent risk and contingent liability, between present damage and future contingent loss, are, in their own ways, helpful, but fall short of the objective of a single bright-line rule providing clear and satisfactory conclusions. This should not be surprising. It is doubtful that the historic curiosity of the common law rule that some torts were not complete until actual loss was suffered by*

the plaintiff is a tool of sufficient flexibility to deal with modern problems posed by financial loss suffered through professional default.'

52. Fourth, O'Donnell J. stressed that the approach to be adopted to this issue should be pragmatic and should bear a relationship to the point at which an ordinary person would say they had, or had not, sustained actual loss. The courts in performing the task must '*prefer sensible pragmatism to relentless logic*' and, therefore, '*it is insufficient to identify increased risk alone as damage leading to accrual of the cause of action at that point'* (para. 139). It was put as follows (at para. 132):

> '*It is clear 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 layperson's understanding of that term. That is real actual damage, which a person would consider commencing proceedings for. The decision in Gallagher must be understood in this light. The approval in that decision of Wardley carries with it the narrower reading of the decision in Forster.'*

53. Importantly for this case, he continued (at para. 133) '*[i]t follows, however, for even that narrower reading, that there must be cases in which it can be said that actual damage is suffered on the occurrence of the transaction even if that was not reasonably discoverable for some time.'* He continued '*rights may be less*

valuable by reason of exposure to a risk in which case a cause of action may accrue, but that is not the same as saying that the risk or contingent risk in itself constitutes the loss if that does not have a present effect on the value of the right'.

54. It was this criterion – the rendering of the right less valuable – that both explained *Gallagher* (where this was the case), and dictated that the Court of Appeal in *Cantrell* had erred in equating the facts of the two cases. The alleged negligence in *Cantrell* did not itself have this effect. It was only when the benefits and burdens revealed a loss that time begins to run: if the balance between benefits and burdens depends on a contingency it is only when that contingency occurs and affects the value or the possibility of it occurring affects that value such as to create a loss, that a cause of action accrues (at para. 138). Thus, it was only at the point when the value of the investment fell below parity that the mis-selling claim accrued, and it was only at the point at which the LTV covenant had a negative impact on the valuation that damage attributed to the alleged negligence in negotiating the LTV covenant was suffered. The examination of these factors, it was repeated, had to be undertaken in the light of the need '*to prefer sensible pragmatism to relentless logic'* (at para. 139).

The correct approach to this case

55. In the course of his judgment in *Cantrell*, O'Donnell J. (at para. 140) framed the applicable test in terms that tie the decision in that case to the approach adopted

in *Brandley*: '*[t]he test is when provable injury capable of attracting compensation occurred, and that is when it is available to be proved and damage is, in the Brandley sense, manifest*'. Collins J. elaborated upon this at para. 34 of his judgment, reducing the overall effect of the authorities to seventeen propositions. I am in broad agreement with his useful synopsis.

56. In particular, rigorous logic might suggest that a plaintiff who enters into any transaction that exposes them to the risk of future damage has, for that reason alone, had their position dis-improved by the transaction and, thus, that they are damaged by it. It will always be possible to put a value on a future contingent liability. The decisions in *Gallagher* suggests, and that in *Cantrell* implements, a brake on that logic. This is necessary for a host of reasons. While lawyers and accountants might choose to categorise a pure contingency as '*damage'*, '*loss'* or '*a liability'* just about no-one else does and it is, on any view, a concept of injury that bears little relationship to experience. To so categorise that risk provokes its own practical dilemma, by demanding that plaintiffs who may appear to have suffered no tangible detriment as a consequence of a transaction or event nonetheless proceed to litigate complaints of breach of duty, and that a court engage in a theoretical evaluation of the cost and value of unmaterialised risk in assessing damages. This point is made forcefully by Fennelly J. in *Gallagher* in his consideration of one of the English cases (*DW Moore & Co. v. Ferrier* [1988] 1 WLR 267 (at para. 95)). That it may be possible to conduct such a valuation, or that judges in other cases regularly have to value future contingencies may be true, but neither consideration justifies extending the

circumstances in which that exercise – which becomes more difficult and less reliable the more remote the risk –must be undertaken.

57. And, finally, as the judgment of Fennelly J. in *Gallagher* also shows, without a frank acknowledgement that the balance between cases in which, intuitively, a plaintiff cannot realistically be said to have been damaged by a transaction or event and those in which there has been a real change in their position is best struck on a pragmatic basis, the law is forced to accommodate the demands of common sense and justice by over-refined distinctions and categorisations. That pragmatic response does not mean abandoning the need to articulate *a* test: it is just that by excluding from the legal definition of damage a purely contingent risk and that which is a '*mere possibility',* requiring instead that the damage be '*actual*', '*measurable'*, '*relevant',* '*real'*, '*immediate'* or '*not remote'*, litigants, lawyers and judges are provided with both a framework for analysis, and sufficient room to accommodate the practical realities and exigencies of an individual case. These are not at all unusual benchmarks in the law in general, or for that matter around the particular principles that have been developed to govern the award and assessment of damages in the law of tort.

58. While it is true that the approach taken in the Irish cases differs from that reflected in some of the English decisions, in fact the approach suggested in *Cantrell* echoes in some respects that urged by Lord Mance in *Sephton* (who, on one view, questioned at least some of the English Court of Appeal decisions considered in *Gallagher* and *Cantrell* – see para. 78 of the judgment). The language he used to describe the test he urged is in my view very useful when

focussed on the facts of this case. In his judgment in that case he framed the relevant inquiry by reference to whether the plaintiff's '*legal position has, through negligence, been altered to his immediate, measurable economic disadvantage'* (para. 67), later (para.77) expressing the view of the facts of that case in terms that he did not consider that '*the law should treat purely contingent loss assessed on so remote a basis as sufficiently measurable, in the absence of any change in the claimant's legal position and of any diminution in value of any particular asset'*. Unless and until '*a remote contingency eventuates the claimant is not expected to issue proceedings which he would not normally issue or wish to issue unless and until that point arrives'* (para. 78). He continued (at para. 80):

> '*Here, the requirement of relevant and measurable damage before the accrual of a tortious claim has to be interpreted in the context of purely contingent liability occurring without any immediate change in the claimant's legal position, and I see no reason to add to the strictness of the English legal position by treating the claimant as having suffered measurable loss before the contingency materialised.'*

59. All of that being so I think that for the purposes of this case the following five propositions can be extracted from the decision in Cantrell:

(i) The outcome of the case shows that the argument from which the defendant in that case began – the contention that *Gallagher* had decided that in the case of negligence claims with respect to

investments damage normally occurs when the investment was made – was necessarily rejected.

(ii) The proper interpretation of *Forster* – or at least the interpretation guiding Irish law – is *not* that purely contingent loss constitutes damage for the purposes of the accrual of the tort of negligence, but that such loss when combined with other loss (in that case the loss caused by the fact of the mortgage) may trigger the running of the limitation period.

(iii) Increased risk alone is not sufficient damage leading to the accrual of a cause of action (para. 139), nor is a loss that is entirely dependent on a contingency.

(iv) In deciding what *is* sufficient damage for these purpose, the yardstick is '*real actual damage, which a person would consider commencing proceedings for'* (para. 132). This may arise in cases in which '*rights may be less valuable by reason of exposure to a risk'* (para. 133). One of the circumstances in which this will occur is where there is a transaction involving benefits and burdens in which the balance between those benefits and burdens depends on a contingency. In that situation, it is only where that contingency occurs and affects the value or the possibility of it occurring affects that value such as to create a loss, that the cause of action accrues (para. 138).

(v) There will be cases in which it can be said that actual damage is suffered on the occurrence of a transaction even if that was not reasonably discoverable for some time (para. 133).

60. Two points should be made about these features of the decision in *Cantrell*. First, proposition (iv) should not be interpreted as envisaging a subjective or unstructured inquiry. It is intended to posit a test which is capable of objective application, while leaving some '*play at the joints'* to accommodate those cases in which the present injury is so attenuated that no reasonable litigant could be expected to proceed to court if confronted with it. The need for that flexibility will be particularly acute when distinguishing between a loss which is a pure contingency, and a circumstance in which there is an actual and present injury. As Collins J. put it in the course of his judgment in *Noble v. Barr and ors.* [2021] IECA 269 (at para. 75), the dividing line between present loss and contingent/future loss '*is blurry, imprecise and inevitably impressionistic'.* Even where a present loss *can* be identified, the cause of action will still not accrue when the adverse impact upon the right or interest in play is *de minimis.* Instead, as Lord Mance put it in *Sephton*, what must be identified to sustain the claim that the Statute has started to run is, at the relevant point in time, an '*immediate, measurable economic disadvantage'* or a loss which is '*sufficiently measurable'*.

61. Necessarily, all of this will involve in any case on the margins an assessment of the extent of the impairment of the right or property interest as of the point at

which it is asserted the cause of action has accrued. The starting line for that assessment must be that if there is *any* reduction in present value, there has been damage but, of course, there will be cases in which it may be possible to say that the extent of that damage was at the point in time in question so remote and/or minor as to render it immeasurable and thus irrelevant. The distinction is fact sensitive but real and, I think, is well evidenced by the specific features of this case, to which I will shortly return. There is inevitably some untidiness generated by this approach, but that is the price of flexibility: the objective of the courts must be to suffer that inelegance while gradually contracting the ambit of the consequent uncertainty by developing on an incremental basis principles that will govern like situated cases thereafter. The alternative is to acquiesce in what Lord Goff famously described as '*the fallacy of the instant, complete solution'*.

62. Second, much of the argument advanced on behalf of the plaintiff before the High Court, the Court of Appeal and this court was, albeit indirectly, around the proposition addressed by point (v) which, for the reasons I have noted earlier, does not properly arise in this case. While the plaintiff was inclined in this regard to stress that part of McKechnie J.'s analysis in *Brandley* which focussed on the need for the damage to be '*manifest*' (and even if that term is apt to describe the correct approach to claims of financial loss) he was concerned in that case with whether damage had manifested itself in the sense of whether it was *provable* not with whether it was *discoverable*. It must be remembered that while McKechnie J. framed the test he articulated in *Brandley* by reference to what is '*manifest'*, he did not purport to invent a new benchmark for the

commencement of the Statute of Limitations: his concern was the re-statement of what had been described in *Hegarty v. O'Loughran* as damage that was '*provable'*. The pneumoconiosis cases (*Cartledge v. Jopling* [1963] AC 758) show that it is possible for damage to be '*manifest'* in this sense in personal injury cases without necessarily being reasonably discoverable, and *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 AC 1 shows the same to be true in the case of damage to property.

63. The issue thus cannot be whether time runs from the time at which the plaintiff might reasonably have known of his loss or cause of action, but instead at what point – having regard to the test articulated here by O'Donnell J. – an injury was sustained by the plaintiff. That, in turn, falls to be assessed by reference to whether the state of affairs at the moment the sale of the property closed amounted to no more than a *'contingent loss'* or a *'risk'* (points (ii) and (iii) above), or whether the plaintiff had sustained real actual damage for which a person would consider commencing proceedings, and whether his rights were less valuable by reason of exposure to any relevant risk (point (iv)).

Application

64. Having regard to the foregoing, and taking into account the direction that the matter should be viewed both pragmatically and while bearing in mind the *'layperson's*' understanding of *'damage'*, it seems to me to be clear that where a solicitor is retained for the purposes of obtaining for his or her client a good marketable title and fails so to do, the point at which the client has suffered

actionable loss will generally be the point at which the property is conveyed to him or her. What the client has at that time obtained will usually be materially less valuable than his entitlement and he has a right to sue to recover from the negligent solicitor the difference between the value of the right he contracted for, and that of the asset he has obtained. The loss in this situation will generally be, to again use Lord Mance's language, immediate, measurable economic damage and, to revert to the language used by McKechnie J in *Brandley,* that damage is *'manifest'* in the sense that it is capable of proof and of being discovered.

65. While the plaintiff placed some emphasis on his contention that the planning issue could have been at all times (and indeed eventually was) resolved, the fact that the error that has resulted in the loss of value can be reversed will not in itself convert the present damage to the client's interests into a future contingency. Certainly, as Lord Wilson put it in *Maharaj v. Johnson* [2015] UKPC 28, [2015] PNLR 27 (at para. 24), it is '*possible to visualise … situations in which the fault could so easily be remedied that the damage would be no more than nominal'* (referring to the judgment of Hobhouse LJ in *Knapp v. Ecclesiastical Insurance Group plc.* [1998] PNLR 172, at p. 184). However, it is very hard to see how this can be so where it is the case that both (a) rectification is dependent on the agency of a third party who cannot be compelled by the plaintiff to take the steps necessary to reverse the error, and (b) where the plaintiff would be exposed to the real risk of more than a *de minimis* cost in having the error remedied.

66. *Maharaj v. Johnson* helpfully demonstrates why this must be so. In 1986 the defendants, solicitors retained by the claimant to act on their behalf in the acquisition of a property, failed to ensure that the party signing a conveyance on behalf of the vendor had proper authority to do so, with the result that the claimants did not acquire good and marketable title to the lands. This only became apparent to them in 2008 when they entered into a contract to sell the property for $20M (they purchased it for $170,000) and the title defect became apparent. The purchaser rescinded the contract, the difficulty with title was remedied by the original vendor executing a deed of confirmation but, by the time of the institution of the proceedings, the lands were said to be worth only $4M. When the claimants sued, they were met with the Statute of Limitations, and an issue was tried as to its application.

67. The opinion of the Board (which held the claim to be statute barred) was delivered by Lord Wilson (with whom Lady Hale and Lords Carnwath and Hodge agreed, Lord Clarke dissenting in part on other grounds). He noted the distinction between *'no transaction'* and *'flawed transaction'* cases and described it as *'a helpful sign-post'*, but stressed that the central concept behind each type of case was different. In *'no transaction'* cases, the claimant would not have entered into any transaction, but in the *'flawed transaction'* cases, the plaintiff would have entered into an analogous, but flawless, transaction. In the *'flawed transaction'* case, the enquiry is whether *'the value to the claimant of the flawed transaction was measurably less than what would have been the value to him of the flawless transaction'* (at para. 19). In a *'no transaction'* case,

in contrast, but for the defendant's breach of duty the plaintiff would have entered into no transaction at all. In that situation, the enquiry was whether – and if so at what point – the transaction into which the claimant entered had caused his financial position to be measurably worse than it would have been had he not entered into it. The Board stressed the need to adopt a realistic analysis of the facts in categorising a case for this purpose: on the facts there the defendants' duty was to take reasonable care to ensure that the vendor entered into a legally effective transaction. There was no suggestion that at the time of the original conveyance it would not have been possible to procure within a reasonable period the personal execution of the relevant documents by the vendor.

68. It followed that the case was a *'flawed transaction'* case, and therefore that the issue was whether a *'measurable'* as opposed to a *'purely contingent'* loss had been sustained. On the facts there, the loss was *'actual'*. This was so for three reasons: (i) the plaintiffs' failure to obtain an legal interest in the land on that date subjected them to *'significant risks'* which were present from their acquisition of the property (ii) they would have met difficulty at any time from the date of the conveyance in selling the land, and (iii) the plaintiffs could not remedy the flaw themselves, there was cost in doing so, and had the original vendor not been available or willing to remedy the defect it could have been necessary to take costly legal steps to compel her to do so.

69. Although cited in *Cantrell, Maharaj* is one of the foreign decisions that has never been questioned here. Indeed, the same conclusion would follow from

even the narrowest reading of *Forster*, as explained in *Gallagher* and *Cantrell*, and it reflects the understanding that underlay the decision of this court in *Tuohy v. Courtney* [1994] 3 IR 1.

70. The basis for the conclusion reached in the case is in my view compelling, and the rationale of the decision readily transfers to this claim. Collins J. in the course of the judgment of the Court of Appeal identified why this was the case, and why the plaintiff had from the point of the conveyance suffered an actionable loss. Firstly, that the plaintiff's mortgage proceeded on the basis that the plaintiff would obtain good title; secondly, that the plaintiff and his then wife as owners and occupiers of the property became liable to enforcement action by the Planning Authority; thirdly, that any such action would entail significant consequences for the plaintiff and his then wife; fourthly, that even in the absence of enforcement action, the marketability of the property was clearly adversely affected by the defect on title, and as a result, as the price paid for the property was for a house that was planning compliant, what they received was less valuable; and fifthly, that while it was open to the plaintiff to seek retention permission, this would entail expense, and the application might be refused which would mean further expenditure would be necessary to bring the property into compliance if this was even possible.

71. As a result, Collins J. suggested that the plaintiff and his wife acquired something different and worth less in July 2006, and that they suffered real and actual damage. Or, to put it another way, applying the hypothesis of whether the plaintiff could have maintained an action for damages against the defendant

following completion of the sale of the property to them, he could and, therefore, time ran from that point (see *Nouri v. Marvi* [2010] EWCA Civ. 1107 at para. 33 per Patten LJ). As the fourth defendant observes in the course of his submissions, the harm which the plaintiff had suffered was that he had brought a property which he could not freely use or own without the risk of prosecution under the planning legislation.

72. In this regard it is critical that on the basis of the evidence before the court, the difficulties with the planning status of the property were in no sense either *de minimis* nor of such a nature that the grant of retention permission could be compelled or was inevitable. That evidence does not disclose a situation in which there were minor and easily resolved technical deficiencies. The statement of claim makes the opposite case:

> '*Not all planning permissions and Building Bye-Law Approvals required by law for the development of the subject property as at the date of sale were obtained (save in respect of matters of trifling materiality) and further, where implemented, the conditions thereof in relation to and specifically addressed to such development were not complied with substantially.'*

73. Indeed, in his notice for particulars raised on the solicitors' defence, the plaintiff refers to '*these serious breaches of the terms and conditions of Planning Permission'*, while his submissions to the High Court described a '*substantial Planning defect'* which it is argued was the cause of the loss and damage to the plaintiff, referring later to the claim that the planning permission '*had not been*

complied with in a very substantial manner' and to the '*the problem that the dwelling house was not substantially built in compliance with Planning Permission'.*

74. Even were one to say that the manner in which hedgerows were retained, any failure to provide notifications to the planning authority or the species of plants used around the boundaries were so minor as to render the objections of the planning authority purely technical and the grant of retention permission inevitable, the statement of claim asserts that there had been a failure to submit a revised dwelling design *prior* to the commencement of the development and that the windows used in the property had been those originally proposed *and rejected* by the authority when it granted permission for the development. That interpretation of those deficiencies is supported in evidence by the correspondence from the local authority itself which, it will be recalled, both asserted that the entire development was unauthorised and threatened enforcement action. Were it to be suggested in the teeth of that evidence and those pleas in the statement of claim that, in fact, the issues raised around the permission by the local authority were either misconceived or minor in nature, it was incumbent on the plaintiff to adduce some evidence (whether from a planning consultant or otherwise) to that effect. In fact, the affidavit evidence adduced for the purposes of this application (which comprised sworn evidence of the plaintiff's solicitor) never even suggests that the deficiencies alleged by the local authority either did not in fact exist or were minor in nature. This – I hasten to add – is not to decide or indeed suggest that the plaintiff bears the burden of proving that the case is *not* statute barred: it is simply that on the

evidence before the court the planning issues were not *de minimis*, and that if the plaintiff wished to contradict that evidence and his own pleading, it was a matter for him to do so.

75. It must follow that if the approach taken in *Maharaj* reflects the law here, then the plaintiff in this action must lose the limitation issue. That much was acknowledged by Meenan J. who accepted that *Maharaj* would result in the claim being statute barred, as it would follow from the reasoning of the Board that the transaction of July 2006 was a *'flawed transaction'* and that this was the point from which the damage occurred. That reasoning, he concluded, was not consistent with the decision in *Brandley* as the Board did not have regard, as McKechnie J. did, to *'the fundamental distinction between "defect" and "damage".'*

Defect and damage

76. Meenan J. explained the effect of *Brandley* as he saw it, as follows (at para. 19):

> *'It seems to me that fundamental to the decision of McKechnie J. is the distinction between "defect" and "damage". Whereas a "defect" can occur at one point in time the resulting "damage" can occur at another. Thus, in this case, the "defect" occurred in July 2006, i.e. when the false certification of compliance was purportedly relied upon, but the "damage" did not occur to the plaintiff until the contract for the sale of the property was rescinded in October 2008, in excess of two years after the occurrence of the defect.'*

77. Collins J., in contrast, felt that the *'defect/damage'* distinction has *'special significance and meaning in the context of defective building claims'* and, moreover, that in this case the *'defect'* (the fact that the property was not compliant with planning permission) and the *'damage'* (the blot on title with consequent damage) were coincident. This is clearly correct. By identifying the title issue as merely a *'defect'* and by categorising the *'damage'* as arising only when the purchasers rescinded the contract for the sale of the property in October 2008, the High Court was in truth interpreting *Brandley* as deciding that in the context of a claim for economic loss the fact that a property conveyed to the plaintiff comprised unbeknownst to him, an unauthorised development was no more than a latent and potential trigger for damage which might, or might not, subsequently manifest itself in a measurable economic injury. This, indeed, is how the plaintiff puts his case: the flaw/defect, as he describes it, *'was present at the time of the purchase of the dwelling house as a latent defect'*.

78. But that is demonstrably wrong. From the moment the sale closed, the plaintiff and his wife were the owners of a property which was of diminished value, and which would remain at that diminished value unless and until the planning position was regularised. The *'defect'*, as the fourth defendant submits, did not need to progress in any fashion as it remained the same threat to the value of the property until corrected. That injury was on any version *'manifest'* in the sense in which McKechnie J. used that term – the fact that the property had not been constructed in accordance with the relevant permission would have been evident from matching the terms of the planning permission against the development as

it had been constructed. Regularisation of that defect was something which was – as was the case in *Maharaj* – dependent on the co-operation of a third party, which might or might not have been forthcoming and which carried with it a real and present risk of associated cost – the cost not only of obtaining advice regarding and processing an application for retention, but more significantly the potential cost of undertaking any works required to obtain it. If necessary to resort to the image at all, the *'balance'* of benefit and burden was adverse from the point of conveyance.

79. In point of fact, McKechnie J. in the course of his judgment in *Brandley* suggested that in a claim for pure economic loss, the defect and the damage coincided, at least in those cases in which it could be said that the defect *was* the damage (see para. 139(xi)). The same point seems to have been suggested by O'Donnell J. in *Cantrell* (at para. 141). Thus, in the course of his judgment, McKechnie J. considered the judgment of Geoghegan J. in *Irish Equine Foundation Ltd. v. Robinson* [1999] 2 IR 442 where the court found that time in a claim for negligence arising from the installation of a defective roof ran from the point of installation. However, McKechnie J. said, Geoghegan J. in that case treated the claim as one for pure economic loss. He explained (at para. 120-121):

> *'This perhaps makes it easier to understand why the judge seems to have conflated <u>defect</u> with <u>damage</u>: in a pure economic loss case, the defect <u>was</u> the damage <u>ab initio</u> … the judge was drawing a distinction between the time when the clock might start to run in pure economic loss cases, on the one hand, and in property damage claims, on the other.'*

80. While McKechnie J. was careful later in his judgment to stress that that conclusion was based upon the pleadings in the case that, as it happens, mirrors the understanding that is generally applied to the terms *'defect'* and *'damage'* when used in reference to claims for pure economic loss: the point is made in McGee *Limitation Periods* (9th Ed. 2022 at para. 5.012):

> *'The difficulties surrounding the concept of damage may conveniently be divided into two groups. First, there is the question of the difference between damaged property and defective property. Secondly, there is the question of whether particular items of loss are recoverable as a matter of law.* ***Problems of the first kind arise only in the context of damage to property …****'*

81. Either way, to my mind the language of *'defect'* sits uneasily with the complexion of most claims for economic loss as conventionally understood. If the concept underlying this distinction between *'defect'* and '*damage'* has any useful role to play in this arena it seems to me to be mirrored in the distinction drawn in *Gallagher* and *Cantrell* between a pure contingency, and actual damage. But once the issue is framed in those terms, it is immediately obvious that this case falls within the narrow interpretation of *Forster* accepted in both of these cases: the plaintiff faced as a consequence of the fourth defendant's alleged negligence not only the risk that the title issue would emerge in the future and at the time of and as a result of an attempted sale of the property with the attendant economic injury caused by rescission of that contract, but the

present damage of an actual diminution in the value of his property resulting from a readily discernible flaw in what had been conveyed to him.

Conclusion

82. The decisions of this court in *Gallagher* and *Cantrell* confirm that while the test for the accrual of a cause of action in negligence is, in theory, the same for all forms of injury, in taking account of the particular features of claims in negligence to recover pure economic loss it must accommodate the reality that while, in theory, losses that are contingent may have a present value at the time of the wrongful act giving rise to them, it is artificial and unreal to describe pure contingencies as actionable damage. Instead, the court must undertake a pragmatic case-by-case analysis, asking itself when a real and meaningfully measurable loss was sustained, at what point the balance between the benefits and burdens of a transaction became adverse to the interests of the plaintiff, and when a lay person would understand actionable damage for which a person would commence proceedings to have occurred.

83. There will be marginal cases in which that pragmatic approach may be difficult. But this is not such a case. Here, the plaintiff obtained in July 2006 an asset that was less valuable than that for which he had contracted, and while it may be that the reason for that diminution in value might have been reversed at comparatively little cost, or for that matter in certain events at no cost to him, this was dependent on the actions of a third party which could never have been compelled and which – had the original vendor not intervened – would have

involved a measurable cost. He had been damaged in his property as and from that point in time, and he learnt both of the fact, and the cause, of that damage within two years of incurring it. In these circumstances, his claim against the fourth named defendant in negligence is statute barred and this appeal must be dismissed.