



August 2019

Court of Appeal: Financial Loss Claims Statute Barred

Cantrell & Ors v Allied Irish Banks Plc & Ors [2019] IECA 217 (18 July 2019)

The Court of Appeal has overturned a finding of the High Court in one of the so-called “*pathway cases*”, setting the parameters for hundreds of investors seeking damages against AIB and a number of other defendants for losses made on their investments.

High Court

The appeals arose as a result of a decision of Mr. Justice Haughton in the High Court (delivered on 28 April 2017) on a preliminary issue as to when the time limitation periods started to run for claims arising from losses suffered by investors following their investment in certain “Belfry” property investment schemes (the “Belfry Funds”).

A component of the investment included a loan whereby debt was acquired with a loan to value (“LTV”) covenant which meant that if the property value fell below 80% of the purchase price of the assets, there would be an automatic default and crystallisation of the floating charge, entitling the lender to dispose of the assets. The investors, who claimed to have entered into the Belfry Funds on the basis of representations made in the investment prospectus and other

For further information on any of the issues discussed in this article please contact:



John O’Riordan
Partner, Litigation
DD: + 353 (0)1 673 1792
john.oriordan@dilloneustace.ie

Róisín Peart
Litigation PSL
DD: + 353 (0)1 673 1781
roisin.peart@dilloneustace.ie

marketing material, said that they received no notice of this covenant or its potential negative impact until they received a letter from the defendants in 2008 indicating that the property value had fallen below 80% of the purchase price and that an event of default had occurred. Ultimately, the investors lost all of their investments and commenced proceedings in 2014 seeking damages for breach of contract, negligence, breach of duty, negligent misstatement and misrepresentation.

The High Court held that the limitation period in relation to the breach of contract claims began on the date the investors entered into the contract which, as it was in excess of 6 years from the date of commencement of the proceedings, meant those claims were statute barred.

The remaining “*claims in tort*” were split into three categories by the Judge: (1) negligence *simpliciter*; (2) negligent misstatement/misrepresentation; and (3) negligence and breach of fiduciary duty/mis-management. In respect of (1) and (2) it was held that the 6 year limitation period only began to run when the actual damage occurred. That was found to be the date when the audited accounts demonstrating the actual loss in shareholder value were signed off by the directors. As that fell within the relevant limitation period, the claims were not statute barred.

Given the above findings, Mr. Justice Haughton found that it was unnecessary to determine whether the investors were entitled to rely on an allegation of fraud in relation to the alleged non-disclosure of the LTV covenants, which would have the effect of postponing any limitation periods.

Court of Appeal

The question to be determined by the Court of Appeal (Peart J., McGovern J. and Baker J.) was whether Mr. Justice Haughton erred in distinguishing between the different categories of investor claims (as they arose from the same set of facts) and in his overall finding that the investors were not statute barred in their claims of misrepresentation and negligent misstatement.

The Court found that the trial judge was incorrect in his conclusion that the damage was manifest only when the loss actually occurred and found instead that the LTV covenants, which gave rise to the ultimate loss of the investments, were present and capable of being discovered at the time of the original investment.

Furthermore, whilst Haughton J. was correct that the relevant question was when the damage was caused, the Court found that he was incorrect to conclude that this happened only when it showed in the accounts. Rather, “*the cause of action accrues when the plaintiffs were in a worse position than they would otherwise have been*”, and this was sometime after the investments were initially made when the LTV covenants were entered into for the purposes of securing the borrowings. As

this fell “*well outside*” of the relevant limitation period, the appealed claims were statute barred and it was not necessary for the Court to consider whether the trial judge was correct to distinguish between the different categories of claims.

As the trial judge had made no determination of fact regarding the allegation of fraud in relation to the claim of non-disclosure of the LTV covenants, which would have the effect of postponing any limitation periods, that matter has been returned for determination by the High Court.

Comment

This is a hugely significant case, not only because it sets the parameters for the other hundreds of claims arising from the Belfry Funds, but also because it highlights the circumstances and factors that a court should consider when determining if a claim for financial loss is statute barred. Of particular note is the reluctance expressed by the Court of Appeal to conclude that a time limitation should run before a plaintiff knew, or could have known, of the cause of action; and its reference to the fact that legislative provisions have been implemented to rectify this in the case of personal injury claims, but not for other types of damage including claims for financial loss.

Dillon Eustace

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2019 Dillon Eustace. All rights reserved.