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Supreme Court Overturns Court of Appeal in Key Financial Loss Test Case

Cantrell & Ors v Allied Irish Banks Plc & Ors [2020] IESC 11 (10 December 2020)

The Supreme Court has overturned a 2019 decision of the Court of Appeal in one of the “Belfry” property fund test cases, effectively restoring the 2017 High Court finding that the investors’ claims are not statute-barred.

This is a hugely significant decision for the hundreds of investors who are seeking damages for losses made on their investments, and indeed for other financial service providers seeking clarity in relation to the potential liability period for their investment products.

Background

The High Court was originally asked to determine a preliminary issue as to when the six year time limitation period began to run for financial loss claims in a group of cases concerning the “Belfry” property investment funds.

The key point to be addressed was when the financial loss (the “damage”) suffered by the investors actually occurred.

On 28 April 2017, Mr. Justice Haughton gave judgment that the claims of breach of contract and breach of fiduciary duty were statute-barred as those causes of action had accrued at the time the investments were first made. However, in relation to the investors’ “claims in tort” for negligence, misrepresentation and negligent misstatement, the Judge found that the actual damage occurred on the date the audited accounts demonstrating the loss were signed off

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by the directors, as that was the date that the damage was reasonably capable of being discovered. Accordingly, those claims were found to fall within the six year limitation period and were allowed to proceed. On that basis the Judge found it was unnecessary to determine the further allegation made by the investors of fraud in relation to the alleged non-disclosure of the loan to value (“LTV”) covenants which triggered the loss.

The determinations of the High Court that the investors’ claims in tort were not statute-barred were appealed to the Court of Appeal which, on 18 July 2019, overturned the judgment of Haughton J. The Court of Appeal found that the cause of action had, in fact, accrued on the date that the investment agreements containing the LTV covenants that led to the financial losses were first entered into by the investors – in other words, the date of the original investment. As this fell outside of the six year limitation period, the relevant claims were found to be statute-barred, with significant repercussions for the wider investor group.

A more detailed analysis of the High Court and Court of Appeal decisions can be found in our previous briefing [here](#).

Supreme Court

The matter was further appealed to the Supreme Court, which delivered its judgment on 10 December 2020 (O’Donnell J). The Supreme Court set aside the order of the Court of Appeal and restored the order of the High Court, allowing the investors’ claims to proceed.

In its judgment, the Supreme Court noted that it is typical for there to be a delay between the date of a negligent act (i.e. the investment advice) and the date of discovery of the alleged damage (i.e. the actual loss) in financial loss claims arising from negligence. O’Donnell J. held that a “*pragmatic*” approach must be taken to the date of accrual of such claims: A comparison should be made between the position the person is in now and the position they would have been in had they not entered into the transaction, to ascertain if the burdens of the investment outweigh its benefits. If that burden/benefit comparison reveals that a loss has been made, and that loss constitutes “*real actual damage, which a person would consider commencing proceedings for*” then a cause of action arises. In circumstances where the burden/benefit balance depends on a contingency, such as the LTV covenants in this case, “*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*”.

Applying that reasoning to this case, O’Donnell J concluded that the High Court was correct to hold that the cause of action in the mis-selling claims accrued when the value of the investment first fell below the amount of the original investment, which was likely at some point during the financial year covered by the accounts which revealed the loss, which fell within the six year limitation period. In respect of the investors’ claims relating to negligence in negotiating the LTV covenants, it was found that the damage occurred when the value of the investment dropped to the point that the covenants were triggered, which also fell within the six year limitation period.

Comment

This judgment will certainly be welcome news to the “Belfry” investor group, who may now proceed with the relevant claims. However, it simultaneously creates uncertainty for financial service providers in determining what the potential liability period is for their investment products, with the risk of an increase in the number of claims in this area.

A further interesting point to note from this judgement is the view expressed by O’Donnell J. in relation to the claims for breach of contract, which had been held to be statute-barred by the High Court. As that aspect of the High Court judgment was not appealed, the Supreme Court indicated it could not address it in the context of this case. However, the distinction that was drawn by the High Court between the time limits which applied to the breach of contract claims and those that applied to the negligence claims was commented on by O’Donnell J, who said it was “*more than a little odd that the same alleged wrongful act having the same consequences could be barred in contract in some cases before the cause of action in tort may have accrued*”. The reason for that distinction is generally understood to be that contracts reflect the expressed will of the parties but O’Donnell J felt this “*may be to prefer form over substance*” with the inevitable result being that plaintiff’s must identify separate causes of action/damage leading to more complicated proceedings.

Ultimately the Supreme Court concluded that the legal position in Irish law in relation to the date of accrual of a cause of action in negligence is “*inherently unsatisfactory, and incapable of solving the serious difficulties raised by the problem of latent damage*”. The need for urgent reform of the law was specifically highlighted and a call was made for legislation to be enacted by the Oireachtas to clarify the applicable time limitation periods and set clear criteria for determining discoverability. We will watch this space with interest.

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