INTRODUCTION

1. The general limitation period for actions in contract and tort is a six year one. A lot can change in a six year period. Six years ago, €3 billion was spent in domestic commercial property transactions in one year. November, 2006 must, with the benefit of hindsight, be seen as close to the top of the Irish property market and those who entered into transactions around that time are nursing significant losses. Some of those who are nursing losses are likely to be considering whether they have redress against their professional advisors. The subject of this paper is the potential effect of the Statute of Limitations, 1957 on professional negligence actions.

2. At the outset, it should be noted that in many cases, where a party enters into a transaction, or otherwise undertakes a course of action, on foot of negligent advice from a professional advisor, there will be no dispute as to when the cause of action accrues, in that it will be undisputed that the course of action is detrimental to the client and consequently, he will suffer damage at that point. There are, however, cases where there is a lack of clarity as to when financial loss has been suffered.

3. One case of this type is the recent decision of the Supreme Court in *Gallagher v ACC Bank plc* [2012] IESC 35\(^1\), where a bank customer who borrowed €500,000 to invest in a capital guaranteed product and failed to make money which would enable him to cover the interest sued the bank asserting that the transaction was an

\(^1\) The author should disclose that he acted on behalf of the Defendant in this case.
unsuitable one. However, on the basis that he had waited for more than six years after making the investment to bring the proceedings, the Supreme Court, reversing the High Court\(^2\), held that the claim was statute barred.

4. While not a professional negligence action, \textit{Gallagher} is a significant case in that it is the first time that the Supreme Court has examined closely the application of limitation periods to claims for financial loss, the classic claim which one will see in a commercial professional negligence action.

5. This paper looks first at the law in general in this area, focussing on contract and tort claims, next considers the decision in \textit{Gallagher} and then looks at some of the principal foreign decisions. In some ways, \textit{Gallagher} is more significant for what it did not decide, as opposed to what it did.

6. The decision has attracted significant comment- this week a Sunday newspaper started a campaign to reform the law in this area, insofar as claims of “mis-selling” by financial institutions was concerned\(^3\). However, there is a risk of over-stating the effect of the decision- the Supreme Court’s decision was very much based on the facts of the case and, far from setting out general principles or adopting or rejecting the approach taken in similar English or Australian decisions (which cannot all be reconciled easily), the Court went to some lengths to distance itself from making such a decision. So the first point to be made to practitioners in relation to \textit{Gallagher} is that it is not as far-reaching or plaintiff unhelpful a decision as it may first appear- while the outcome was adverse to the plaintiffs in that litigation, some of the comments made by the Court appear to be more plaintiff-friendly than the approach taken in English decisions.

7. The second point for practitioners, however, is that \textit{Gallagher} illustrates very clearly that just because loss may not have crystallised so as to be capable of 

\(^2\)\textit{Reported as O’Hara v. ACC Bank plc [2011] IEHC 367}

\(^3\)\textit{“Mis-selling deadline scandal”, Sunday Times, 25 November, 2012}
precise quantification does not mean that the Statute has not started to run and, consequently, if six years is allowed to elapse from the date that a party enters into a transaction, there is a risk, even in the case of a long running investment-depending on the facts-that any claim may become statute barred.

GENERAL PRINCIPLES

8. In relation to both contract and tort, the relevant provisions of the Statute of Limitations, 1957⁴ provide for a limitation period of “six years from the date on which the cause of action accrued”.

9. It is well established that a cause of action in contract accrues when the breach of contract occurs, not when the damage is suffered, since the essence of an action for breach of contract is the breach itself, rather than any resulting damage which may be occasioned thereby (see Irish Equine Foundation Ltd. v. Robinson [1999] 2 IR 442).

10. The position is different in tort. Torts can be grouped into three categories⁵: those actionable per se, such as defamation, where the cause of action accrues on the commission of the wrong, continuing torts, such as a continuing trespass to land, where a fresh cause of action accrues every day but the right of action is restricted to that part of the wrong committed in the previous six years⁶ and single torts requiring proof of damage, such as negligence (which will be the most relevant in the professional negligence context), where a cause of action accrues upon the plaintiff suffering damage.

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⁴ Section 11(1)(a) in the case of contract, Section 11(2)(a), as amended by Section 3 of the Statute of Limitations (Amendment) Act, 1991, in the case of tort
⁵ See Canny, Limitation of Actions, 2010, at paragraph 7-01, which analysis was accepted by Charleton J. in the High Court judgment in Gallagher (at paragraph 25).
⁶ which can also be relevant in the professional negligence context, for example where an architect is under a continuing duty to keep a design under review during a construction period- see, for example, Brickfield Properties Ltd. v. Newton [1971] 1 WLR 862
11. In Hegarty v. O’Loughran [1990] IR 148, the Supreme Court (Griffin, J.) stated (at p.158):

“...when the wrong is not actionable without actual damage as in the case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until the damage happens or occurs”

12. A plaintiff who has a cause of action in contract and tort is entitled to pursue whichever claim gives him the most advantageous limitation period (see Finlay v. Murtagh [1979] IR 249).

13. While remedies in contract and tort can differ, in many professional negligence actions, in particular where a party pursues a course of action which, but for negligent advice he would not have pursued, the measure of damages is likely to be the same under both headings- as the High Court (Clarke J.) noted in ACC v. Johnston [2010] 4 IR 605, where the breach of contract involves professional negligence on the part of an advisor, then there is unlikely to be, in most cases, any significant difference between the proper approach, whether same is considered from the perspective of a tort or a breach of contract, for the breach of contact concerned will simply be a failure to act or advise in a non-negligent way (with the relevant duty of care being assessed by according due weight to any relevant terms of the contract).

14. Indeed, in Gallagher, O’Donnell J. noted (at paragraph 3) that not only was there a similarity between the claim in contract and tort, but they were in fact identical, the same facts being packaged as a claim in contract, negligence and negligent misstatement.

15. Accordingly, while the enactment of the Statute pre-dates Hedley Byrne Ltd. v. Heller & Partners Ltd. [1964] AC 465, the effect of that judgment and the
development of a remedy in tort for financial loss is that a plaintiff can have two different limitation periods applicable to what is in substance the same claim.

16. This led to an interesting debate in the Supreme Court in *Gallagher* as to whether from a policy perspective, it made sense to seek to align limitation periods in contract and in tort, on which Fennelly J. (with whom the other members of the Court agreed) and O’Donnell J. expressed different views.

17. In England, the argument was made by Lord Nicholls in *Nykredit Mortgage Bank plc v. Erdman* [1997] 1 WLR 167, that where appropriate the policy of the law should be to minimise rather than expand the disparity between the running of time and contract in tort cases. Fennelly J. did not consider this to be appropriate considering that it involved the interpretation of an Act of the Oireachtas by reference to policy considerations.

18. In contrast, O’Donnell J. noted (at paragraph 5) that if and insofar as the Oireachtas had made a choice, the choice was one made at a time when the type of tort liability now contemplated was unknown. O’Donnell J. also expressed the view that an alignment between the two would help achieve a fair and predictable result, referring inter alia to the litigation “Russian roulette” which could arise where a plaintiff would run a risk of starting a claim too early. However, the majority view of the Supreme Court was that of Fennelly J.

**WHEN IS DAMAGE SUFFERED?**

19. Accordingly, in any case where tortious liability is invoked, which will be the case in most professional negligence actions, the key determination is when, in the case of financial loss, damage is suffered. This can become particularly difficult where the immediate consequence of the negligence by a professional is to expose the client to a risk of future loss. This issue has been considered in
some detail by the English Courts, in a series of judgments which are difficult to reconcile fully with each other and on which the Supreme Court expressed no concluded view in *Gallager*.

**GALLAGHER**

20. Turning to *Gallagher*, there the Plaintiff invested €500,000 in an investment bond, known as “SolidWorld Bond 4” advertised and marketed by the Defendant bank. The performance of the bond, which was capital guaranteed, was linked to the performance of a number of “blue chip” shares.

21. The Plaintiff borrowed the money to invest from the bank and the shares did not increase in value such that he would cover his borrowings. He complained that he was induced to purchase what he characterised as a combined borrow to invest financial product which he alleged was completely unsuitable for him or for any investor, on the basis that (on his case) the investment would have had to far out perform the market if he were to get any return over and above the interest he had to pay on the sum he borrowed. He did not make any complaint about the quality of management of the investments in the bond.

22. In the High Court, Charleton J. took the view, emphasising (at paragraph 42) that the transaction was one that could turn out for better or for worse, that the purchaser of the bond did not suffer an immediate loss on purchase but, instead, faced a contingent loss. Accordingly, he held that the plaintiff’s claim was not statute barred.

23. The Supreme Court disagreed. The start point for Fennelly J., who delivered the principal judgment, was the Supreme Court’s decision in *Hegarty v. O’Loughran*, a medical negligence action. In *Hegarty*, Finlay C.J. held that the time limit commenced to run at the time when a “provable personal injury, capable of
“attracting compensation” occurred to the Plaintiff. In his concurring judgment, Griffin J. stated that the date of accrual is the date when a Plaintiff is in a position to establish “by evidence” that damage has been caused to him.

24. Having carried out an extensive review of English authority, together with a decision of the Australian High Court, *Wardley Australia Ltd. v. Western Australia* (1992) 175 CLR 514, Fennelly J. ultimately formed the view that the caselaw involved “endless prognostication” and the drawing of “fine distinctions” (at paragraph 96) but did not give any “easy answers” (at paragraph 93). He concluded that it was not necessary to choose between the different approaches considered in English cases (at paragraph 104). He considered (at paragraph 104) that the mere possibility of a loss was not enough and considered the following statement of Brennan J. in *Wardley* to provide a useful framework of analysis:

“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...”

25. Fennelly J. went on (at paragraph 111) to emphasise, however, that there will be cases where there is immediate loss, even if there are difficulties in quantification and contingencies. He compared the position to a personal injuries action, where there may be various uncertainties and contingencies, for example by reference to future loss of earnings or medical costs, but that such uncertainties did not prevent the early accrual of a cause of action, provided that the plaintiff had suffered actual loss at the time of entry into the transaction.

26. Turning to the facts of the case, Fennelly J. held (at paragraph 116) that it was inescapable that the Plaintiff’s claim was that he suffered damage by the very fact of entering into the transaction and purchasing the bond and, consequently, that the cause of action then accrued. On its “own particular pleaded facts”, Fennelly
J. considered the case to be “a clear one” (at paragraph 119) and not the cause of action accrued when the Plaintiff purchased the bond.

FOREIGN AUTHORITIES

27. While the judgment of Fennelly J. runs to forty one pages, it is really the last five pages where he sets out his views on the appropriate legal test and its application to the facts. Prior to that, however, he engaged in a detailed review of the relevant English caselaw, together with Wardley.

Forster

28. The start point of this analysis is the decision of the Court of Appeal in Forster v. Outred [1982] 1 WLR 86. There the plaintiff entered into a mortgage to secure borrowings of her son and subsequently brought professional negligence proceedings against her solicitor for failing to explain the transaction. The proceedings were held to be statute barred on the basis that damage had been suffered at the time that the plaintiff entered into the mortgage, and not at a later time when she was called upon to pay.

29. When subsequent decisions attempt to explain Forster, greatest emphasis is placed on the fact that the plaintiff’s interest in the property had suffered an immediate reduction in value.7

30. The basis for this conclusion was that when the plaintiff had entered into the mortgage, she had encumbered her interest with a legal charge which might, according to matters outside her control, mature into financial loss (see the judgment of Stephenson L.J. at page 98).

7 This aspect of the case was emphasised by the High Court of Australia in Wardley, at page 529.
31. Dunn L.J. similarly stated (at page 99) that in cases of financial or economic loss, the damage crystallises and the cause of action is complete at the date when the Plaintiff, in reliance on the negligent advice, acts to his detriment. Encumbering her property with a mortgage was such a detriment even if payment was never demanded on foot of it.

Moore

32. A similar approach was taken in *DW Moore & Co. v. Ferrier* [1988] 1 WLR 267. Here a firm of insurance brokers took on a new shareholder and director, who entered into a written agreement containing a restrictive covenant. Some years later, this individual left the firm and it transpired that the covenant was valueless. When the firm sued their insurers, the Court of Appeal held that the cause of action against the solicitors had accrued at the time when a valueless restrictive covenant was entered into on negligent advice rather than when the plaintiff sought to rely on the covenant. In response to the difficulty in assessing damages at the time in question, Bingham LJ stated (at pages 279-280):

“*If the quantification of the plaintiffs' damage had fallen to be considered shortly after the execution of either agreement, problems of assessment would undoubtedly have arisen.... In making his assessment the judge would have had to attach a money value to a possible future contingency; but judges do this every day in awarding claimants damages for the risk of epilepsy, the risk of osteoarthritis, the risk of possible future operations, the risk of losing a job and so on. The valuation exercise is, of course, different, but the difference is one of subject matter, not of kind.*”

33. In *Gallagher*, Fennelly J. characterised the finding that the cause of action against the Solicitors in *Moore* accrued immediately the negligent drafting of the non-compete clause as “remarkable” (at paragraph 95) and posed the rhetorical question as to whether the other directors were seriously expected to sue the
solicitors at a time when there was no reason to expect the new director to leave the company or, a fortiori, to set up competition within the forbidden geographical area.\(^8\)

**Wardley**

34. Fennelly J.’s comments appear to be to some extent consistent with the approach taken by the High Court of Australia in *Wardley*. The facts of *Wardley* will resonate with an Irish audience. At a time of market turmoil, it was represented to the State of Western Australia that Rothwells, a merchant bank, was sound and had substantial net assets and that was only experiencing liquidity difficulties as a result of withdrawals of deposits by depositors. On foot of this representation, the State was led to grant an indemnity to a bank against a facility granted by that bank to Rothwells, undertaking to indemnify it against any loss which might arise if Rothwells did not satisfy in full its liability under a facility to be granted by the Bank to Rothwells. Ultimately, Rothwells was wound up and the State suffered loss.

35. The view of the Australian High Court was that where a party entered into a contract which exposes him to a contingent liability, he does not suffer damage until the contingency is fulfilled- i.e. it was only when a call was made on the indemnity which, in the present case required that the bank’s net loss be ascertained and quantified, that the cause of action accrued.

36. The Court rejected the contention that the previous English decisions established a principle that a plaintiff sustains loss on entry into an agreement, notwithstanding the fact that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. The Court (at page 531) characterised

\(^{8}\) A similar approach was also taken in *Iron Trade Mutual Insurance Co. v. Buckenham* [1990] 1 All ER 808, *Bell v. Peter Browne & Co.* [1990] 2 QB 495 and in *Knapp v. Ecclesiastical Insurance Group plc* [1998] PNLR 172. Similar to his comments on *Moore*, in commenting on *Bell*, Fennelly J. appeared to be sceptical of the suggestion that the husband was implicitly expected to sue the Solicitors immediately after the negligent drafting of the deed conveying the family home.
the decisions in cases which involved contingent loss, specifically *Forster* and *Moore*, as being decisions turning on the plaintiff having sustained measureable loss at an earlier time, quite apart from the contingent loss which threatened at a later stage.\(^{9}\)

37. The Court concluded (at page 533) that it was unjust and unreasonable to expect a plaintiff to commence proceedings before a contingency was fulfilled and that if an action was commenced before that date, it would fail if the events so transpired that it became clear that no loss was, or would be, incurred. Moreover, a plaintiff would run the risk that damages would be estimated on a contingency basis, in which event the compensation awarded might not fully compensate the plaintiff for the loss ultimately suffered. Such practical consequences outweighed the strength of the argument that the principle applicable to the cases in which the plaintiff.

*Sephton*

38. The distinction between actual and contingent liabilities was considered in detail by the House of Lords in *Law Society v. Sephton* [2006] 2 AC 543.\(^{10}\) There, accountants had wrongly signed off on a solicitor’s accounts, incorrectly stating that they had properly examined relevant documents. The solicitor misappropriated funds from the client account and the Law Society had to make compensation payments to former clients, subsequent to which it sued the accountants, alleging that it had relied on their reports in deciding not to exercise any investigatory powers.

39. The House of Lords held that damage only occurred when a claim was made against the Law Society’s fund, on the basis that a contingent liability, such as the possibility of an obligation to pay money into the future, was not itself damage

\(^{9}\) In *Sephton*, Lord Walker agreed with this proposition (at paragraph 49). It is also echoed by Fennelly J. in his analysis at paragraph 111 of *Gallagher*.

\(^{10}\) Referred to by the Supreme Court in *Richardson v. Madden* [2010] IESC 13
until the contingency occurred.\(^{11}\)

40. It is important to note that the House of Lords did not overturn the established line of authority referred to above. Lord Walker, referring to *Forster, Bell and Iron Trade*, stated (at paragraph 45) that they were all cases where the client, through the negligence of his professional advisor, ended up with a package of rights less valuable than he was entitled to expect, metaphorically damaged or defective goods. Referring to other authorities, including *Knapp* and *Moore*, he noted (at paragraph 47) that in those cases, the claimant had, as a result of professional negligence, suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset or had been disappointed in an asset which he acquired\(^ {12}\).

41. Lord Walker (at paragraph 48) contrasted *Sephton*, as being a case involving the imposition on the claimant of “a purely personal and wholly contingent liability, unsecured by a charge on any of the claimant's assets”. He also expressed the view that the outcome in *Forster* might have been different, had the mother given a personal covenant guaranteeing her son's debts and if she had not given any security over any of her own assets.

42. It is clear that the House of Lords placed considerable emphasis on the fact that what was involved in *Sephton* was a “wholly contingent liability”- the Law Society only bore the risk of having to meet claims, which might or might not be made. The need for a liability to be “wholly contingent” in order for damage not to have been suffered is also evident from the following passage from the judgment of Lord Hoffmann (at paragraphs 30-31):

“In my opinion, therefore, the question must be decided on principle. A contingent liability is not as such damage until the contingency occurs.

\(^{11}\) A similar approach was taken by the High Court (Irvine J) in *Darby v. Shanley* [2009] IEHC 459

\(^{12}\) It is also noteworthy that Lord Walker stated (see paragraphs 41, 48) that a cause of action can arise notwithstanding the fact that it is not possible to quantify the damages.
The existence of a contingent liability may depress the value of other property, as in Forster v Outred & Co [1982] 1 W.L.R. 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone as in this case, the contingency is not damage.” (emphasis added)

43. From this, it would appear that the approach taken by the House of Lords was to establish two cumulative criteria before it could be said that the statute does not begin to run at the time of entry into a transaction- not only must the liability be a contingent one but the party who enters into the transaction must not receive less than he should have done and be no worse off by entering into the transaction. It is where the contingency is “standing alone” that there will be no damage.

AXA Insurance

44. The next case of relevance is AXA Insurance v. Akther & Darby [2010] 1 WLR 1662. Here, the plaintiff provided after the event legal expenses insurance, whereby they underwrote the ability of plaintiffs to bring personal injuries claims on a no win no fee basis. Solicitors, who acted on a panel, were only meant to accept into the scheme cases which had prospects of success of at least 51%. The defendant firm was sued for having wrongly vetted claims and an issue arose as to whether the claim was statute barred if a claim had been admitted more than six years prior to the proceedings.

45. The Court of Appeal held that damage was suffered by an insurer at the time where policies were underwritten which would incur liabilities in excess of those which would have been incurred had breaches by solicitors in vetting claims not occurred. Arden L.J. explained the position as follows (at paragraph 57):
“In my judgment, it is clear from the Sephton case that the incurring of a purely contingent liability which may result in an actual liability at a future point in time does not cause the limitation period to start to run. However, this is not the case where in addition to incurring a contingent liability the claimant suffers damage to a particular asset of his, for example because he also executes security over his property, as in Forster's case [1982] 1 WLR 86. In that case, time began to run from the date of execution of the security. In my judgment, there is no difference between the case where security is given over a tangible asset, such as real property, and the case where security is given over an intangible asset, such as a debt. In either case, the claimant's property is damaged. Likewise, the principle that the incurring of a purely contingent liability is not itself damage does not apply where the claimant acquires a contingent liability as a part of a package of rights under a bilateral transaction and the value of that package has been diminished by the negligence of the defendant: see the Sephton case [2006] 2 AC 543, paras 30 and 45, per Lord Hoffmann and per Lord Walker respectively.”

46. Longmore L.J. rejected the argument (similar to that made by the plaintiff in Gallagher) that it was necessary for claims which were likely to fail to actually fail before damage was suffered such as to trigger the limitation period, stating (at paragraph 82):

“The most that can be said in the present case is that the loss suffered by the claimant insurers is contingent upon the claim, which is (ex hypothesi) likely to fail, actually failing. But that does not make the case a case of a 'mere contingent liability' because the claimants have entered into a flawed transaction which they ought not to have entered into. To my mind that is the damage which the claimants have suffered and that occurred at the time of the inception of the policies. It is true that the insurers are not immediately worse off as a result of entering into the ATE policies because
they receive the premiums up front and it will be a short time before they are “on balance worse off” to use Lord Hoffmann's phrase in para 20 of the Sephton case [2006] 2 AC 543, but that will be well before the underlying claim has “failed” which is the time argued for by Mr Hollander. In this context it is important to appreciate that the alleged negligence is that the defendant solicitors were negligent in selecting claims which had less than a 51% chance of success. The loss to insurers was therefore in the natural order of things bound to occur. I therefore agree with Arden LJ (para 61) that there was measurable relevant loss on the inception of the policies in that any valuation of the policies at that time would have to take into account the assumed fact that there had been no proper vetting. I also agree with her in relation to what have been called the ‘conduct breaches’.” (emphasis added)

Shore

47. Perhaps the most controversial English decision is the judgment of the Court of Appeal in Shore v. Sedgwick Financial Services Ltd. [2008] PNLR 37. Here, it was held that a party who transferred pension assets into a riskier investment suffered damage at the time of transfer, notwithstanding the fact that he had parted with a sum of money and received an asset worth the same sum. In Gallagher, Fennelly J. characterised Shore (at paragraph 82) as taking an “extra step”, which he felt compounded the difficulties in establishing a clear principle from the cases.

48. In Shore, Dyson LJ, referring to the authorities, noted (at paragraph 27) that a clear distinction had been drawn between transactions which give rise to pure contingent liabilities (“contingent liability cases”) and transaction cases where a party enters into a transaction and gets less than he should have got. He took the view that the case before him was not a contingent liability case.
49. Of particular significance to the instant case is the explanation of Dyson LJ (at paragraphs 37-38) as to why the case was a transaction case, which turned on his description of when damage is suffered where a party purchases a riskier investment than that which he intended:

“It is Mr Shore's case (assumed for present purposes to be established) that the PFW scheme was inferior to the Avesta scheme because it was riskier. It was inferior because Mr Shore wanted a secure scheme: he did not want to take risks. In other words, from Mr Shore's point of view, it was less advantageous and caused him detriment. If he had wanted a more insecure income than that provided by the Avesta scheme, then he would have got what he wanted and would have suffered no detriment. In the event, however, he made a risky investment with an uncertain income stream instead of a safe investment with a fixed and certain income stream which is what he wanted.

The analogy with the investor who is negligently advised to buy shares rather than Government bonds does not assist Mr Soole. In my judgment, an investor who wishes to place £100 in a secure risk-free investment and, in reliance on negligent advice, purchases shares does suffer financial detriment on the acquisition of the shares despite the fact that he pays the market price for the shares. It is no answer to this investor's complaint that he has been induced to buy a risky investment when he wanted a safe one to say that the risky investment was worth what he paid for it in the market. His complaint is that he did not want a risky investment. A claim for damages immediately upon the acquisition of the shares would succeed. The investor would at least be entitled to the difference between the cost of buying the Government bonds and the cost of buying and selling the shares.”

13 Emphasis in original
14 Emphasis added
Commenting on the decision in *Shore*, Jackson & Powell (*Professional Liability*, 7th ed., 2012, at paragraph 5-055) state:

“Where the complaint is that the breach of duty by the financial advisor caused the claimant to make an investment which carried a greater degree of risk than was appropriate, damage is suffered when that investment is made and the claimant is exposed to the risk, even if the risk does not materialise at that point and there is a chance that the investment actually made will out-perform that which should or would have been made.”

In *Gallagher*, Fennelly J. stated that *Shore* was, perhaps, the case with which he had the greatest difficulty, noting that it seemed to have been accepted that the Plaintiff got full market value at the time for the rights which he transferred out of a pension scheme into another investment (at paragraph 96).

Fennelly J. was critical (at paragraph 86) of the view of Dyson L.J. that the possibility of actual financial harm constituted the loss, noting that this was far removed from the view of the High Court of Australia in *Wardley* and, in particular, the idea that a transaction in which there were benefits and burdens resulted in loss or damage only if an adverse balance was struck.

**CONCLUSION**

Where does this leave us? Jackson & Powell (at page 157) suggest that in English law, the authorities now show that the key distinction is between cases where there is an immediate loss of value of some asset or interest in an asset as a result of the acceptance of a contingent liability (for example, if it is charged to secure that liability) and cases in which a plaintiff has merely become a subject to a contingency which may or may not lead to loss in the future. In the former cases,
actionable damage is suffered when the contingent liability is accepted. In the latter cases, time does not run until the risk or contingency materialises causing actual loss.

54. The authors accept that this is a very fine distinction. They state that another way in which actionable damage can be suffered is if a plaintiff obtains something less valuable than he would have done had the defendant not been negligent and, furthermore, by reference to Shore, when a plaintiff obtains something which is materially different from what he was entitled to expect to obtain, this will readily be held to amount to actionable damage even if, on one view, he has suffered no monetary loss.

55. Ultimately, while the Supreme Court grappled in Gallagher with the English case law and pointed out some of the fine distinctions and apparent anomalies which it threw up, in particular in relation to establishing precisely what was a contingency as opposed to an actual loss, it did not provide general guidance as to how these issues would be dealt with by an Irish Court, with Fennelly J. expressly doubting (at paragraph 105) whether it would be possible to lay down a rule capable of easy application in every case. Consequently, as the Supreme Court recognised, the law in this jurisdiction is likely to develop on an incremental basis.

56. Having said that, there does appear to be a level of reluctance on the part of the Supreme Court to adopt the approach taken by the English courts, in particular that taken in Shore.

57. The sense of the judgment of Fennelly J. is that need for “provable” loss, as per Hegarty, coupled with the “framework of analysis” provided by Wardley inform the Supreme Court’s thinking. That, in turn, suggests that if and insofar as a plaintiff’s net worth is reduced as a consequence of an event, loss or damage is suffered at that time, even if the quantification of the loss and damage is not then ascertainable. In contrast, if a transaction gives rise to benefits and burdens, the
transaction results in loss or damage only if an adverse balance is struck—no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is worse off than if he had not entered into the transaction in question.

58. More troublesome are cases like *Shore*. In that case, the damage was considered to be provable from the outset, by reference to the cost of unscrambling the unwanted transaction. It appears, however, that such an approach is unlikely to favour with the Irish courts, having regard to the analysis of Fennelly J..

59. Finally, it should be noted that there is the possibility of statutory reform in this area. In its 2011 report\(^{15}\), the Law Reform Commission recommended that a two year limitation period should run in all cases from the date of knowledge of the plaintiff, subject to an ultimate limitation period, which is recommended at fifteen years from the date of the act or omission giving rise to the cause of action, with a narrow statutory exception to extend or disapply this period.

60. In conclusion, the two points made at the outset should be reiterated. First, while it is difficult to glean general principles from *Gallagher*, given the Supreme Court’s express desire to consider the area on a case by case basis, its analysis is not necessarily unhelpful to plaintiffs. Secondly, it should be emphasised that an inability to quantify loss does not necessarily mean that damage has not been suffered and that time has started running for the purposes of the Statute.

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\(^{15}\) *Report on Limitation of Actions* (LRC 104-2011)