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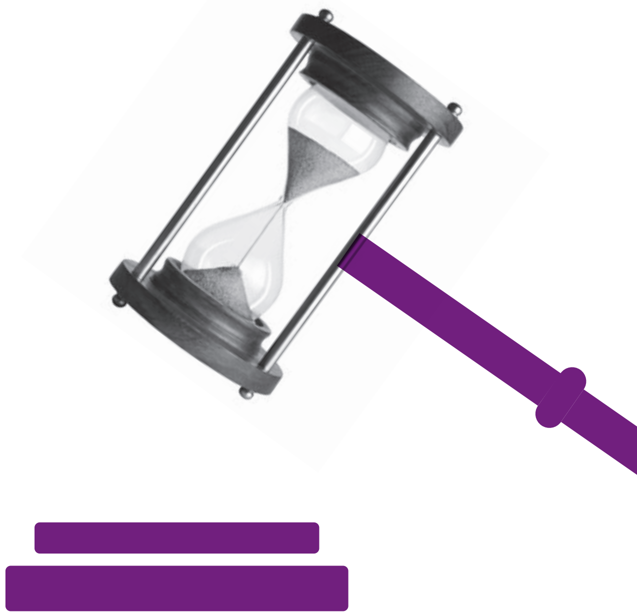

Timely action

Cantrell v AIB ("the Belfry Funds litigation")

On 28 April 2017, Haughton J., in the High Court, delivered his ruling on the question of whether the plaintiff's claims were out of time under the Statute of Limitations Act 1957. This arose because the plaintiffs' claims had been instituted more than six years after they invested in the Belfry Property Investment Scheme (the "Scheme").

Background

This ruling clears the way for the continuation of the "Belfry Funds" litigation. The litigation involves eight financial loss "pathfinder" actions brought by a number of plaintiffs against AIB, which are based on the following two claims:

i. As a result of a number of alleged negligent misrepresentations contained in the Belfry Property Investment Scheme Prospectus (the "**Prospectus**"), AIB breached its duty to the plaintiffs.

ii. AIB failed to adequately advise the plaintiffs regarding all aspects of the fund, in particular, the Loan-to-Value ("**LTV**") covenant.

When does the date of accrual arise in negligent misstatement claims?

Haughton J. accepted that there is currently no clear answer in law regarding the date upon which the negligent misstatement action, which arises from a contractual relationship, first arises. In this case, the question that arose was whether the action accrued on the date the negligent misstatement was given and the contract was entered into, or when the plaintiff subsequently suffered actual loss. Haughton J. accepted there may be policy reasons that favour the cause of action arising at the time when the investment contract was entered into. He observed that when the Court is determining whether to permit such claims, it must try to strike a balance between the parties competing interests. On the one hand, policy permits a plaintiff to pursue a claim, and on the other hand, the desire that these types of claims are brought promptly so that a defendant will not have an everlasting fear of potentially being sued.

When did the plaintiff's negligence claim arise?

In negligence, in particular in respect of negligent misstatement claims where the damage suffered is purely financial in nature, Haughton J. laid down the following guidelines in order to determine when time begins to run and, therefore, when actual damage occurred:

- The Court will determine based on the merits of each case when the cause of action will be regarded as accruing and when time starts to run.
- The Court must decide on a case-by-case basis when the negligence action is complete. However, a negligence action cannot be regarded as complete until there is a wrong and actual damage.
- The time when actual damage is regarded as arising must be determined by the evidence presented in each case.
- In the absence of fraud or fraudulent concealment, time begins to run from the date there is a probability of financial loss arising from the negligent misstatement, and is not affected by the date upon which the plaintiff discovered or could have reasonably discovered the existence of the cause of action.

Had the time expired on the Negligence Claims?

Applying the aforementioned guidelines, Haughton J. held that in respect of the claims for negligent misstatement, time did not begin to run until the plaintiffs suffered actual loss, which did not occur when each of the plaintiffs invested in the Scheme because at that time there was only a mere possibility of loss occurring. Similarly, in respect of the claims relating to the LTV covenants, actual loss did not arise until the value in the plaintiff's investments in each Belfry fund was written down to nil. It should be noted that the Court refused to make any rulings in respect of the allegations of fraudulent concealment.

Turning to the claims for breach of statutory and fiduciary duty respectively, the Court held the plaintiff's right to bring these claims had expired because time began to run and actual damage occurred from the date the investment properties were acquired, investments rotated, and AIB charged the relevant fees. Further, because each of the plaintiffs were furnished with annual property updates and audited accounts, they were expressly notified of any alleged wrongs. Therefore, because actual damage had occurred more than six years before any of the plaintiffs instituted proceedings, all of their claims relating to these matters were out of time under the Statute of Limitations Act 1957 and would not be considered at the future trial of the action.

The Court did not make any ruling on the substantive issues. These will be determined at the trial of the action.

Practical implications

This judgment provides valuable guidance regarding the guidelines and principles a Court will apply when it is determining:

i. when actual loss will be regarded as arising

ii. the date upon which time begins to run in respect of a negligent misstatement claim where the plaintiff's loss is purely financial

Of further note, is the Courts observations regarding policy considerations and that it will try to strike a balance between the parties competing interests when it is determining the date the negligent misstatement claim accrued.

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