EVERSHEDS SUTHERLAND

Providing guidance

Court of appeal clarifies time limits in financial loss claims

Under the Statute of Limitations, claims in tort (such as negligence) must be brought within six years of the date of accrual of the cause of action. Financial loss claims arising out of negligent acts can be complex, because the cause of action does not always accrue when the wrong is committed.

Actual damage is necessary to complete the wrong. The investment or product may perform well in the initial period after the wrong is committed, and the damage may not be readily apparent. So when then does the cause of action accrue? This is exactly what the Court of Appeal was recently called upon to consider in what is commonly referred to as the *Belfry Funds Litigation*[1].

Background

The Belfry funds were property investment schemes undertaken by six UK Belfry Property companies, and in which the plaintiffs invested. The investments were made between 2002 and 2006. AIB, a defendant in the proceedings, was the placing agent and promoter for the investments. The other named defendants included the Belfry funds and the Directors of the funds.

The property investments were funded by a mix of equity and bank debt. The bank debt was negotiated by the Directors on behalf of the funds and was entered into after the plaintiffs had made their investments, and included Loan to Value (LTV) covenants which the plaintiffs claimed were never disclosed to them prior to making the investments.

Under the LTV covenants, when the value of the properties purchased by the Belfry funds fell below 80% of the borrowed sum, an event of default occurred, entitling the lender to force a sale/foreclose. The funds performed well initially, and it was not until August 2008 that correspondence to the plaintiffs showed concern regarding the performance of the funds and a fall in value. Ultimately, the value of the property fell below the borrowings by 80% of the value: a breach of the LTV covenants. The lender activated its powers under the covenants, and the properties were disposed of to pay the debt, ending the plaintiffs investments at a loss.

The proceedings

Proceedings were issued by the plaintiffs in 2014 alleging breach of contract, negligence, negligent misrepresentation and misstatement. The defendant raised a preliminary issue that the proceedings were statute barred. Eight cases out of over 300 in relation to the Belfry funds were chosen as 'pathway cases' for the court to determine the preliminary issue. The eight cases were chosen because they covered all of the Belfry Funds which gave rise to litigation, and included plaintiffs who invested savings, inheritance, pensions or borrowings, and/or were employees of AIB.

The High Court

Giving judgment in the High Court in 2017, Haughton J found that certain parts of the proceedings that alleged negligent misrepresentation and misstatement were not statute barred[2]. Haughton J found that time runs from when loss is provable, which is not affected by the date on which the plaintiff discovered or could reasonably have discovered the existence of the cause of action.

Read our earlier briefing on the High Court judgment **here.**

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1. Cantrell & Ors v Allied Irish Bank plc & Ors [2019] IECA 217

2. The claims in contract were found to be statute barred, as under the Statute of Limitations such claims must be brought within six years from the date upon which a cause of action accrues. In contract cases, the cause of action accrues when the breach occurs rather than when damage is suffered. Haughton J also found that the claims for breach of statutory and fiduciary duty were statute barred.

In Haughton J's view, the LTV covenants did no more than create the risk or possibility of loss and that no provable loss occurred until actual loss occurred which he held was when the investments were written down to nil in 2009. The defendants appealed this finding to the Court of Appeal.

The Court of Appeal

The Court of Appeal (COA) disagreed with the approach of the High Court, finding that the plaintiffs complaint was in fact that *the existence* of the LTV covenant (as opposed to the triggering of the covenant) and the failure to disclose it and explain its effect, is what caused damage and it was this which completed the tort.

The COA considered the Supreme Court decision of *Brandley -v- Deane*[3] ("Brandley") which post-dated Haughton J's decision. Although Brandley was a property damage claim, the COA was satisfied the same test applies to mis-selling cases. The issue in *Brandley* was what constitutes actionable damage in tort for the purpose of the statute of limitations. The Supreme Court held that it is when the damage manifests itself (ie when it is capable of being discovered, rather than actually discovered).

Applying *Brandley*, the question for the COA was whether the existence of the LTV covenants, just as the defective foundations in *Brandley*, did not produce any damaging effects until much later.

Causation is key

The COA acknowledged the difficulty in assessing damage in financial loss cases, as it is often the market that causes the loss, and not the negligent act sued upon. In such circumstances, it is for the court to assess the causal connection between the alleged negligent act and the loss that arises therefrom.

The COA held that it was the existence of the LTV covenants as negotiated by the Directors of the funds, and not market forces that caused the plaintiffs to lose their money in these cases. The causative connection on which the plaintiffs relied is between the existence of the LTV covenants and the actions of the lenders following the collapse of the property market which resulted in the reconstitution of the loans and ultimately the loss of all equity in the investments. The claims are that because of the actions of the Directors in agreeing to the LTV covenants, the investments became more risky, and was a material element in the loss of their money. It followed that the cause of action accrued when the loan agreement were entered into, which was more than six years before the proceedings actually issued. Therefore, the appeal was allowed and the claims in negligence were statute barred.

Conclusion

The case will now be remitted to the High Court to decide on a point not previously considered in relation to the non-disclosure of the LTV covenants, namely whether the plaintiffs are entitled to a postponement of the limitation period on the grounds of the defendants alleged fraud.

The decision of the COA will be regarded as harsh by investors. The COA noted the "understandable reluctance" on the part of the courts to conclude that time begins to run for limitation purposes even before a plaintiff knew, or could have known, that he had any reason to bring proceedings.

It is up to the legislators to amend the limitation period in financial loss claims, not the courts. In the UK the Latent Damage Act 1986 gives plaintiffs an extended limitation period where facts relevant to the cause of action were not known at the date the cause of action accrued. In Ireland, albeit only in the context of complaints against financial services providers to the Financial Services and Pensions Ombudsman, recent legislation[4] has extended the time limit to bring complaints in relation to long-term financial services[5].

It remains to be seen how the COA decision will be applied.

In the interim, should you wish to discuss this briefing in more detail please contact:

Gerard Ryan
Partner, Head of Corporate & Commercial

T: +353 1 6644 202
gerardryan@eversheds-sutherland.ie

David O'Beirne
Partner, Corporate & Commercial

T: +353 1 6644 203
davidobeirne@eversheds-sutherland.ie

Norman Fitzgerald
Partner, Dispute Resolution and Litigation

T: +353 1 6441 239
normanfitzgerald@eversheds-sutherland.ie

3. [2017] IESC 83

4. Financial Services and Pensions Ombudsman Act 2017

5. Otherwise, the Statute of Limitations 1957 was amended to allow for an extension of the limitation period in personal injuries cases, under the Statute of Limitations (Amendment) Act 1991.

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