[2026] IEHC 620

THE HIGH COURT

RECORD NO. [2023/1532 P]

BETWEEN

BRIAN KERR AND PAUL KERR

PLAINTIFFS

AND

MARTIN MORAN TRADING UNDER THE STYLE AND TITLE OF MARTIN MORAN & COMPANY SOLICITORS

DEFENDANT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 14th day of September, 2026

INTRODUCTION

1. This judgment arises from two motions before the court. In the first motion, the defendant seeks orders striking out the plaintiff's action on the basis that it is bound to fail, relying primarily on the provisions of Order 19, rule 28 of the RSC, as amended. There were separate strands to that application, with arguments grounded on the Statute of Limitations and a second argument grounded on the assertion that the defendant had been improperly joined. In turn, that second argument was based on an assertion that the defendant was not the solicitor that conducted the conveyancing transaction in question, and that the firm named in the title was not the correct defendant. In the second motion, the plaintiffs are seeking to cross-examine the defendant, the deponent of a number of affidavits in these proceedings. The second motion was not pressed by the plaintiffs at the hearing of the motions and will not be dealt with, save to observe that the court did not form the impression that any cross-examination was required.

2. These are professional negligence proceedings. The basic facts can be set out shortly. On the 18 July 1996, the first-named plaintiff purchased a property at 10 Glenmalure Court, Dublin 8 with his now deceased brother (who was the father of the second-named plaintiff). The plaintiff and his brother were registered as joint tenants over the property. The plaintiffs argue that the property should have been conveyed as tenants in common. This was because the intention was that the property would be held as an investment, and that, in the event that the plaintiff or his brother died, their respective shares would pass in accordance with their testamentary wishes. As the property was conveyed on the basis of a joint tenancy, this meant that if one of the purchasers died (which is what occurred) any attempt to transfer the half share value of the property to their successors would require a further conveyance from the surviving purchaser and a significant tax liability would arise.

3. The 1996 conveyance was handled by a firm of solicitors: "Finbar Cahill & Company". When the conveyance was conducted, the defendant was a partner in this firm. The plaintiffs' claim against the defendant trading under the style of Martin Moran & Company is on the basis that the defendant-solicitor was the one who handled the conveyance, that the case-file transferred to the defendant's practice, and that the defendant committed ongoing failures up to the death of the second-named plaintiff's father in 2017.

4. For the reasons set out in this judgment, I am satisfied that the relief sought by the defendant cannot be granted in this application. The court is not satisfied that the defendant has established to the requisite level that this case should not be permitted to proceed, notwithstanding some obvious frailties in the case. However, the court is not making any final findings in relation to the matters raised by the defendant and it remains open to him to seek to make out his defence at trial.

BACKGROUND

5. This is an application in which, as explained in more detail below, absent an agreement as to facts, the court is obliged to take the plaintiffs' case at its highest, subject to the qualification that certain additional matters may be considered. As a result, the court is making no findings of fact in relation to the substantive case, and this part of the judgment is concerned primarily with a summary of what the parties have said in pleadings and affidavits.

6. The proceedings were commenced by way of plenary summons filed on the 4 April 2023, hence just under six years from the death of the first plaintiff's brother and well over six years from the date of the transaction.

7. The case concerns the purchase of the property at 10 Glenmalure Court, Dublin 8 in July of 1996. The first-named plaintiff purchased this property with his brother, David Kerr, who passed away in 2017. The second-named plaintiff is the son of the deceased. The plaintiffs contend that the defendant at the relevant time was a solicitor in Finbar Cahill & Co. The statement of claim states that the purpose of the conveyance was as an investment. The property purchase was secured by a mortgage and that finance was used for the purchase and to discharge sums remaining on another investment property. According to the statement of claim, the defendant signed a letter from Finbar Cahill & Co. dated the 19 July 1996 confirming that the sale had closed the previous day. The defendant also was claimed to have signed a letter dated the 22 May 2001 confirming that the title deeds to the property were in the firm's storage facility. On the 25 May 2017, the first plaintiff's brother died and by operation of law the first plaintiff held the full title as surviving joint tenant.

8. The statement of claim describes the retainer as the provision of legal services to the purchasers in respect of the conveyance of the property. It goes on to assert that the defendant was instructed that the purchasers intended to hold the property in a way that their respective interests in the property would pass on their deaths to their respective estates. The central claim is that contrary to the instructions and terms of retainer the solicitors acting for the purchasers caused the property to be conveyed to them as joint tenants and not as tenants in common. As a consequence, the first plaintiff claims that he has been fixed with an inheritance tax liability and that the beneficiaries of the late David Kerr's estate will incur a further tax liability if the property is conveyed to them by the first plaintiff.

9. The particulars of negligence in the statement of claim include claims that the defendant was negligent in failing to ensure that the purchasers were registered as tenants in common, and also claims that there was a failure to advise in relation to that aspect of the transaction and its likely consequences. In addition, the particulars include claims that there were failures on the part of the defendant up to the death of the late Mr Kerr in 2017 to rectify the error or advise the purchasers that the property could have been registered as a tenancy in common.

10. In replies to particulars the plaintiffs plead that their case is that the defendant himself and not another solicitor in Finbar Cahill & Co. was the person dealing with the conveyance, and that the solicitor to whom they provided instructions and dealt with was the defendant.

11. While the defendant was a partner in Finbar Cahill & Co at the time of the conveyance, the defendant now operates as the principal in the firm titled Martin Moran & Company. The defendant began trading under the style of Martin Moran & Company in 2002. The firm which was trading as Finbar Cahill & Company now trades as Cahill & Company.

12. The defendant delivered a defence on the 21 March 2024. A preliminary objection is raised on the basis that the claim is statute barred by the effluxion of time. Further, there was a claim that there was no privity of contract between the first-named plaintiff and the defendant. This is on the basis that the conveyance is alleged by the defendant to have been completed by a solicitor who is now deceased but was a member of Finbar Cahill & Co at the time of the conveyance. The defendant contends that it is illogical that a firm (Martin Moran & Company) would be liable for the alleged acts or omissions of a solicitor firm which has been dissolved for two decades (Finbar Cahill & Company). Thus, it is pleaded, the plaintiffs are estopped from obtaining the relief sought.

ARGUMENTS

13. The within application is brought by notice of motion filed on the 7 August 2024. The defendant seeks an order pursuant to O. 19 r. 27 and / or r. 28 RSC striking out the plaintiffs' action on the basis the action is bound to fail. The same relief is sought in the alternative pursuant to the inherent jurisdiction of this court.

14. The crux of the defendant's argument is that, first, the plaintiffs instituted proceedings against the wrong party, and, second, the action is statute-barred. In advancing his argument, the defendant provided comprehensive submissions relating to the jurisdiction of the court to strike out proceedings as bound to fail.

15. There was a comprehensive exchange of affidavits. The defendant fully contests the plaintiffs' claims and has made a number of averments explaining why he considers the claims are bound to fail. However, the court is not in a position to and with very little exceptions should not seek to resolve contested factual claims in an application of this nature. Nevertheless, for the purposes of this application, it can be noted that the defendant accepted that he was partner in Finbar Cahill & Co. at the relevant time but denied that he carried out the conveyance, and, in that regard, he identified colleagues that he says were involved. In response, the first-named plaintiff denies that he dealt with or instructed anyone other than the defendant in connection with the transaction. The first-named plaintiff exhibited a number of documents that he says show that the defendant was the relevant solicitor acting in relation to the transaction. It is also clear that there was some apprehension on both sides and the first plaintiff's tax advisor in August 2020 identified that there was an issue in relation to the manner in which the property was held. That emerged from a note of a meeting that occurred, but there is a dispute as to the accuracy of the note and the recollections of the parties who attended the meeting. Significantly, the first-named plaintiff contended that the defendant advised him in August 2020 that the creation of the joint tenancy was demanded by the mortgage provider. The defendant denies the implication that in some sense he misled the first-named plaintiff.

16. All of the above highlights that there are significant issues of fact that simply cannot be resolved in an affidavit-based application premised on the contention that the plaintiffs' case is bound to fail.

17. The defendant set out the legal principles governing applications to strike out in his written submissions, and the plaintiffs accepted the defendant's outline of the relevant principles as correct. It will therefore be possible to set out the relevant principles as they are agreed between the parties prior to addressing their application to these proceedings.

Principles Generally

18. The default or starting position is that proceedings should proceed to trial. However as explained in a number of cases, including *Moylist Construction Ltd v. Doheny* [2016] IESC 9, this starting position is subject to the qualification that a plaintiff should not be permitted to maintain proceedings which are fundamentally unsustainable.

19. O. 19 r. 28(1) RSC provides that the court may strike out a claim, or part of a claim which:

> ...
>
> *"iii) is bound to fail, or*
>
> *iv) has no reasonable chance of succeeding."*

20. O. 19 r. 28(3) RSC permits the court to have regard to the pleadings and if appropriate, to the affidavit evidence filed in support or opposition to the application.

21. By way of statutory instrument (S.I. 456/2023), the substance of O. 19 r. 28 RSC has been amended in such a way that the previous distinction between the court's jurisdiction to strike out proceedings pursuant to i) O. 19 r. 28 RSC, and ii) the inherent jurisdiction of the court, has been eroded. The effect of this amendment was considered – and the erosion noted explicitly – by Simons J. in *O'Malley v. National Standards Authority of Ireland* [2024] IEHC 500. The *dicta* of Simons J. were approved by the Court of Appeal in *Meehan v. Ireland* [2025] IECA 59, in which Allen J. held the following:

> *[54] The amendment of O. 19, r. 28 – as Simons J. has said – has had the practical effect of eroding the previous distinction between the jurisdiction conferred by the Rules to strike out pleadings and the inherent jurisdiction of the court to deal with an abuse of process. Simons J. also recalled the consistent jurisprudence of the Supreme Court that the jurisdiction to dismiss proceedings as being bound to fail is not to be misunderstood as a jurisdiction to resolve issues on a summary basis. That is also correct. The effect of the new O. 19, r. 28 is to erode the distinction between the previous jurisdictions. It does not create a new jurisdiction to summarily determine contested questions of fact or law. Now, as heretofore, the jurisdiction is one which must be exercised sparingly and only in clear cases, rather than on the basis that the plaintiff's claim is very weak.*

22. On the basis of this erosion, the defendant argues that earlier case law remains relevant. In particular, the summary of the relevant principles applicable to strike out applications articulated by the Supreme Court in *IBRC v. Purcell* [2016] 2 I.R. 83 are contended to be of assistance. I have emphasised the principles which I consider to be of particular relevance to the facts as they arise in this case.

1. *"The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.*

2. *In considering an application to strike out proceedings pursuant to its inherent jurisdiction the Court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in Barry v. Buckley [1981] IR 306).*

3. *This jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases". (See Costello J. in Barry v. Buckley [1981] IR 306).*

4. *Moreover as McCarthy J. stated in Sun Fat Chan v. Osseous Ltd [1992] 1 IR 425 "Generally the High Court should be slow to entertain an application of this kind".*

5. *In addition as was stated by Keane J. in Lac Minerals v. Chevron Corporation [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in Supermacs Ireland Ltd v. Katesan (Naas) Ltd [2000] 4 I.R. 273 "<u>a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action</u>".*

6. If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in Sun Fat Chan v. Osseous Ltd).

7. The Court can only exercise a jurisdiction to strike out a claim on the basis that "on admitted facts it cannot succeed" (per McCarthy J. in Sun Fat Chan v. Osseous Ltd).

8. The Court in considering whether to strike out a claim " must treat the plaintiff's claim at its high water mark" (per Clarke J. in McCourt v. Tiernan [2005] IEHC 268.

9. The burden of proof lies on the defendant to establish that the plaintiffs claim is bound to fail. (See Salthill Properties Ltd v. Royal Bank of Scotland [2009] IEHC 207)

10. The Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out. (See Clarke J. in Salthill Properties Ltd v. Royal Bank of Scotland.)"

Statute of Limitations

23. The underlying issue here can be stated quite simply: When did the cause of action accrue? There is no disagreement as to the fact that the right to remedy will be extinguished upon the expiry of the limitation period and the statute's invocation. The parties disagree, however, on when precisely the cause of action accrued.

24. Section 11 of the Statute of Limitations 1957, provides that the limitation period commences on "*the date on which the cause of action accrues"*. The defendant considers that this period commenced, and the loss crystallised upon the completion of the conveyance.

25. This question necessarily requires the court to determine at what point the cause of action is said to accrue and consequently the point from which the limitation period runs. This issue is fundamentally one to be determined on the facts of the case; however, the approach to be adopted has been the subject of extensive consideration by the Supreme Court in cases which the parties agree are relevant.

26. The pertinent judgments identified by the parties begin with *Gallagher v. ACC Bank plc* [2012] IESC 35; the later judgment of *Brandley v. Deane* [2017] IESC 83; continues with *Cantrell v. Allied Irish Banks plc* [2020] IESC 71; and concludes with *Smith v. Cunningham* [2023] IESC 13. In *Cantrell,* the Supreme Court took the opportunity to distil the previous case law and it is through the lens of the Supreme Court's analysis in *Cantrell* that the earlier judgments will be set out below. A further distillation was conducted in *Smith,* and it will be helpful to have considered the previous case law prior to considering the judgment of Hogan J. in that case.

27. In *Gallagher,* the plaintiff brought a claim for misselling of an investment bond. The limitation period commenced on the day that the relevant investment was made. As noted by the Supreme Court in *Cantrell,* the facts in Gallagher were somewhat unusual. Due to the structure of the investment product and the nature of the case, there were only two possible dates for the accrual of the cause of action. These being either the date of the initial investment or the date of realisation of the investment (being five years and eleven months later).

28. Fennelly J. considered that the date of accrual must be the date at which the investment was made. In *Cantrell,* the court considers that Fennelly J. clearly rejected the "*remorseless* *logic"* of certain English authorities, preferring the approach of "*experience and pragmatism"* over "*pure logic"*.

29. In considering the proper approach to the *dicta* of the Court in *Gallagher,* the court in *Cantrell* held:-

> *[132] It is clear that the decision in Gallagher requires the Courts to adopt a pragmatic approach in which the identification of damage for accrual of a cause of action must proceed on an incremental basis and that damage for the accrual of a cause of action must bear a close relationship to the layperson's understanding of that term. That is real actual damage, which a person would consider commencing proceedings for. The decision in Gallagher must be understood in this light.*

30. The defendant further relies on *Brandley v. Deane* [2017] IESC 83 which was concerned with a claim in negligence for physical damage to property. The damage was caused by defects in the laying of the foundation leading to cracks appearing 18 months after the foundations were laid. On the issue of when the limitation period is said to commence, McKechnie J. in *Brandley* distinguished between the points at which damage occurred and at which the damage was reasonably discoverable. McKechnie J. considered the correct point to be at which the damage was manifest (or manifested itself). The definition of *"damage being manifest"* repeated in *Cantrell* was that *"damage must have been capable of being discovered and capable of being proved by a plaintiff"*.

31. In *Cantrell v. Allied Irish Banks plc* [2020] IESC 71, the Supreme Court determined the limitation issues arising in eight pathfinder cases brought by investors in the "Belfry" schemes which launched between 2002 and 2006. Each of these schemes was initially successful but experienced "catastrophic losses" which resulted in the appellants' investments being wiped out or almost wiped out. As noted by O'Donnell J. (as he then was), an issue which arose generally in the aftermath of the financial crisis was the disappointed investor who seeks to attribute a loss to the negligence of his advisor, where the loss or damage leading to the negligence "*may not be said to have occurred or been detected until some time after the advice was given and the investment made or the asset acquired"*.

32. O'Donnell J. identified the applicable test which ties together the *dicta* of the court in *Cantrell* and the earlier decision of *Brandley* in the following terms:-

> "[t]*he test is when provable injury capable of attracting compensation occurred, and that is when it is available to be proved and damage is, in the Brandley sense, manifest"*

33. The Court in *Smith* had the benefit of the judgments in *Gallagher, Brandley* and *Cantrell.* In light of the *dicta* which had accrued at that point, Hogan J. noted that a series of propositions could be identified. The following propositions are of relevance in these proceedings:

> *(iv) In deciding what is sufficient damage for these purpose, the yardstick is ' real actual damage, which a person would consider commencing proceedings for' …. This may arise in cases in which 'rights may be less valuable by reason of exposure to a risk'…. One of the circumstances in which this will occur is where there is a transaction involving benefits and burdens in which the balance between those benefits and burdens depends on a contingency. In that situation, it is only where that contingency occurs and affects the value or the possibility*

of it occurring affects that value such as to create a loss, that the cause of action accrues…

(v) There will be cases in which it can be said that actual damage is suffered on the occurrence of a transaction even if that was not reasonably discoverable for some time….

34. Hogan J. further notes that the proposition at (iv) should not be construed as a subjective inquiry. Rather, it is an objective test with "some play at the joints" designed to accommodate those cases in which the injury is "*so attenuated that no reasonable litigant could be expected to proceed to court if confronted with it".*

35. The concluding paragraphs in *Smith* are also of assistance:-

The decisions of this court in Gallagher and Cantrell confirm that while the test for the accrual of a cause of action in negligence is, in theory, the same for all forms of injury, in taking account of the particular features of claims in negligence to recover pure economic loss it must accommodate the reality that while, in theory, losses that are contingent may have a present value at the time of the wrongful act giving rise to them, it is artificial and unreal to describe pure contingencies as actionable damage. Instead, the court must undertake a pragmatic case-by-case analysis, asking itself when a real and meaningfully measurable loss was sustained, at what point the balance between the benefits and burdens of a transaction became adverse to the interests of the plaintiff, and when a lay person would understand actionable damage for which a person would commence proceedings to have occurred.

36. The precise issue of how questions concerning limitations interact with applications to strike out was considered by Simons J. in *Killeen v. Higgins* [2025] IEHC 582. The pertinent paragraph identified by the defendant is:-

> *The operation of the Statute of Limitations 1957 in the context of a professional negligence action taken by a claimant against their former legal advisors may entail factual complexity which may militate against a strike out application. This is because legal advisors will, by definition, usually have a greater knowledge and insight into the factual circumstances which might give rise to a right of action. If a legal advisor were to conceal a material fact from their client, this might result in the postponement of the limitation period under section 71 of the Act. To take a hypothetical example: suppose a solicitor failed to carry out a conveyancing transaction properly and omitted a crucial step, such as the registration of the transfer of ownership. If the legal advisor was aware of this omission and deliberately concealed the fact from his client, then the client might be able to rely on this deliberate concealment to postpone the limitation period.*

37. The plaintiffs did not stray beyond the *dicta* of the Supreme Court in *Smith* and argued that the issue arising in this case is to be resolved by reference to the *dicta* therein. The plaintiff's argument in this regard is that the *"real actual damage, which a person would consider commencing proceedings for"* occurred on the 25 May 2017, upon the death of David Kerr.

38. This argument is complemented by an additional argument such that the plaintiffs' claim the defendant to have been negligent on an ongoing basis for failing to rectify the mistake in registration up to the date of death of David Kerr.

Proceedings against the wrong party arguments

39. The argument in this respect is that the defendant is neither the firm which carried out the conveyance nor its successor. Rather, it is argued that the role of the defendant-solicitor was an administrative one, including the witnessing of certain documents in the process. According to the defendant, there was no provision of legal advice, no substantive conduct of the conveyance, nor any assumption of responsibility for the transaction. The argument is therefore made that such limited involvement is incapable as a matter of law of grounding liability. This argument is said to be made out by the exhibit of the Memorial of Indenture signed by the plaintiff, which, the defendant asserts, shows that another solicitor in Finbar Cahill & Co. was responsible for the transaction.

40. In relation to the point that the defendant is not the successor firm to that which carried out the transaction, the defendant places heavy reliance on the definition of a "*succeeding practice"* for the purpose of the Professional Indemnity Insurance (Amendment) Regulations 2022 (S.I. 585/2022). As provided by the regulations, a firm will only constitute a succeeding practice where one or more of a set of criteria is established:

- Where it is held out as a successor to the preceding practice
- Where there is a continuity of principals
- Where the liabilities of the preceding practice have been assumed

41. The defendant argues that none of these criteria are established. The consequence is that the plaintiffs have therefore instituted proceedings against the wrong party.

42. The plaintiffs disagree with the relevance of the 2022 Regulations on the basis that they are clearly directed to the issue of professional indemnity insurance. Alternatively and accepting in *arguendo* that the Regulations maintain relevance, the plaintiffs note that there is a continuity of principals arising from Martin Moran being a partner in "Finbar Cahill & Company" and "Martin Moran & Company." This would therefore satisfy a required condition under the 2022 Regulations.

43. Leaving aside the question of whether the plaintiffs instituted proceedings against the correct party, and dealing exclusively with the reliance on the 2022 Regulations, I am satisfied that this issue does not fall to be resolved by reference to the definition of a "succeeding practice" articulated therein. The Regulations are addressed to the discrete question of professional indemnity insurance and do not in any way assist the parties or the court in identifying the correct defendant to proceedings. I do not understand the Regulations as displacing or seeking to amend the usual well established principles of partnership law that operate in this jurisdiction.

44. In my view the correct approach is one grounded in partnership law, and the liability of partners for actions taken by a firm while they were members. In that context, leaving aside for a moment the question of whether the firm identified in the title to the pleadings should have been utilised, the fact of the matter is that at the material time the defendant was a partner in the firm that conducted the conveyancing transaction.

45. In addition to the arguments about the effect of the 2022 Regulations, the defendant argues that the contemporaneous documentation of the transaction illustrates that there is no privity of contract between the parties. In *Harrington v. SRF Ltd* [2025] IEHC 252, the plaintiff sought in his personal capacity to sue the defendant for defects in machinery purchased by two companies he was associated with. Kennedy J. held that the claim rested on a "*demonstrably false premise of a contractual nexus".* The defendant argues that as per *Harrington,* where there is a fundamental mismatch between the parties and the cause of action, it is fatal to the proceedings.

46. In *Highfield Distribution Ltd v. Pat the Baker Unlimited Company* [2020] IEHC 137, Meenan J. considered that there was no evidence of a contractual relationship between the parties, considering on the pleadings before the court that "[t]*he only conclusion that can be drawn…is that the wrong company has been named as defendant."* On this basis, the court dismissed the proceedings.

47. If the court is satisfied that the plaintiffs have identified the wrong defendant, it is argued that this is not merely technical but goes to the root of the proceedings. The Court of Appeal in *Von Geitz v. O'Brien* [2026] IECA 18 upheld the dismissing of proceedings where the appellant sought to obtain relief against a party he did not identify as a defendant to the proceedings. The defendant in this instance argues that the plaintiffs have similarly misidentified the appropriate defendant.

48. The defendant additionally notes that no amendment to the proceedings can cure the defect as it is not one of form or clerical misdescription. In *Scallon v. Independent News and Media plc* [2020] IEHC 472, the plaintiff sought to advance a cause of action against the publishers of the "*Sunday World*" in this jurisdiction, having also instituted proceedings against the publisher in Northern Ireland. The plaintiff, however, did not sue the publisher which consisted in fact of three companies within the INM group. Humphreys J. considered that the attempt to amend the proceedings to sue the correct defendants was in reality to reconstitute the proceedings against different legal entities.

49. The defendant therefore considers the within proceedings to be incurable and must be struck out as bound to fail.

50. The plaintiffs did not engage in any great detail with the case law concerning the consequence of suing the wrong defendant. It appears from the submissions before the court that the plaintiffs consider that the reliance on the 2022 regulations is misguided and that the correct defendant has in fact been identified. Further, if the court accepts that there has been ongoing negligence until the death of David Kerr in 2017, then the correct defendant has been identified. The plaintiffs reject the defendant's suggestion that the involvement of the defendant-solicitor was merely administrative but emphasise that the tasks undertaken were in fact instrumental to the conveyance process.

DISCUSSION

51. In the first instance it can be noted that this is an application pursuant to Order 19, rule 28 of the RSC, as amended. The significance of relying on that provision has been set out above, but it is worth reiterating an additional point made by Simons J. in *Killeen v. Higgins* [2025] IEHC 582 at para 46:

> "*It is very unusual for a defendant to seek to have the question of whether proceedings are statute-barred determined by way of a strike out application. This is because such an application requires a defendant to satisfy a much higher standard. As explained in the case law discussed above, the jurisdiction to strike out proceedings is one to be sparingly exercised and should only ever be adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have some early determination on some point of fact or law. A strike out application is viewed through a very different lens than the trial of a preliminary issue: the court does not engage at a granular level with the question of whether the proceedings are statute-barred with a view to final determination on the merits one way or the other. Rather, the court must be satisfied that there is no reasonable chance of the plaintiff being able to answer the plea that the proceedings are statute-barred. The court must consider whether there is a reasonable possibility that evidence – whether oral or documentary – might be forthcoming which would support the plaintiff's answer to the plea.*"

52. While that passage is very helpful in approaching the limitation issue in this case, it is also applicable to a large extent to the other aspect of the defendant's motion. It can be recalled that the defendant claims that the wrong party has been joined. I agree that it seems unusual and unhelpful that the defendant was named "trading as" his new firm. However, the claim made by the plaintiffs is that the defendant was the solicitor involved in the conveyancing transaction. In that regard, the defendant adduced evidence in which he claimed that other than introducing the first-named plaintiff and his brother to his partners who conducted conveyancing he had no role in the transaction. That claim was not fully supported by the evidence, and I am not satisfied that the evidence adduced by the defendant which shows the involvement of other solicitors, can be taken as showing to the level of proof required in an application of this type that the defendant simply was not responsible for the matters that gave rise to this claim. It was accepted that the defendant was a partner in the firm that acted for the purchasers in the transaction at issue and that he was involved at least at some level in the transaction. Moreover, given that the plaintiffs' case must be taken at its height, the plaintiffs clearly plead, and the first plaintiff has averred, that the only solicitor that they considered they instructed was the defendant. Those disputes will have to be resolved at trial.

53. Hence, at this point in the proceedings, I do not agree that there is sufficient certainty to displace the pleaded claim that he conducted or bore some liability for the manner in which the conveyance was approached. In the premises, the court is not at all satisfied that there is a basis for striking out the claim on the basis that the defendant was not involved in the transaction, and this is a matter that ought to be resolved in a proper trial.

54. In relation to the element in the motion that the defendant's current firm should not have been named as a party, this is more substantive. However, this also is not a basis for striking out the claim, and it is a matter that could be resolved by a motion to amend the title. What is clear is that the defendant personally is named and that at the relevant time he was a partner in the firm that conducted the transaction. As such, at this stage in the proceedings and having regard to the nature of the motion before the court, it seems to me that it cannot be said with certainty that he has been joined improperly or that the claim is bound to fail on this basis. If the defendant considers that others are responsible for the wrong (if there was a wrong) there are procedural steps open to him to agitate that issue.

55. Turning to the limitations issue, the case law requires the court to be able to identify with reasonable certainty at this point that the claim is statute barred. In *Smith v. Cunningham* [2023] IESC 13, Murray J. found that the solicitor in that case had been retained in order to obtain a good marketable title to the property in question but had failed to do so. In those premises, the point at which an actionable loss arises "*will generally be the point at which the property is conveyed to him or her*". The reason being that what the client has obtained will be materially less valuable to him than what he ought to have obtained. Importantly – albeit the issue there was a planning difficulty – that approach to loss was not affected by the fact that the error in question could have been resolved.

56. In this case, the position is that on the plaintiffs' pleaded case, they retained solicitors to purchase an investment property as tenants in common and obtained a property as joint tenants. Clearly that situation could have been rectified between the transaction and the date when the first plaintiff's brother passed away in 2017. However, there remains a strong argument that the essential "*real actual damage*" was occasioned once the transaction was complete.

57. The alternative – which the plaintiffs expressly contended for – would be that no cause of action could accrue until one or other of the purchasers died. That would involve the cause of action accruing at some indefinite period in the future with the potential associated liability remaining in a form of suspended animation until that contingency transpired. It seems to me that this would introduce a level of uncertainty that is in opposition to the theory underlying the Statute of Limitations.

58. In the premises, and taking the plaintiffs' case at its height, there is certainly merit in the defendant's claim that this cause of action accrued once the transaction was complete because at that point in time the purchasers had suffered real actual damage: they had obtained a title that did not reflect what they required and which was liable to a definite crystallised loss in the event that one of them died.

59. The difficulty for the defendant is that, despite that frailty in the plaintiffs' case, their claim is not solely confined to the immediate transaction but also asserts a further number of particulars to the effect that there was an ongoing duty to remedy the title issue; and, while there is no formal plea invoking section 71 of the Statute, the plaintiffs assert that the defendant had claimed that the mortgage provider had insisted that the property be held as a joint tenancy.

60. It is necessary to recall the observations made by Simons J. in *Killeen v. Higgins* referred to above, regarding the high threshold to be reached in an application of this type. The court must be satisfied that there is no reasonable possibility of the plaintiffs being able to respond to the plea that the claim is statute-barred, and that the relative weakness of the claim is not sufficient to justify striking out the claim at this point. I consider that the plaintiffs' claim has the appearance of weakness but that it should be permitted to proceed. It may well be that further material will be disclosed as part of the discovery process, and it seems to me that a trial court will be in a far better position to resolve the claims with the benefit of oral evidence. In the premises I am not satisfied that the defendant can succeed in this application.

61. Given that this case concerns matters that occurred between 1996 and 2017 and has taken some time to come on, it should be progressed as a matter of some urgency. I will direct that the case be listed in the Non-Jury list on a date early in October 2026 with a recommendation that it be afforded a degree of priority.

62. In relation to costs, my provisional view is that the plaintiffs should be entitled to the costs of the defendant's motion to be adjudicated in default of agreement but with any further steps in relation to costs being stayed pending the determination of the proceedings in the High Court. I consider that no order as to costs should be made in relation to the cross-examination motion. In case the parties wish to argue for a different outcome in relation to costs I will list the matter before me at 10.30am on Wednesday, the 7 October 2026.