Neutral Citation Number [2006 IEHC 47]

THE HIGH COURT

[2000 No. 8343 P]

BETWEEN

JANE EVANSON

PLAINTIFF

AND

SARAH A. McCOLGAN AS PERSONAL REPRESENTATIVE OF PETER McCOLGAN DECEASED

DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 27th day of January, 2006.

By notice of motion dated 5th day of May, 2004 the defendant seeks an order pursuant to Order 25 Rule 1 of the Rules of the Superior Courts that a preliminary issue be tried as to whether that the plaintiff action is barred by virtue of the provisions of s. 9 of the Civil Liability Act 1961 as amended.

1. Background

The proceedings in question arise out of a road traffic accident which occurred on 20th October, 1995 on the main Letterkenny to Lifford road. The vehicle in which the plaintiff was a passenger collided with a vehicle being driven by one Peter McColgan. Mr. McColgan unfortunately died as a result of the collision.

Subsequently the plaintiff commenced proceedings Record No. 1998/11298 P by way of originating plenary summons wherein the late Mr. Peter McColgan was named as defendant. These proceedings were issued on 16th October, 1998 in circumstances which will be later described. No appearance was ever entered to those proceedings. The first reason therefor was that the defendants pointed out that the plaintiff was not entitled to sue that defendant being a deceased person, even if sued in the care of the solicitors nominated on behalf of the defendant by his insurer. The second reason which gave rise to this motion was that, when the writ was served on Messrs John P. Redmond and Company, the defendants nominated solicitors, they raised the issue that the summons to be out of time in that such proceedings should have been initiated within two years of the date of the death of Peter McColgan.

2. On 18th July, 2000 the plaintiff commenced the current proceedings against the defendant in her capacity as the personal representative of the late Peter McColgan. A second set of proceedings was also initiated by the plaintiff's husband, also involved in the accident. While the same issue arises in regard to the second proceedings, it has been agreed that the motion should determine the issue for both cases. An appearance was entered to the proceedings and a statement of claim was filed on 31st August, 2000 asserting negligence and breach of duty including breach of statutory duty by the defendant.

3. On 29th May, 2001 a defence was delivered stating that the action of the plaintiff herein is barred pursuant to the provisions of s. 9 of the Civil Liability Act 1961. Thereafter a reply to the said defence was delivered on 1st October, 2002.

4. The plaintiff Jane Evanson resides in Northern Ireland. She sustained injuries in the accident. They were of a significant nature. She was minded to initiate proceedings and to that end instructed her solicitor in Northern Ireland, Brian Patrick McElholm, to advise her in this regard. Mr. McElholm forwarded a letter of claim on 13th December, 1995 to the insurers for the deceased namely Cornhill Insurances in Dublin (hereinafter "Cornhill"). Cornhill passed the file to their Belfast office and correspondence then followed between the Belfast office of Cornhill and Mr. McElholm.

The Correspondence

5. The first letter referred to then, is one of 13th December, 1995. It was addressed to Cornhill Insurance at Russell Court, St. Stephen's Green, Dublin 2. It was headed

> "Re: Your Insured Peter McColgan deceased of Keady, Muff, Co. Donegal.
>
> My Clients: Michael and Jane Evanson of Crevenagh, Omagh, Co. Tyrone
>
> Your Insurance Policy No: PZO-7760276
>
> Road Traffic Accident at Trimlagh, Letterkenny, Co. Donegal on 20th October, 1995.
>
> Dear Sir
>
> > I act for my above clients who sustained serious personal injuries in the above mentioned road traffic accident. I have not directed a letter of claim to the personal representatives of the late Peter McColgan as my clients did not wish the family to be troubled. However I would advise you that both my clients suffered severe personal injuries in the above accident. I have been instructed to pursue claims for personal injuries loss and damage and I would be obliged if you would open correspondence with me and confirm whether or not you are prepared to accept liability on behalf of your Deceased Insured at this stage.
>
> I am in the process of obtaining the necessary medical reports and I will contact you further in that regard in due course.
>
> I would be obliged to hear from you soon as possible.
>
> Yours faithfully"

In response to that letter Cornhill in Dublin indicated that they had passed the file to their Belfast Office to deal with the two claims.

6. On January 12th 1996 a letter was sent from Cornhill in Belfast to Mr. McElholm. In the course of that letter they sought details of the date of the accident, and other details as to the plaintiff's personal circumstances and her injuries. These details were provided by Mr. McElholm on 23rd January, 1996.

7. On 7th May, 1996 Mr. McElholm again wrote to the Cornhill in Belfast drawing attention to his response of 23rd January, 1996 and indicating that he did not appear to have heard from the Cornhill since. He stated that it appeared to him that liability should not be in dispute. He requested that he hear from the Cornhill by return regarding the matter of liability. He added:

> "Please note that if I do not hear from you within seven days from the date hereof proceedings will issue without further notice".

The Cornhill replied on 13th May, 1996 indicating that they understood that Mr. McElholm was obtaining various medical reports and requesting sight of them, as well as details of any special damages being claimed. This letter was signed by Mr. Ian Sayer, an official of the Cornhill in Belfast holding the position of Deputy Team Leader.

8. Mr. McElholm states that, at the time, it was a widespread practice in Northern Ireland not to share medical reports without an admission of liability. It was certainly his practice not to do so until liability was admitted and he can now think of no occasion whom he did share such reports without such an admission. Therefore on receipt of the letter dated 13th May, 1996 from Cornhill he telephoned that insurance company in Belfast and spoke to a claims clerk named "Jennifer" to confirm that there would be no dispute with regard to liability. In an affidavit sworn herein, Mr. McElholm specifically deposed to the fact that the claims clerk to whom he spoke indicated that liability would not be in dispute given the circumstances of the accident. He also stated that he was concerned that the defendant would not raise any issue with regard to speed or any other element of contributory negligence. He was assured that there was no issue with regard to these issues and that the matter should be settled quite easily subject to obtaining all necessary medical reports on both sides. Mr. McElholm says that this telephone conversation must have taken place on 17th May, 1996 as he made a handwritten note on the face of defendants letter of 13th May, 1996. This note or memorandum reads

> "17/5/96
>
> No dispute on liability."

9. Mr. McElholm further specifically swears that Cornhill, through the same official (now known to be a Jennifer Crean) requested that he not pass the file to agents in Ireland for the purpose of instituting proceedings but that he should as he only seek legal advice as to valuation of the claim and that he continue to conduct settlement negotiations directly with the Cornhill so as to avoid costs. He agreed to this course of action on the basis that his clients had specifically instructed him to achieve an early settlement as they had just embarked on a new business venture.

10. On 17th May, 1996 (the same date as that memorandum) Mr. McElholm wrote two letters. The first of these was addressed to the plaintiff and her husband. The letter confirms that Cornhill had contacted him through their Belfast office and indicated that liability was not in dispute. He stated that he had arranged with them that he would obtain further medical reports in respect of both plaintiffs and forward these directly to the insurance company. He added:

> "They wish then to deal directly with me, and that I only use my agents in Donegal as consultants in regard to valuations in the Republic of Ireland. They have indicated that they would like to achieve an early settlement of these cases and will do so upon receipt of our confirmation that our medical evidence is complete …".
>
> Clearly this letter is of particular value as being contemporaneous to the events in issue.

On the same date Mr. McElholm wrote to the Cornhill. That letter reads

> "Thank you for your letter of 13th May. I further refer to my telephone conversation with Jennifer in your Office on 17 May.
>
> I note that there will be no dispute in liability in this matter and I would be grateful if you could confirm that in writing and confirm that no question of contributory negligence or any other complicating factor in regard to liability will be raised. On the basis that I am confident that I will receive this information I enclose the following medical report in respect of Jane Evanson:
>
> 1. Report of Thomas F. Fannon M.D. FRCS Ed Dated 1 February, 1996
>
> You will note that Mr. Fannon recommends a report from Mr. D.P. Burns Consultant Surgeon RVH. I will confirm that I have already requested same from Mr. Burns but as yet have not heard from him. I am also in the process of obtaining medical evidence in relation to my client Michael Evanson. Upon receipt of further reports in respect of both parties I will let you have a note of same."

On the same date Mr. McElholm wrote a further letter to the Cornhill enclosing copies of hospital accounts from Letterkenny General Hospital in respect of both his clients, as such accounts would form part of the claim for special damage.

He also wrote a letter to Mr. Michael Evanson requesting details of any uninsured losses which he may have incurred in the accident and also asked for details of any towing or storage account in respect of his own vehicle, the excess on his insurance policy and any car hire account if relevant. Mr. McElholm states that thereafter the emphasis was on gathering medical evidence and particularising the plaintiff's particulars of his loss and obtaining valuations from counsel with regard to the plaintiff's injuries. This is confirmed by letters dated 26th June, 1996 and 9th October, 1996 relating to the vouching of the items of special damages referred to earlier. Having written on the 9th October, 1996 furnishing this material, on 30th October, 1996 Mr. McElholm again wrote to the Cornhill referring to his earlier letter and stating that he would be obliged to hear from them as soon as ever possible.

11. On 23rd October, 1996 Mr. Sayer writes to Mr. McElholm seeking purchase receipts of the various rather small items of special damage which have been claimed earlier and also asking details as to when these articles were purchased. One of the items was a CD player and he enquired whether it was installed in the motor vehicle.

12. At this stage a loss adjustor had been retained on behalf of the plaintiff. His name was Neville King. On 18th November, 1996 Mr. McElholm enclosed copy correspondence provided by Neville King the loss adjustor in relation to the CD carried in the Evanson car. Mr. King's letter of 12th November, 1996 furnished a claim schedule with the purchase dates written beside each item and also confirmed that the CD player was not installed in the motor vehicle and was simply being transported to Donegal for the vehicle. Mr. King asked the claims assessor in Cornhill to contact him and he would endeavour to agree quantum with regard to this section of the claim.

13. On 29th January, 1997 Mr. Sayer wrote to Mr. McElholm referring to the claim and confirms having received certificates from the Compensation Recovery Unit indicating that no benefits had been paid to the plaintiffs. He adds

"Please inform us whether or not your medical evidence is now complete".

On 4th June, 1997 Mr. King wrote to Mr. McElholm advising that he had that day agreed the contents of the motor vehicle section of the claim with Cornhill in the sum of STG £1,750 plus £100 policy. He added that Mr and Mrs Evanson had requested that interim payment be forwarded to them as soon as possible as they would wish to replace these items before departing on their holiday in two weeks time.

14. He also included a copy of his fee account and asked for it to be forwarded to the Cornhill.

15. In summary therefore, Mr. McElholm states that at all times Cornhill Insurances urged him not to engage agents in Ireland but to deal directly with themselves so as to reduce costs and to save time; that Cornhill Insurance were most anxious that proceedings would not be instituted but that the plaintiff's claim should be settled by way of negotiations as between himself and the insurance company without having to issue unnecessary proceedings and incur unnecessary costs. He states that the conduct of the case by Cornhill Insurance Company up to and including beyond the two year time limitation period would indicate that they too accepted this agreement.

16. It is relevant to recollect here that the accident occurred on 20th October, 1995. Thus the statutory two year time limit expired on 19th October, 1997.

17. Mr. McElholm's knowledge of this question is not addressed. None of the participants in the events appear to have adverted at any time during this period to the fact that the statutory time limitation pursuant to s. 9(2) of the Civil Liability Act 1961 as amended was just two years.

18. On 11th February 1998, and outside of the limitation period, pursuant to the earlier agreement, six medical reports in the case were sent to the Cornhill by way of Disclosure by Mr. McElholm, and two medical reports were sent in relation to Mr. Michael Evanson. Ms. McDonnell the assistant solicitor then dealing with the file in Mr. McElholm's office stated to the Cornhill that she would be obliged if the official dealing with the matter in the Cornhill would contact her with a view to arranging a join consultation in respect of the matter.

19. On 28th of April, 1998 Mr. Sayer of the Cornhill again contacted the plaintiff's solicitors apologising for not having responded earlier and stating that Cornhill would then require details of the plaintiff's gross and net earnings for a period of 26 weeks prior to the accident. They also sought details that all expenses should be enclosed. Mr. Sayer added

"On receipt of same we will contact you to discuss your clients claim".

20. On 7th September, 1998 Ms. McDonnell wrote to the Cornhill stating that details of the plaintiff's gross and net earnings for the 26 weeks prior to the accident were unavailable as they had just started their own business and therefore no accounts were available for that period. By this point Ms. McDonnell was working with the firm of John J. Roche and Company of Newtownstewart. On 24th September, 1998 Mr. King the Loss Assessor wrote to Ms. McDonnell at John J. Roche and Company and indicated that he understood they now acted on behalf of the claimants and reminding her that in June 1997 he had agreed the contents of the motor vehicle with the insurers in the sum of STG £1,850. He enclosed a copy of the bank draft. He also stated that he would be obliged if Ms. McDonnell would advise him of the current position with regard to the claim as he had not received payment from the insurers. A copy of the relevant bank draft dated 23rd June, 1997 is exhibited in the proceedings.

21. It is clear that Ms. McDonnell by early October 1998 considered that matters had dragged on excessively and on 6th October, 1998 she indicated that she had been instructed to issue proceedings. She wrote:

"Dear Sirs

> You will note that we are now instructed by the above named following the closure of the office of B.P. McElholm Solicitor. I can confirm that we are now instructed to issue proceedings herein to protect our clients position. Please confirm your clients Title for the purpose of issue of the proceedings. I would also assume that giving (sic) the circumstances you would intend to nominate solicitors to accept service of proceedings in the South of Ireland. I would be obliged to receive details of same by return."

On a letter of the same date Ms. McDonnell enclosed a copy of a medical report which she had received from Mr. Thakore Consultant Surgeon relating to Mrs. Evanson's injuries. On that same letter there is a written memorandum to the following effect.

"12/10/98

Mr. Sayers/Ms. McCrey

To ring me back today", and referring to a direct line telephone number.

On 13th October, 1998 there is exhibited an attendance docket from Ms. McDonnell. This reads

"Tel. Att. On Ian Sayer.

Sols to accept service in Eire

JP Redmond and Co

22 Merchants Quay

Dublin 8

Defendants Title Peter McColgan".

22. Thus on 13th October, 1998 Ms. McDonnell wrote to Messrs Reid and Sweeney Solicitors, Main Street, Ballyshannon, Donegal. Referring to both her clients the letter reads

"Dear Sirs

> We act for the above named in relation to a claim for damages arising out of a road traffic accident on 20th October, 1995. We are in the process of negotiating a settlement with the insurers but it has become necessary to issue proceedings solely to protect our clients position. Our counsel Mr. Paul McGettigan has drafted proceedings and recommended that we contact your office with a view to having same issued and served. The insurers have confirmed that the defendant (although deceased) is to be named as Peter McColgan and proceedings are to be served on JP Redmond and Co Solicitors, 22 Merchants Quay, Dublin 8.

I would be obliged if you would attend to this matter and let us have a note of your fee herein. Please confirm that proceedings will be issued before Tuesday 20th October.

Yours sincerely".

It is clear then that Ms. McDonnell, proceeding on her misapprehension as to the time limit, was seeking to ensure that proceedings were issued within a perceived three year time limit from the date of the accident which had occurred on 20th October, 1995.

23. Prior to these letters of October 1998 however Ms. McDonnell specifically deposes that she telephoned Cornhill Insurances on 12th October 1998, asking them to confirm their insurer's title for the purpose of issuing proceedings and spoke at that stage to Ian Sayer who "specifically requested that your deponent herein not issue proceedings as liability was not disputed". Ms. McDonnell adds:

> "I say that this conversation took place well outside the statutory period and even at that stage the said Cornhill Insurance were requesting that proceedings not be issued. I say that Mr. Sayer informed me the following day as to the name of the solicitors who would be acting for the defendant and the appropriate title of the defendants."

She refers to the attendance docket dated 13th October, 1998 and also to the fact that proceedings thereafter were issued on 16th October of that year to Reid and Sweeney Solicitors. Thereafter her colleague Patrick Roche assumed conduct of the file effective from November 1998 and she had no further input therein.

24. The position of the defendant's insurers in this motion is put forward on the basis of two affidavits, one sworn by Ian Sayer and the other by Eric Dawson. Both are now officials at Allianz Northern Ireland Insurance Company in Belfast (formerly Cornhill Insurance plc).

25. It is necessary to deal with the affidavit of Mr. Sayer first. From a consideration of the file he states that it seems that it was Jennifer Crean who spoke with Mr. McElholm on 17th May, 1996. Ms. Crean worked with the Cornhill Insurance company at that time.

Efforts were made to have her swear an affidavit in these proceedings. But no such affidavit has been adduced.

Mr. Sayer also states that he could confirm from the file that at no stage was there any indication that there would be a dispute on liability and that at all times the plaintiff's claim was a matter for assessment only. He states that this is consistent with the handwritten note of Mr. McElholm on the letter written by Mr. Sayer on the 13th May, 1996 and upon which Mr. McElholm made the memorandum referred to earlier.

26. However Mr. Sayer goes further and states that *he* is clear that

> "in any conversation with Mr. McElholm, at no stage was it intimated or indicated to him that he should not issue proceedings but certainly if it was the case back in May 1996 that Mr. McElholm was anxious to achieve an early resolution of the case, your deponent would certainly have taken the view that issuing proceedings will only have delayed matters". Mr. Sayer continues:
>
> > "However at no stage did your deponent make any representation to Mr. McElholm that it would never be necessary for the plaintiffs to have to issue proceedings as whilst the matter may have been for assessment only, the deponent in May 1996 or thereafter could never have been confident that agreement could be reached on quantum and if this were the case obviously proceedings would then have to issue.

He concludes:

> "Hence, if there were any agreement regarding the institution of proceedings as whether or not to institute such proceedings, your deponent first disputes that this was agreed but, in any event, secondly, is adamant that same was only on the basis that the matter would be resolved in a short period of time as was the then intent on the part of the plaintiff". Clearly however Mr. Sayer cannot testify as to what was represented to the plaintiffs solicitor by Ms. Crean.

27. Mr. Sayer states that, having perused the file, at no stage did he make any note or memorandum to the effect that Mr. McElholm need not issue proceedings. He also draws attention to a letter of 6th October, 1998, sent to him by Mr. McElholm, which letter makes no mention of any agreement or representation whereby it was not necessary for the plaintiff to institute proceedings at all. The letter confirms that proceedings were now going to be issued "to protect the plaintiff's position" and requesting that Mr. Sayer nominate a firm of solicitors in this jurisdiction. He adds:

> "Your deponent is unaware whether or not at that stage the plaintiff's solicitors were aware that the statutory limitation had expired as the defendant was deceased, though your deponent does note Ms. McDonnell's averment that by October 1998 it was clear that the statutory period had expired."

Mr. Sayer fairly adds that at that time he was not aware of the divergence in this jurisdiction between the more common limitation period and that which exists when the plaintiff is deceased.

Mr. Sayer points out that the memorandum of 13th October, 1998 wherein he nominated Mr. John P. Redmond and Co to accept service, further underlines that at no time was there any agreement or representation for proceedings not to issue.

28. On 15th October, 1998 Mr. Sayer wrote to John P. Redmond and Company Solicitors with regard to their nomination as solicitors to act in defence of the claim. This letter reads:

"Our insured – P. McColgan (deceased)

Motor accident – October 20th 1995

M & J Evanson v. McColgan

We refer to the above tragic accident in which our insured was killed. We have nominated your good selves to accept service of proceedings from the solicitors acting on behalf of the third parties.

There is no dispute on liability. The solicitors have indicated that the proceedings are only issued due to the time period and that immediately the medical evidence is complete which we hope will be in the near future, discussions can take place …"

29. With regard to the telephone conversation which took place on 13th October, 1998, Mr. Sayer says he is quite certain that neither on the occasion Ms. McDonnell mentioned nor on any other occasion did he request her in any way not to issue proceedings. To his recollection statutory periods were never mentioned between them. He did however give the name of the solicitors in Dublin namely John P. Redmond and Company who would accept service. He states that he does not recall and has no note on the file to state that he agreed to allow Peter McColgan to be named as the defendant in the proceedings. He again refers to his letter to John P. Redmond and Company on 15th October, 1998 and says that if he had made such an agreement with Ms. McDonnell he would certainly have informed John P. Redmond and Company of the same.

30. Mr. Sayer says that at no stage was it ever agreed or represented that the plaintiff need never institute proceedings as this could in due course have made it impossible for the parties to resolve the matter. However he states in certain actions he might occasionally request a firm of solicitors not to issue proceedings after an offer to settle a claim had been made but rather for the firm of solicitors to hold off issuing such proceedings until their client had come back with an acceptance of such offer. However in those circumstances, a note would have been made of the offer and the fact that proceedings were to be held off until a response had been given to same. In this case, this did not arise as no offer in settlement of the case was ever made.

31. It is noteworthy however that in his letter of 15th October, 1998 Mr. Sayer in the course of the heading of the letter refers to the case as being "M & J Evanson v. McColgan" having previously referred to the Cornhill insured as being "P. McColgan (deceased)". It will also be noted that he states that the proceedings are "only issued due to the time period". From this I infer that Cornhill Insurance apprehended that the plaintiff's solicitors would not have issued the proceedings but for their concern regarding the time period. They would not have done so otherwise.

A further question arises. Upon that basis had the plaintiff's solicitors been induced to desist from the issuing of proceedings? The only reasonable conclusion is that the decision not to issue proceedings arose from the conduct of the negotiations between the plaintiffs and Cornhill.

32. It is necessary then to deal with two other affidavits which were sworn in time sequence. The first of these, already referred to, is that of Eric Dawson. Mr. Dawson, an insurance official with the defendant, denies that any representation was made by him in any contact which he had with Mr. McElholm whereby it was deemed not necessary for the plaintiff to issue proceedings. He adds that if such an unusual and far reaching agreement had been made, a note of same would have appeared on the file and would have been followed up by a confirmation letter to the plaintiffs then solicitors.

33. Mr. Dawson concedes that, while it seems that Ms. Crean on behalf of the defendant agreed that liability would not be put in issue, it was certainly not the case that a representation was made whereby that no issue would be taken on time if and when the plaintiffs issued proceedings. Mr. Dawson accepts that he too was unaware of the distinction in time limitation that exists in the case of the deceased persons as defendants. I consider that Mr. Dawson's affidavit must be seen in the same light as that of Mr. Sayer. He cannot depose as to what Ms. Crean said, any more than Mr. Sayer.

34. There is finally an affidavit from Mr. McElholm wherein he states that in cases such as these it was his usual practice to forward a file to agents in this jurisdiction within 12 months of the date of the accident in the event that the case had not settled. He adds:

"In this particular case Cornhill Insurance urged me not to do this and at all times represented to me that this was a case of assessment only and not to incur any further costs by issuing proceedings. It was on these representations that the file was retained and proceedings not issued".

He adds

… "If the representation had not been made then I would have forwarded the file to agents in the Republic of Ireland and had proceedings issued before the expiry of the two year limitation period".

35. On behalf of the defendant Mr. Comyn SC submitted –

(1) That the plaintiff's advisors thought that the relevant time limitation in this jurisdiction for the issuing of proceedings was a three year period;

(2) That the plaintiff was never led to believe that the proceedings need not be issued within this statutory period whatever it might be;

(3) That there was no misrepresentation from the Cornhill as to the time limit applicable nor as to the need to issue proceedings at some stage within such time limit as might apply;

(4) That there is not here a question of "mutual mistake" nor any issue, arguing by analogy, similar to a position which arises in contract law where both parties to a negotiation operate under a fundamental misapprehension. Rather their limitation period is laid down by statute. No representation was made by the Cornhill Insurance Company as to the time limit which might give rise to mutual mistake;

(5) That there is no mutuality of duty between the obligations of the plaintiff's solicitors to their client and that of the insurers. It is the duty of the plaintiff's solicitor to protect the interest of their client;

(6) That a concession in liability is not be seen as a carte blanche never to issue proceedings;

(7) That on the evidence the reason why these proceedings were not issued in time was because there was error on the part of the plaintiff's solicitors as to the time limitation.

36. Consideration of the Evidence
On the evidence I conclude that the following events *combined* gave rise to the situation whereby proceedings were not issued within the time period.

The first of these was that of the 13th May, 1996. This was the conversation which took place between Mr. McElholm and Ms. Jennifer Crean. It is clear that Ms. Crean gave Mr. McElholm to understand that there would be no dispute in relation to liability. Second, it was the desire of the Cornhill not to incur any further costs by the issuing of proceedings. Third, if the representations had not been made would Mr. McElholm otherwise have forwarded the file to agents in the Republic of Ireland and had proceedings issued before the expiry of the two year limitation period? On behalf of the defendants Mr. Comyn S.C. submits that no weight should be given to evidence of this nature. One cannot "superimpose" subjective evidence of an habitual practice on the objective facts. However I consider some weight can be given to this evidence because of other uncontested evidence. In this regard there is one uncontested factor which stands out. It is that the plaintiff themselves were anxious to achieve an early settlement. They had embarked on a new business venture. On a number of occasions referred to earlier it was the plaintiff's solicitors themselves who took the initiative in the course of the negotiations. They were constrained to contact the Cornhill with a view to reminding them to deal with the file. It was necessary to retain the services of a loss adjustor to deal with the claim for the contents of the car. This aspect of matters was dealt with by the Cornhill and a cheque was forthcoming on 23rd June, 1997. Thus there was pressure from the clients to expedite matters. The fact that the plaintiff's solicitor did not issue proceedings sooner after the first letter can only be attributed to the representations of the defendants. Mr. Sayer's affidavit is carefully phrased. I do not understand the plaintiffs case to be that it was agreed or represented that the plaintiff need *never* institute proceedings. Rather their case is that they accept that they were asked to *refrain* from issuing proceedings, although it is accepted that no representation was made by the Cornhill that it would never be necessary to issue proceedings nor that the plaintiff was absolved from the need to issue proceedings within a reasonable period. An additional factor was that, due to the unawareness of both parties as to the time limit, the representations (which I am satisfied were made) were sufficient to bring about a circumstance where the plaintiffs claim became statute barred.

But for those representations what would, as a matter of probability; have occurred? Having regard to the nature of the client's instructions, their apprehension as to the urgency of the proceedings and also (with lesser weight) the evidence regarding Mr. McElholm's normal procedure, I consider, the evidence as a matter of probability, points to a conclusion that the proceedings would have been issued in this jurisdiction within the time limitation period of two years.

37. One other matter arose on the evidence. This relates to the circumstances surrounding the issue of the first summons. This was issued on 16th October, 1998. The defendant nominated in the summons was the late Peter McColgan.

On behalf of the defendant Mr. Comyn S.C. submits that the plaintiff has not adduced any evidence that her solicitors were misled as to the identity of the defendant in the first set of proceedings. He points out that despite the fact that Messrs Redmond and Co indicated that Mr. McColgan could not be sued, this was not met by the plaintiff's solicitors with any contention that they had been misled by Cornhill Insurance into nominating the late Mr. McColgan. I do not think it is possible for the court to draw any inferences either way from what occurred, especially having regard to Mr. Sayer's letter of 15th October, 1998 identifying the cases: "*M. and J. Evanson v. McColgan*", and the previous reference to the insured as "P. McColgan (deceased)". It is only fair to say this issue remains unexplained. It also must be accepted that there is no suggestion in any of the correspondence from which it might be enforced that there was any lack of candour or misconduct on the part of either of the participants in these negotiations. Thus the plaintiff cannot contend in the instant case that any reliance upon a plea under the statute of limitations would be dishonest, as opposed to unconscionable.

38. The Law
To a degree this case bears resemblance to the case of *Yardley (A Minor) plaintiff v. Patricia Boyd (defendant)* (1995 No. 215 P) Herbert J. Unreported 14th December, 2004. But there the representation made by the defendant as to liability was limited in nature. It is referred to by Herbert J. (at p. 8 of his judgment) as being "far short of the sort of clear and unambiguous promise assurance or representation that liability would not be an issue necessary to enable the doctrine or promissory estoppel to be invoked by the plaintiff" .. But based on the facts Herbert J. stated he was

…..

" … satisfied on the evidence, that the *sole* (italics added) reason why the originating summons in this action was issued outside the period allowed by s. 9(2) of the Civil Legality Act 1961, was that the person in the firm of Brophy Solicitors, having carriage of the action was unfortunately unfamiliar with that section and that the shorter limitation period which is specified as compared with the generally known limitation period of three years provided by s. 11(2)(b) of the Statute of Limitations 1957. Thus the action was dismissed."

39. But it is essential to bear in mind these critical distinctions. It can by no means be said that the sole reason why proceedings were not issued here was unawareness of the limitation period. There were clear representations. There was a clear course of negotiation and conduct. There was an abandonment of liability.

40. Finally counsel submitted that the plaintiffs do not contend that there was an unlimited concession on liability and that at all stages the question of whether or not proceedings ought to be issued was, on the evidence, present to the mind of the plaintiff's solicitors. On the evidence, it could not be contended that the plaintiff's solicitors had been "lulled into a false sense of security" regarding the need to issue proceedings. A gap in the correspondence from the plaintiff's solicitors between 18th November, 1996 and 11th February, 1998 which indicated that the negotiations had "gone off the boil".

41. Both the defendant and plaintiff (represented by Mr. Michael Carson SC) rely in this case on the decision of the Supreme Court in *Ryan v. Connolly* [2001] 2 ILRM 174.

42. In that case the plaintiff was involved in an accident on 26th April, 1995. In *Ryan* the plaintiff was involved in an accident on 26th April, 1995. By letter dated 23rd May, 1995 the plaintiff's solicitor informed the second named defendant that the plaintiff was claiming damages as against the latter (the driver of the car) for having caused the accident and requested her to forward the letter

to her insurer. With one exception, the ensuing letters from the defendants' insurer to the plaintiff's solicitor were headed "without prejudice". By letter dated 11th July, 1995 the insurer sought certain information from the plaintiff's solicitor and stated that on receipt of same and having concluded their investigation, they would advise as to their decision on liability. Their requests for information were stated to be without prejudice to liability on the part of the insured. By letter dated 1st September, 1995 the plaintiff's solicitor provided this information. Arrangements were made for a medical examination. By letter dated 9th July, 1996, the insurer stated that it had concluded the damage claim directly with the plaintiff's insurers and requested the plaintiff's solicitor to advise if he was in a position to discuss a settlement at the time. By letter dated 24th July, 1996, the plaintiff's solicitor had stated that he was awaiting an up to date medical report and would contact the insurer as soon as one was obtained. By letters dated 13th March, 1997, 30th October, 1997 and 27th January, 1998 (which were not replied to by the plaintiff's solicitor) the insurer requested the plaintiff's solicitor to advise as to whether he was in a position to have settlement negotiations. By letter dated 2nd July, 1998 – at which point the Statute of Limitation period of three years had expired – the insurer requested the plaintiff's solicitor to advise if he was in a position to meet for without prejudice talks. On 30th April, 1998 the plaintiff's solicitor requested the insurer to nominate a solicitor to accept service of proceedings. These proceedings were instituted by way of plenary summons dated 11th December, 1998 and a statement of claim was delivered on 11th June, 1999. In their defence delivered on 14th July, 1999, the defendants pleaded that the action was statute barred pursuant to s. 11(2)(b) of the Statute of Limitations, 1957, as amended.

43. In its consideration of the earlier authority of *Doran*, the Supreme Court held in Ryan that a plaintiff who seeks to rely on the estoppel principles outlined therein, must establish that there was a clear and unambiguous representation by the defendant that liability would not be in issue, from which it was reasonable for the plaintiff to infer that the institution of proceedings was unnecessary. In this regard a plaintiff cannot rely on a strained or fanciful interpretation of the words used by the defendant. He must show that it was reasonable in the circumstances to construe the words in a sense that would render it inequitable for the defendant to rely on the defence under the Statute of Limitations. However the court added this caveat: the fact that a defendant has expressly and unambiguously conceded the issue of liability in a case will not necessarily of itself make it reasonable for the plaintiff to assume that he can defer the institution of proceedings beyond the limitation period. Where, for example, an insurance company accepts within days of an accident that no issue on liability arises but the subsequent negotiations become dormant, the plaintiff may be precluded from relying on the principle under consideration if he permitted the limitation period to expire without instituting proceedings. In the absence of a statement by the insurance company from which it was reasonable to infer that, in the event of the proceedings not being instituted within the limitation period, they would refrain from relying on their defence under the Statute of Limitations, the insurance company should not in principle subsequently be precluded from relying on such a defence.

Keane C.J. added

> "On any view however it is clear that a plaintiff who seeks to rely on the law as laid down in *Lowe v. Bouverie* and *Doran v. Thomson Limited* must be in a position to satisfy the court that there was a clear and unambiguous representation by the defendants that liability would not be an issue from which it was reasonable for the plaintiff to infer that the institution of proceedings was unnecessary."

44. I accept Mr. Carson's submissions that it is clear from the judgment of the then Chief Justice, and in particular to his reference to the state of the law in *Doran v. Thomson*, that the earlier authority of Doran was not overruled. Effectively Doran's case, seen from the standpoint of the judgment of the Chief Justice in Ryan, limits the requirement on a plaintiff raising an estoppel to establishment of the fact that there had been a withdrawal of liability. However the Supreme Court judgment in Ryan's case makes the point that a mere withdrawal of liability may not, of itself be sufficient in certain circumstances, and gives the example of a settlement negotiations which become dormant. This is not the case here. The negotiations did not come to an end in the sense that there had been the refusal of an offer, or in any sense from which a court might infer that there was then an obligation on the plaintiff's solicitor to issue proceedings and that negotiations had broken down. It is in that light that one should see the statement of Keane C.J., set out above, which is to describe a situation in which the plaintiff who has obtained the benefit of a withdrawal of liability, and who was in negotiation which subsequently becomes dormant, may thereafter find himself defeated by the statute and unable to raise an estoppel unless he is in a position to establish that reliance on the statute had also been withdrawn. Mr. Carson points to the fact that *Doran v. Thomson* was referred to with approval in the course of the judgment in *Ryan v. Connolly* and therefore manifestly was not overruled by the latter case.

45. It is unnecessary to consider the ancillary submission by Mr. Carson S.C. that even if he is incorrect, the earlier citation from *Ryan* should be seen as obiter dicta.

46. In the course of arguments Mr. Comyn SC relied on a quotation from Spencer Bower, Estoppel by Representation 4th ed. at chap. V.2.1 (p. 90):

> "Implicit in the requirement that the represented induced the represented by the representation is a requirement that the represented rely on the representation. Inducement and reliance may be different concepts but each tests whether the representation caused the relevant conduct, from the point of view of representor and representee respectively, and a representor cannot induce a representee to act by a representation unless the representee relies on the representation."

Mr. Comyn submits that in the instant case the evidence does not disclose that there was conduct which the plaintiff relied on and was justified in relying on in not issuing proceedings. I regret that I cannot accept this submission.

47. For the reasons outlined earlier I consider that there was express representation by the defendants that proceedings need not be issued. The nature of the representation was that the plaintiff's solicitors in Northern Ireland should continue to deal with the case; that the matter should not be sent to solicitors in this jurisdiction for the purpose of issuing proceedings in order to save costs; and that on foot thereof the plaintiff and the defendants could discuss an early settlement as desired by the plaintiffs themselves. It was this representation which caused the plaintiff's solicitors to desist from issuing proceedings within the two year time limitation period. There was no evidence before the court regarding Mr. McElholm's understanding of the law in this jurisdiction. In the absence of an affidavit from Ms. Jennifer Crean I consider that the evidence of Mr. McElholm both on the nature and effect of the inducement should be accepted. On foot of the express representation or inducement outlined earlier there was a course of conduct, both oral and written, as indicated by negotiations which took place between May 1996 and June 1997. Thereafter there was a payment by the defendant's insurers of STG £1,850. This payment was made directly to the plaintiffs. I consider that the course of conduct in question continued beyond the expiry of the implementation period. This is shown by the letter from Mr. McElholm to the Cornhill on 11th February, 1998 enclosing a letter from the plaintiff's accountant regarding loss of earnings and a response thereto of Mr. Sayer of the Cornhill of 25th May, 1998 apologising for the delay in dealing with the matter and seeking additional details regarding earnings. In this case the relevant period for the assessment as to whether an estoppel arises is within the two year period. Within that time span I consider there is evidence on which an estoppel arises.

48. But for the inducement as identified above on the part of the Cornhill Insurance Company I consider the effect of the evidence is that proceedings would have been issued within the two year period. In *Doran v. Thomson Limited* [1978] I.R. 223, Henchy J. observed

> "Where in a claim for damages such as this a defendant has engaged in words or conduct from which it was reasonable to infer, and from which it was in fact inferred, that liability would be admitted, and on foot of that representation the plaintiff has refrained from instituting proceedings within the period prescribed by the statue, the defendant will be held estopped from escaping liability by pleading the statute. The reason is that it would be dishonest or unconscionable for the defendant, having misled the plaintiff into a feeling of security on the issue of liability and thereby, into a justifiable relief that the statute would not be used to defeat his claim to escape liability by pleading the statute".

49. This dictum applies in the instant case, but certainly not in the sense that Cornhill Insurance did anything dishonest or underhand. It is the conduct and inducement which would render reliance on the plea under s. 9 of the Act of 1961 unconscionable in the circumstances.

50. For the reasons outlined therefore the court will decline the relief sought in the Notice of Motion.