THE COURT OF APPEAL

[2014 No. 370 and 393]

The President
Irvine J.
Hogan J.

BETWEEN

EMERALD ISLE ASSURANCES AND INVESTMENTS LIMITED, TIMOTHY MAVERLY AND JAMES MOREY

PLAINTIFFS

AND

PATRICK DORGAN AND OTHERS PRACTICING AS COAKLEY MOLONEY SOLICITORS

DEFENDANT

JUDGMENT of the Court delivered by the President on 25th January 2016

1. This is an appeal by the plaintiffs against the judgment and order of the High Court (Kearns P.) dismissing their claim for negligence against their former solicitors. The personal plaintiffs are directors of the first plaintiff company which was engaged in the business of a life insurance agent. This action arose out of the conduct of proceedings by the defendant solicitors on behalf of the plaintiffs against Hibernian Life Ltd. which were ultimately settled in 2010 for €300,000.

2. The case under appeal was heard in the High Court over 12 days between 6th December 2011 and 18th January 2012 by Kearns P. who on the latter date delivered an ex tempore judgment dismissing the plaintiffs' claim. The plaintiffs appeal against the dismissal of their action and the defendants cross-appeal seeking their costs.

Background Facts and Relevant Chronology

3. In 1991 and 1992, Emerald entered into a tied agency agreement with Hibernian Life for the sale of the latter's life insurance policies. Disagreements arose between Emerald and Hibernian at the end of 1994 and Emerald instructed the second defendant Mr Duane who issued a summary summons claiming IR£89,260.47 on 24th November 1994. In December 1994, Hibernian issued a notice of termination of the agency with effect from the end of that year. On 15th January 1995, on the plaintiffs' instructions the solicitor issued a plenary summons seeking damages for breach of contract. On the same day, he issued a second summary summons seeking IR£154,691.94 on behalf of his clients.

4. The three separate proceedings moved at different paces. The statement of claim in the plenary proceedings was delivered on 17th October 1996. On 2nd December 1996, the High Court made an order consolidating the proceedings on the application of Hibernian following which an amended statement of claim in the consolidated action was delivered on 18th December 1996, seeking special damages in the sum of IR£6,248,600.37. Following the delivery of particulars, Hibernian delivered its defence on 12th November 1997 in which it made a lodgement of IR£425,000.

5. There was correspondence in 1998 and 1999 between Mr Duane and A&L Goodbody, the solicitors for Hibernian Life in relation to discovery. Hibernian's affidavit of discovery was filed on 25th March 1999 and Emerald's on 31st May 1999. Then there was some further correspondence in relation to the discovery which terminated in August 1999.

6. Mr. Duane sent papers to Senior Counsel, Mr. Shipsey S.C. on 6th June 2000 for the purpose of advising proofs. In his advice on proofs, which was dated 13th March 2001, Counsel advised a number of steps, including preparation of detailed witness statements by Messrs. Maverly and Morey, the identification of an industry expert in relation to practice concerning commission and a report from an independent forensic accountant.

7. On 26th June 2002, Hibernian brought a motion to dismiss the action for want of prosecution. Affidavits were exchanged, and following a number of adjournments, the motion was struck out by consent on 9th April 2003 with costs to Hibernian.

8. A forensic accountant, Mr. Peelo, was engaged on or about 13th or 14th January 2003. Then there was a settlement meeting on 16th January which did not result in agreement. Mr. Peelo then prepared a draft report which was circulated on 3rd November 2003. Emerald was in delay in furnishing information to Mr. Peelo that he sought on 16th January 2003 and which they did not provide until 28th July 2003. In March 2004, he sought further information that Emerald provided in July 2004. Thereafter, Mr. Peelo produced a second draft report on 26th July 2004.

9. The 4-year period between 2003 and 2007 is critical in the case. The period was taken up with disagreements between the plaintiffs and their forensic consultant, Mr. Peelo. The expert was not prepared to furnish a report or to commit himself to giving evidence of sums which in his professional opinion he could not justify. For their part, the plaintiffs were of the view that Mr. Peelo's figures were too low; that he was undervaluing the amount of their legitimate claims and they were not satisfied to have the case presented on the basis of his report. Ultimately, it seems that Mr. Peelo was prepared to stand over a claim of approximately IR£2.8m, whereas the plaintiffs were seeking more than double that amount, their figure being approximately IR£6.25m. Mr. Peelo produced some five or six draft reports during the period 2003 to 2007. Coakley Moloney wrote to their town agents asking them to set the action down for trial and on 22nd October 2009, they again wrote requesting the service of Notice of Intention to Proceed.

10. On 18th January 2010, Hibernian's solicitors brought a motion to dismiss the action on the grounds of inordinate and inexcusable delay.

11. On 7th July 2010, the plaintiffs' action against Hibernian was compromised on terms that Emerald would be paid €300,000 inclusive of costs. The plaintiffs were persuaded to accept the settlement terms offered by the strong unanimous advice of counsel and of their solicitors that Hibernian's motion was likely to succeed and that the plaintiffs' case would be dismissed on the grounds of

inordinate delay if it went to hearing.

The Judgment of the High Court
12. Kearns P noted that that it was not disputed by the defendants that the plaintiffs had a stateable case against Hibernian. The plaintiffs had their own in-house accountant who prepared the set of figures that formed the basis for the claim that was made. The judge found that the proceedings did not move quickly, but that the correspondence revealed that the plaintiffs' solicitor, Mr Duane, was met with some difficulty at every point. He said that the relationship between the plaintiffs and their solicitor continued in an ambivalent and indecisive fashion for a number of years. The judge held that the motion to dismiss that was brought in 2002 was a wake-up call in every sense. Looking at the matter from the Hibernian solicitors' point of view, there was complete silence from the plaintiffs' solicitors for six and a half years until in 2009 the Notice of Intention to Proceed was served.

13. The trial judge noted the difficulties that were encountered in relation to the forensic accountant's reports. He cited Jackson & Powell 'Professional Liability', 6th Ed., to the effect that if an action is struck out for failure to comply with time limits or want of prosecution, the solicitor will in the ordinary course have no defence to an action for breach of duty unless the client has caused or consented to the delay. Flenley's 'Solicitors' Negligence and Liability' at p. 618 says, as was quoted by Kearns P:

> "In the absence of exceptional circumstances, solicitors who fail to issue claims within the relevant limitation period or who allow their clients' cases to be struck out for want of prosecution or who allow their clients to be prevented from defending the claim for procedural reasons, will be liable negligence."

14. The judge held that both sides had a degree of culpability. He accepted that Mr. Duane gave warnings which he found the plaintiffs had not heeded, but the judge found that:

> "Mr. Duane, in the circumstances, should have given a much more elaborate warning than he did, spelling out in great detail that not only might the motion to dismiss be brought, but that in that situation the lodgement would be lost. The costs of the other side would be incurred and the plaintiffs would be liable for their own side's costs.
>
> I am satisfied that no elaborate warning of that nature was given. To that extent there was, in my view, a breach of duty insofar as advices given by Mr. Duane are concerned, but that does not end that particular aspect of the case, which, to my way of thinking, is the central point."

He then turned to the question of whether a warning would have made any difference. He said that they had not, in evidence, said that a warning in more elaborate terms would have made a difference:

> ". . . or that they would have settled for a particular sum, and indeed even as of now it is unclear what figure might have pleased them. Every time a particular figure arose, it was never sufficient. I do not think on the issue of causation in relation to the warning, I do not think a somewhat elaborate warning by Mr. Duane would have brought about any other result. I think the difficulty was there. The case could not move because the plaintiffs would not accept and could not agree with their own forensic accountant and the risk, which was always present, eventually came to pass, namely, the bringing of this motion and the potential and the very grave risk that the case would be dismissed."

15. In essence, therefore, Kearns P. found that the solicitor, Mr. Duane, was at fault in failing to give a detailed, explicit and elaborate warning as to the consequences that would or might follow from further inordinate delay which was actually happening. However, he also found that any such warning would not have made any difference in the circumstances, first, because the personal plaintiffs had not indicated that they would have responded to such a warning provided another figure which they would have been willing to accept.

The Plaintiffs'/Appellant's Submissions
16. The plaintiffs' case on this appeal is as follows. First, the judge should have held that the second defendant was negligent in his overall handling of the case from an early stage and particularly in respect of:

> (a) Failing to engage Mr. Peelo prior to January 2003;
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> (b) Failing to take action to resolve the impasse of the disagreement between the plaintiffs and Mr. Peelo concerning the damages claim in the period 2003 to 2007;
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> (c) Failing to communicate with A & L Goodbody, the solicitors for Hibernian, in the period between 2003 and 2009;
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> (d) Doing nothing between receiving the final report from Mr. Peelo in 2007 and October 2009.

17. Secondly, it is submitted that Kearns P. was in error in holding that the only breach of duty by the second defendant in the conduct of the litigation was the failure to give a sufficiently detailed warning of the risk of a motion to dismiss for want of prosecution. In fact, the solicitor was under an obligation, in carrying out his professional obligations competently, to bring about a resolution of the impasse, instead of which he acquiesced in the situation and through inaction allowed the passage of further time, leading inevitably to the likelihood of a motion. In this respect, the plaintiffs argue that the authorities establish that a solicitor's obligation is to prosecute the client's action with reasonable diligence and that there was a failure on the part of the second defendant to comply with this duty. He ought to have obtained advice and assistance of senior counsel, but he made no effort to do so, even in response to enquiries from Mr. Shipsey as to the progress of the case. A consultation could have been arranged with all the relevant parties and with Junior and Senior Counsel. That could have been the occasion for a brainstorming session as to how to proceed, a matter which was actually discussed in the course of evidence in the action in the High Court. The possibility could have been considered of proceeding with the evidence of Emerald's in-house accountant Mr. Scannell alone or of another forensic accountant whose engagement could have been urgently arranged. It is also submitted that the plaintiffs indicated a willingness to heed the advice of counsel which was demonstrated by their acceptance of the outcome of the negotiations in 2010 on the occasion of the second motion.

18. Thirdly, the plaintiffs submit that the trial judge was in error in holding that if a proper warning had been given, it would not have made any difference. They challenge the finding by Kearns P. that the personal plaintiffs never said in evidence that they would have settled for a particular sum on the basis that it was not relevant to the issue, and that it is in fact not accurate because they gave evidence that in the course of negotiations in January 2003, they were willing to settle their case against Hibernian for IR£2m. The second defendant confirmed in his evidence having received such instructions. The plaintiffs submit that the judge was in error in adopting an incorrect approach to the question of whether a warning would have made a difference by reference to the evidence

that the parties had given.

19. The plaintiffs cite in their submissions the terms of a letter sent by Mr. Duane to Messrs. Morey and Maverly dated 13th July 2008 as follows:

> "Dear Jim,
>
> Des Peelo accepted the undertaking to discharge the account at £38,090.00.
>
> I have requested A&L Goodbody to identify their junior and senior so that a meeting can be arranged to discuss settlement on a without prejudice basis.
>
> I believe there will not be any necessity to amend the pleadings set out in the various High Court summonses, I also believe that I have complied with each of the requirements set out in the advice and proofs prepared by Bill Shipsey. Goodbodys will revert to me with a date, or a number of dates for a meeting with the identity of their junior and senor counsel. I am not in a position at this stage to say if Hibernian will wish to amend their side of the pleadings. My preference is to furnish a copy of the report to Hibernian's solicitors in advance of the meeting so that they can prepare a meaningful response and have it available on the day of the meeting. I will advise you of the date once it is to hand."

20. Mr. Duane wrote a similar letter to Mr. Peelo. The submission goes on to refer to the evidence of Mr. Duane that he had not actually made any contact with the solicitor in Goodbodys dealing with the case. He had phoned but she was not available and she had not got back in contact with him in response to his message. He did not follow up the matter with any further contact. They rely on this letter as establishing failure on the part of Mr. Duane to deal properly with Goodbodys, and indeed as indicating a more general failure in his communications with his clients, the plaintiffs.

Submissions of the Defendant

21. The defendant says that the core issue in the action is where responsibility lies for the delay in bringing the case against Hibernian to trial. The plaintiffs rejected their solicitor's advice to accept the opinion of Mr. Peelo and to bring the case to trial on that basis. They also rejected the alternative option to engage another expert. The impasse between the plaintiffs and Mr. Peelo continued and was intractable and there was nothing that anybody could have done or said to persuade either of the sides to change their minds. The defendant's position is that there was a complete disagreement as between the plaintiffs and Mr. Peelo. Mr. Duane had suggested an alternative expert, but that had not been followed up with engagement of such a person or firm and that in those circumstances the case could go no further and Mr. Duane found himself in the unfortunate position of not being able to make any progress in the circumstances.

22. The law is not in dispute. According to Oliver J. in *Midland Bank v. Hett, Stubbs & Kemp* [1979] Ch. 384 at 402G:

> "The test is what the reasonable competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as Duchess of *Argyle v. Beuselinck* [1972] 2 Lloyds Rep. 172; *Griffiths v. Evans* [1953] 1 WLR 1424 and *Hall v. Meyrick* [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer".

23. In *McMullan v. Farrell* [1993] 1 I.R. 123, Barron J. said at p. 142 that:

> "A solicitor did not fulfil his obligations to his client merely by doing what he was instructed to do. He had to exercise professional, skill, knowledge and judgment. He had to give appropriate advice. It is probably better that it should be in writing. The extent of the obligation is dependent on the nature of the case".

24. Flendley & Leech in 'Solicitors' Negligence and Liability' at p. 618 under the heading of 'Basic Errors' say:

> "In the absence of exceptional circumstances, solicitors who fail to issue claims within the relevant limitation period allow their clients' cases to be struck out for want of prosecution or allow their clients to be prevented from defending the claim for a procedural reason will be liable in negligence . . .

Exceptional circumstances might include failure of the client to provide funds or instructions or being instructed by the client to delay even though the client is fully informed of the risks of so doing."

25. The defendant cites *Hay v. O'Grady* [1992] 1 I.R. 210 which will be referred to below.

26. In response to the particular submissions made by the plaintiffs, the defendant submits that Mr. Peelo was retained in plenty of time to avoid any risk of the case being struck out. The plaintiffs were responsible for providing all relevant information to Mr. Peelo and would not either accept Mr. Peelo's advice or engage another expert. Mr Tyrrell, the plaintiffs' expert witness on solicitor's professional practice, did not support the claims made on behalf of the plaintiffs, particularly in his answers in cross-examination. He accepted that in view of the disagreement between Mr. Peelo and plaintiffs, the case could not proceed and there was no significant or relevant step in the proceedings that a competent solicitor could have taken.

27. The defendant submits that there is no evidence that any of the steps suggested by the plaintiffs, if they had been taken, would have brought about a resolution of the impasse between them and Mr. Peelo. It is submitted that the only actual step that is proposed as an option was a meeting with senior counsel, Mr. Shipsey. As to the possible outcomes in such circumstances, the defendant submits that none of them would have made any difference. Neither Mr. Peelo nor the plaintiffs were going to change their minds. The third possibility was that Mr. Shipsey might have been persuaded to fight the case on the basis of Mr. Scannell's figures. However, the case against the defendants is based on the need to comply with advice furnished by Mr. Shipsey that an independent forensic accountant was required. The final possibility is that Mr. Shipsey might have succeeded where others failed, but that is in conflict with the submission made by the defendant that the plaintiffs were clearly advised as to the need for an independent forensic accountant.

28. It is denied that Mr. Duane was under an obligation to bring about a resolution of the impasse in circumstances where the plaintiffs were simply not prepared to accept the advice or to get an alternative expert. There was nothing he could do.

29. Finally, the defendant addresses the ground of appeal based on the finding by Kearns P. that even if a sufficiently detailed warning had been given, it would not have made any difference. The defendant submits that this is the heart of the appeal.

30. A plaintiff complaining of negligent advice must establish as a matter of probability that the outcome would have been different if proper advice had been given. The defendant argues:

> (a) That the suggestion that the case could have proceeded on the evidence of the in-house accountant, Mr. Scannell, was not an argument or a point that was raised in the High Court.
>
> (b) The evidence was clear and it is not in dispute, as was accepted by Mr. Tyrrell, that an independent forensic accountant was required. That left two choices open: either to accept Mr. Peelo's advice or to get another expert. Failing such a decision, the case could proceed no further.
>
> (c) Mr. Duane was pressing for an instruction to call the case on, on the on the basis of Mr. Peelo's assessment.
>
> (d) The "incontrovertible and uncontroverted evidence was the Emerald was given a number of warnings, orally and in writing. The issue here is simply whether the warnings should have spelled out that a motion to dismiss the action, if successful, would have the result that not only would the action be dismissed, but that the judgment on the costs would be lost. It is submitted that the loss of the lodgement and the loss of the costs were inevitable consequences of the loss of the action". It may be mentioned at this point that this is the essence of what the High Court found and which is not the subject of an appeal.
>
> (e) There was nothing anybody could have done to change the views of the personal plaintiffs of the case, either by persuading them to accept Mr. Peelo's figures or to get an alternative expert. There was, accordingly, a complete stalemate and Mr. Duane cannot be blamed for that situation.
>
> (f) The evidence as to the willingness of the plaintiffs to accept a settlement in the amount of IR£2m related to a period in time prior to Mr. Peelo's involvement and is therefore not relevant.
>
> (g) It is not open to the plaintiffs to invoke the possibility or prospect of a change of heart or a resolution of the situation by the intervention of senior counsel because the solicitors and plaintiffs had obtained the advice, but the clients were not prepared to go along with it by accepting the advice of Mr. Peelo.
>
> (h) The plaintiffs simply refused to authorise their solicitor to advance the case on the basis of the expert advice that was obtained in pursuance of senior counsel's proofs. There was a complete stalemate and that is not the fault of Mr. Duane, but of the plaintiffs and their own intransigence. As of 2002/2003, the plaintiffs had got a clear warning of where delays might bring them. The delays that led to the motion were the inevitable consequence of the conduct of the plaintiffs and the impasse of their own making which they did nothing to resolve.

The Approach on Appeal

31. In *Hay v. O'Grady* [1992] 1 I.R. 210, the Supreme Court set out the principles governing the proper approach of an appeal court to findings of fact and inferences made by the court of first instance. They may be summarised as follows: –

> (a) Were the findings of fact made by the trial judge supported by credible evidence? If so, the appellate court is bound by the findings, however voluminous and apparently weighty the testimony against them.
>
> (b) Did the inferences of fact depend on oral evidence of recollection of fact? If so, the appeal court should be slow to substitute its own different inference.
>
> (c) In regard to inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge in that regard. Did the judge draw erroneous inferences?
>
> (d) Was the conclusion of law drawn by the trial judge from a combination of primary fact and proper inference erroneous? If so, the appeal should be allowed.
>
> (e) If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.

Discussion/General

32. From late 2003, when Mr. Peelo furnished his first report, it was clear that there was a major disagreement between the plaintiffs and Mr. Peelo as to the value of the claim. What happened over the next four years was an unimpressive display of solicitors' professional practice. The first point at which Mr. Duane can be faulted is in allowing the discussions and debate between the plaintiffs and Mr. Peelo to continue over a four-year period without any resolution. There was consideration of another firm of accountants, but that came to nothing and I leave for the moment any question of whether Mr. Duane or the plaintiffs are to be blamed for that failure. It was a reasonable option to see if another expert could be engaged but if it did not work out then the problem remained as before.

33. The situation as it was developing from 2003 onwards following the striking out of the motion to dismiss for want of prosecution was as follows. Mr. Duane and the plaintiffs had been given a wake-up call, as Kearns P. held. They could not afford to be complacent about further delay. Admittedly, it would have been understandable if some time was taken in preparing expert reports and complying with proofs, but there is a limit to the indulgence that a court is going to afford to a party for those reasons. The consolidated action was in existence since 1995, so as of ten years on, it was time that it ought to have been heard.

34. It is obvious that Mr. Duane should have warned the plaintiffs explicitly that the longer things went on without agreement or some kind of resolution as to the presentation of the claim for damages the greater was the risk that not only might another strike-out motion be issued, but that on this occasion there was a real risk that the entire action would be struck out. So, we must start from the proposition that Mr. Duane was at fault in failing to warn the plaintiffs of the possible consequences of failure to get the damages claim in order. I will discuss what the consequences are of that failure in relation to the President's findings, but I want to look at a

question as to whether that is a complete statement of Mr. Duane's obligation. The President held, expressly or by implication, that it was, but I do not agree.

35. It is reasonable to suggest that in the circumstances in which he found himself with the real difficulty as to how to present the case, Mr Duane did have a number of options available to him. He could have sought the opinion of senior counsel as to how he was to deal with the impasse between the accountant and the plaintiffs in respect of the damages claim. He could have insisted on engaging another accountant. He could have told the plaintiffs that they could proceed with their evidence as it stood on the basis of Mr. Scannell's report. He was the in-house accountant who produced the figure of €6.2m in the first place and could presumably have given evidence of it. It was not imperative that the expert should be designated a forensic accountant, although obviously somebody experienced in giving evidence in court of accountancy matters was highly desirable in a case of that kind. But there is no way that absence of a forensic accountant so called was a fatal bar to the claim proceeding.

36. Clearly, as the trial judge found, Mr. Duane should have given explicit warnings to the plaintiffs as to the consequences of allowing the grass to grow under their feet while they continued in dispute with Mr. Peelo. That advice concerning delay following the first motion should also have included an explicit warning to the clients about their potential exposure to liability for Hibernian's costs as well as those of Coakley Moloney.

37. However, they were entitled to maintain their position and even if Mr. Peelo and the solicitor thought that they were being unreasonable in their demand, it was ultimately for the court to decide what the appropriate compensation was, if it came to that, when they proceeded with their case against Hibernian. There was nothing to stop the plaintiffs from proceeding with their claim as originally set out. No doubt, in the trial, the figures would be tested and the plaintiffs might be exposed to embarrassing criticism, and indeed even to the risk of having some of the legitimate parts of their claim disallowed by unfortunate association with the parts which the court held were wholly exaggerated or unreasonable or unsustainable. But those were risks that also should have been advised about.

38. What Mr. Duane did was throughout this saga to display a woeful pattern of sporadic, ineffectual efforts to make progress, but without any proper appreciation of the danger that the case would become impossible and was inexorably becoming untenable as time wore on.

39. Mr. Duane's obligation was to address the situation and to give clear advice to his clients as to what the options were and what the risks were. He was not fixed to a position of having to continue to employ Mr. Peelo. Neither did he have to achieve a situation where Mr. Peelo and the clients were in agreement. If consensus as to the damages claim between Mr. Peelo and the plaintiffs was impossible, other options were available. Mr. Duane had to advise the clients by telling them in straight terms what the situation was. He was also obliged to follow that up with the clearest letter or letters informing them of the options and the dangers. The biggest danger that the plaintiffs faced was by continuing to haggle with Mr. Peelo and failing to reach agreement that they would bring about a situation in which another motion would be brought or in which they would be unable to proceed without giving rise to another motion which would be impossible to defend. This, unfortunately, is exactly what happened.

40. It is telling in this situation that Mr. Duane never actually sent a clear explicit letter outlining the danger that the case could be struck out for want of prosecution unless the situation was resolved by a decision one way or the other. Neither did he tell the plaintiffs that they could proceed on the basis of the evidence of the in-house accountant, although there would undoubtedly be risks involved in proceeding in that way, not because of any incapacity on the part of Mr. Scannell, although that might be an issue. The real danger that Mr. Duane should have warned the plaintiffs about was that Mr. Peelo was and is an experienced forensic accountant and that if he was strongly of the view that this was the maximum that could be maintained in the case, then they were in for disappointment sooner or later and that another forensic accountant engaged by the defendant, Hibernian, was likely to be at least as strong in dissenting from their claim as was Mr. Peelo. In other words, Mr. Peelo was putting the matter at the best from the plaintiffs' point of view, subject to its being a claim that he could stand over and that there were likely to be substantial inroads made in that claim by the corresponding expert for Hibernian. None of that was included in the letter.

41. In fact, rather worryingly, Mr. Duane wrote a letter to Mr. Morey and Mr. Maverly on 13th July 2008 informing them that he had "requested A&L Goodbody to identify their Junior and Senior so that a meeting can be arranged to discuss settlement on a without prejudice basis". He said that Goodbodys would revert to him with a date or a number of dates for a meeting. He wrote a similar letter to Mr. Peelo. These letters give the clear impression that Mr. Duane had been in communication with the solicitor in Goodbodys dealing with the matter. Mr. Duane gave evidence that he had phoned the solicitor in Goodbodys who was dealing with the matter but she was not available and he left a message for her to contact him. She did not do so and he did not follow up the matter or try to contact her again. Neither did he write any correcting letters to Messrs. Morey and Maverly. These letters do rather confirm the impression that Mr. Duane had a wholly unrealistic view of the circumstances as they existed at the time, and it confirms my impression that he was not on top of the situation at all. It is evidence of poor professional practice on his part that he wrote such a letter following a failure of communication with the other side and gave misleading and self-serving information to his clients.

42. In the circumstances, I am critical of Mr. Duane for his ineptitude in regard to this case and as I have summarised it above. I think that his negligence goes far beyond the failure to give a more elaborate warning to the plaintiffs as Kearns P. found, although I do agree that he is liable on that head.

43. I must now turn to the separate question as to whether Kearns P. was correct in deciding that it would not have made any difference even if Mr. Duane had given the appropriate detailed advice to the plaintiffs. The President held that they would simply not have accepted the advice. It seems to me that one has to approach this question on the basis of objectivity. If a plaintiff, after an unfortunate event, is asked whether he would have behaved differently if given certain advice, the more or less inevitable answer is in the affirmative, but that is not the test that the courts apply. It is very difficult to hypothesise that a person would not have responded to a particular warning without having in mind the nature of the warning. Obviously, the more perilous the situation the more explicit and compelling the warning needs to be, and if the warning was not appreciated fully or complied with or responded to appropriately in the first instance, then it would call for a second warning to be given by a competent professional adviser. What the solicitor cannot do is simply to say that the client would not have paid attention to any warning and therefore he is not liable.

44. In my view, the President was in error in his finding on this matter. The evidence in the case did not demonstrate complete incapacity on the part of the plaintiffs to take advice. They did so on the occasion of the 2010 settlement. More generally, it cannot be deduced that the plaintiffs were not going to respond to a clear, explicit warning simply because they were in dispute with their accountant over quantum.

45. It seems to me that the proper approach to this case is that Mr. Duane is to be faulted and held negligent for a failure to advise his clients appropriately, and by that I mean along the lines indicated above. In the particular circumstances of this case, he was

under an obligation to set out the position clearly before them. If he needed to get Senior Counsel's advice, that would have been appropriate. Alternatively, it might have been desirable to have a meeting. What he needed to do above all was to present them with the situation that they could proceed with their case as matters stood and with the evidence that they had originally relied on, but that there were risks and dangers in that course. They could urgently get another accountant to replace Mr. Peelo. All this should have taken place well before the expiration of four years between 2003 and 2007.

46. My conclusion, therefore, is that the failure in this case is not simply one of the precise terms of a particular letter. It is of a failure of advice and a course of conduct that simply failed to address a particular issue or difficulty that had arisen and that it was not an impossible, intractable problem, but one that had options and consequences, just like many other situations that present themselves to a competent legal or other adviser.

47. In the terms of *Hay v. O'Grady* [1992] 1 I.R. 210 to which reference is made above, it has in my judgment been established on this appeal that the conclusions reached by Kearns P were erroneous. The essential facts – all of the facts on which the decision as to the negligence of the second defendant falls to be made – are not in dispute and the question for this Court is whether the inferences and conclusions that were drawn by Kearns P. were correct. In my view, those inferences are reviewable by this Court and they are not correct.

48. For the reasons above stated, I would allow the appeal and would remit the matter to the High Court for assessment of damages.